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INTERIM REPORT ON PUBLIC POLICY AS A BAR TO ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

I. INTRODUCTION

This is an interim report of the Committee on the topic of public policy as a ground for refusing recognition and enforcement of international arbitral awards.

This report comprises the following sections:

As all arbitration practitioners and scholars know, violation of public policy (or *ordre public*) of the enforcing State has long been a ground for refusing recognition/enforcement of foreign judgments and awards. This principle is enshrined in Article V.2 of the New York Convention[1] and Article 36 of the UNCITRAL Model Law[2]. The public policy exception to enforcement is an acknowledgement of the right of the State and its courts to exercise ultimate control over the arbitral process. There is a tension, however, which the legislature and the courts must resolve between: on the one hand, not wishing to lend the State's authority to enforcement of awards which contravene domestic laws and values; and, on the other hand, the desire to respect the finality of foreign awards. In seeking to resolve this tension, some legislatures and courts have decided that a narrower concept of public policy should apply to foreign awards than is applied to domestic awards. This narrower concept is often referred to as international public policy (or *ordre public international*). This name suggests that it is in some way a supra-national principle; however, in practice it is no more than public policy as applied to foreign awards and its content and application remains subjective to each State.

It has been suggested, instead, that only if an award is contrary to "truly international public policy" or "transnational public policy", representing an

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (the "New York Convention"); *United Nations Treaty Series* (1959), vol. 330, p. 38, no. 4739. The New York Convention has been ratified, acceded or succeeded to by over 120 countries, although not all of those countries have implemented domestic legislation or court procedures needed to give practical effect to the Convention. See van den Berg, *The New York Convention of 1958* (Kluwer, 1981).

[2] United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration, as adopted by UNCITRAL on 21 June 1985, and recommended by the General Assembly of the United Nations to Member States on 11 December 1985 (Resolution No. 40/72).

international consensus as to universal standards and accepted norms of conduct that must always apply, should courts refuse recognition or enforcement.

This Report reviews the development over the past fifteen years[3] of the concept of public policy as applied by enforcement courts.[4]

This Report builds on the paper presented to the Committee by Rapporteur Sheppard at the previous ILA Conference in Taiwan in 1998, and the comments made during that Conference. Subsequently, all Committee members and some non-members were invited to respond to the following enquiry:

(a) Please forward a copy or the text of the relevant legislation and/or conventions that provide that enforcement of awards may be refused on grounds of public policy.

(b) Comment on the practice of the courts, with examples of decisions in which enforcement has been refused and also of decisions in which applications based on public policy have been rejected. What principles of public policy were alleged to have been violated?

(c) Comment on whether the courts, when considering public policy, make a distinction between domestic and international awards; between awards rendered in the country of the forum and awards rendered abroad; and between domestic public policy, international public policy and "truly international public policy". Is there a trend towards allowing enforcement of foreign awards save in the clearest breaches of international public policy?

(d) Comment on whether similar or different principles are applied in respect of foreign court judgments.

(e) Comment on whether the courts distinguish between two aspects of public policy, namely "fundamental principles" (such as *pacta sunt servanda*, *fraus omnia corrumpit*, prohibition of racial discrimination) and mandatory rules of law or "*lois de police*" (in the sense of Article 7 of the 1980 Rome Convention; this could include competition law, company law, bankruptcy law, etc.).

(f) Comment on whether violation of foreign mandatory rules of law or "*lois de police*" by an award can constitute a ground for refusing enforcement.

(g) Is it possible to identify other categories of public policy?

(h) Comment on whether the courts will reconsider the facts underlying an arbitration award to determine whether there has been a violation of public policy.

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[3] A comprehensive review of the various applications of public policy in international commercial arbitration was conducted in 1986 by the International Council for Commercial Arbitration, see ICCA Congress Series No. 3, *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer, 1987). For a very recent review, see Racine, *L'Arbitrage Commercial International et L'Ordre Public* (LGDJ, 1999).

[4] For a detailed analysis by our Committee Chairman of the determination and application by arbitral tribunals of public policy, including mandatory laws or *lois de police,* see Mayer, "Mandatory rules of law in international arbitration", (1986) 2 *Arbitration International* 274; and Mayer, "La sentence contraire a l'ordre public au fond", (1994) *Rev. Arb*. 615; and see other commentaries cited at nn. 86 and 87 below.

We are grateful to the following Committee Members for their responses and comments: Dr Horacio Grigera Naon (Argentina); Sir Laurence Street, The Hon. Rodney Purvis, The Hon. Andrew Rogers and Mr Damian Sturzaker (joint report) (Australia); Professor Bernard Hanotiau (Belgium/Luxembourg); Professors von Hoffman and Karl-Heinz Böckstiegel (joint report) (Germany); Mr. S. K. Dholakia (India); Professor Avv. Piero Bernardini (Italy); Professor Avv. Giorgio Recchia (Italy); Professor Young Gil Park (Korea); Lic. Guillermo Aguilar Alvarez (Mexico); Professor José Luis Siqueiros (Mexico); Mr L. H. W. van Sandick (The Netherlands); Prof. Dragica Wedam-Lukic (Slovenia); Mr Fernando Mantilla-Serrano (Spain); Dr Atef Suleiman (HQ/UAE); and the following non-Committee members: Professor Arelino Leon (Chile); Advokat Jan Erlund (Denmark); Ms Anna Mantakou (Greece); Dr Abdul Hamid El-Ahdab (Middle East); Dr Andrzej Tynel (Poland); Dr Bandar Salman Al Saud (Saudi Arabia); Mr Nigel N. T. Li (Taiwan); and Dr Rauf Versan (Turkey).

All comments and responses have been circulated to Committee members.

II. ATTEMPTS TO DEFINE PUBLIC POLICY

It is notoriously difficult to provide a precise definition of public policy (in the context of enforcement of arbitral awards). The definitions which have been articulated have, however, not changed markedly over the years.

Violation of basic notions of morality and justice

The English House of Lords in 1853 described public policy as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good".[5] Cheshire and North refer to "some moral, social or economic principle so sacrosanct ... as to require its maintenance at all costs and without exception".[6] In the context of enforcement of an arbitral award, the English Court of Appeal (Sir John Donaldson MR), in *D.S.T. -v- Rakoil*[7] (1987), stated:

> "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. ... 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."

The definition of public policy most often quoted is that of Judge Joseph

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5 *Egerton -v- Brownlow* (1853) 4 HLC 1.

6 Cheshire and North, *Private International Law* (13th edn., Butterworths, 1999), p. 123.

7 *Deutsche Schachtbau-und Tiefbohrgesellscaft mbh -v- Ras Al Khaimah National Oil Company* [1987] 2 Lloyd's Rep. 246 at 254.

Smith in *Parsons & Whittemore*[8] (United States Court of Appeals, 1974) in which he held that enforcement of a foreign arbitral award may be denied on public policy grounds "only where enforcement would violate the forum state's most basic notions of morality and justice".

The German *Bundesgerichtshof* (1990) has also defined public policy restrictively in terms of basic rules and ideas of justice, as follows:[9]

> "A violation of essential principles of German law (*ordre public*) exists only if the arbitral award contravenes a rule which is basic to public or commercial life, or if it contradicts the German idea of justice in a fundamental way. A mere violation of the substantive or procedural law applied by the arbitral tribunal is not sufficient to constitute such violation".

Dr El-Ahdab writes[10] that in Moslem Law "the concept of public policy is based on the respect of the general spirit of the *Shari'a* and its sources (the Koran and the *Sunna*, etc.) and on the principle that 'individuals must respect their clauses, unless they forbid what is authorized and authorize what is forbidden'".

Dr Lew's comments over twenty years ago are equally true today. He observed that while a totally comprehensive definition of public policy has never been proffered: [11]

> "... it is clear that [it] reflects the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community. Naturally public policy differs according to the character and structure of the State or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception."

International public policy

Dr van den Berg has commented that the public policy defence rarely leads to a refusal of enforcement: one of the reasons being a distinction drawn between domestic and international public policy.[12]

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[8] *Parsons & Whittemore Overseas Co., Inc. -v- Société Générale de l'Industrie du Papier RAKTA and Bank of America* 508 F. 2d 969 (2nd Cir., 1974).

[9] BGH, 12 July 1990 - III ZR 174/89, NJW 1990 at p. 3210.

[10] El-Ahdab, "General Introduction on Arbitration in Arab Countries", *International Handbook on Commercial Arbitration* (hereinafter "*Handbook*") (Kluwer), Suppl. 27, Dec. 1998, Annex 1, p.12. See also El-Ahdab, "Enforcement of Arbitral Awards in the Arab Countries", (1995) 11 *Arbitration International* 169.

[11] Lew, *Applicable Law in International Commercial Arbitration* (Oceana, 1978), p. 532.

[12] van den Berg, "Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few" in *Arbitration in the Next Decade (*ICC Bulletin - 1999 Special Supplement) at p. 86.

"International public policy" (rather than, simply, "public policy") is increasingly referred to in legislation and court judgments. For example, in France, one of the limited grounds for refusing recognition or enforcement of an arbitral award is if it is contrary to "*ordre public international*".[13] Portugal has a similar provision.[14] The Court of Appeal of Milan has held that the public policy referred to in Article V.2(b) of the New York Convention is international public policy.[15]

International public policy is understood to be narrower than domestic public policy: not every rule of law which belongs to the *ordre public interne* is necessarily part of the *ordre public externe* or *international*. Professor Sanders states that "international public policy, according to a generally accepted doctrine is confined to violation of really fundamental conceptions of legal order in the country concerned."[16]

When commenting on the French legislation, Fouchard, Gaillard and Goldman note:[17]

> "The international public policy to which Article 1502.5 refers can only 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." [emphasis added]

Similarly, the Portuguese legislation refers to the "principles of Portuguese international public policy" [emphasis added]. Thus, the content and application of international public policy remains subjective to France and Portugal respectively, and it cannot be said that either country is necessarily seeking to identify and apply a common international standard.

However, the Milan Court of Appeal (referred to above) may have had in mind a more transnational concept when it described international public policy as a "body of universal principles shared by nations of similar civilisation, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions".

Transnational or truly international public policy

The concept of "transnational public policy" or "truly international public policy" is of even more restricted scope, but of universal application – com-

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[13] Articles 1498 and 1502 of Title V of the New Code of Civil Procedure (1981). See Mayer, "La sentence contraire a l'ordre public au fond", (1994) *Rev. Arb*. 615; and *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (ed. Gaillard and Savage) (Kluwer, 1999), paras. 1645-1662.

[14] Article 1096(f) of the Code of Civil Procedure (1986).

[15] Decision dated 4 December 1992, reported in (1997) XXII *Yearbook* 725.

[16] Sanders, "Commentary" in *60 Years of ICC Arbitration - A Look at the Future* (ICC Publishing, 1984).

[17] See n.13 above, para. 1648.

prising fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as "civilised nations".[18]

Whilst we know of no examples where a court has expressly applied "transnational public policy", there are a few decisions which clearly make reference to the concept as, for example, the Milan Court of Appeal decision referred to above. Also the Swiss Federal Tribunal in *W. -v- F. and V.*[19] (1994*)* 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 recognised in all civilised countries". And a number of cases have recognised certain activities, such as corruption, drug trafficking, smuggling and terrorism, to be illicit virtually the worldover.[20]

III. ENFORCEMENT CONVENTIONS AND NATIONAL LEGISLATION

None of the international conventions relating to the enforcement of arbitral awards, nor the UNCITRAL Model Law, makes express reference to international public policy or transnational public policy. Nor do they seek to harmonise the public policy defence to recognition/enforcement. Irrespective of the specific wording of the national legislation, which varies from making reference to international public policy to having recourse to national norms, the courts of a number of countries have stated that they apply a restrictive concept of public policy. The OHADA Uniform Act is unique in seeking to harmonise the international public policy concept amongst its Member States.

New York Convention 1958

The New York Convention had its genesis in a Report and preliminary Draft

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[18] See Goldman, "Les conflicts des lois dans l'arbitrage international de droit privé" (1963) *Recueil des Cours* 352; Matray, "Arbitrage et ordre public transnational" in *The Art of Arbitration - Essays on International arbitration - Liber Amicorum Pieter Sanders* at p. 241; Lalive, "Ordre public transnational (ou réellement international) et arbitrage international" (1986) *Rev. Arb*. 329 and in English in ICCA Congress Series No. 3, see n.3 above, at p. 257; Buchannan, "Public policy and International Commercial Arbitration" (1988) 26 *American Business law Journal* 511; Racine, see n.3 above at para. 628.

[19] Decision dated 30 Dec. 1994, (1995) *Bull. ASA* 217. However, in *Les Emirats Arabes Unis -v- Westland Helicopters*, 19 Apr. 1994, (1994) *Bull. ASA* 404, the same court, after a long discussion of academic authority, refused to take a position on the point, preferring instead a "pragmatic approach". See Arfazadeh, "L'ordre du fond et l'annulation des sentences arbitrales internationales en Suisse", (1995) *Rev. Suisse Dr. et Int. Dr. Eur. 223*. In France, see *Republique de Cote d'Ivoire -v- Norbert Beyrard*, 12 Jan. 1993, (1993) *Rev. Arb*. 685. The Paris Court of Appeal has expressed a degree of scepticism in relation to applying such a concept in *Fougerolle -v- Procofrance*, 25 May 1990, (1990) *Rev. Arb*. 892.

[20] E.g. *European Gas Turbines SA -v- Westman International Ltd*, 30 Sept. 1993, (1994) *Rev. Arb*. 359, and reported in (1995) XX Yearbook 198, in which the Paris Court of Appeal noted that bribery was contrary to French public policy as well as the ethics of international commerce as understood by the large majority of States in the international community; and see the cases referred to in Part IV.B.3 below.

Convention on the Enforcement of International Arbitral Awards prepared by the International Chamber of Commerce, which had concluded that the system established by the Geneva Convention of 1927 no longer met the requirements of international trade. The Economic and Social Council of the United Nations set up an Ad Hoc Committee to prepare a draft convention. The Committee 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" (based on the wording of the Geneva Convention). Although this wording was not adopted in full,[21] the Drafting Committee noted in its Report that, by using the words "clearly" and "fundamental", it intended to limit the application of the provision to cases in which recognition or enforcement would be "distinctly contrary to the basic principles of the legal system of the country where the award is invoked".[22]

Article V.2(b) refers to "the public policy of that country". Thus, the drafters of the 1958 Convention did not seek overtly to attempt to harmonise public policy or to establish a common international standard.

Other Conventions

The 1927 Geneva Convention[23] stated that an award would be enforceable unless "contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon" (Article 1(e)). As noted above, "principles of law" was omitted from the New York Convention.

The 1975 Panama Convention[24] makes reference to the "public policy of that State". The 1979 Montevideo Convention[25] goes further: it requires that the award be "manifestly contrary to the principles and laws of the public policy ['*orden publico'*] of the exequatur State" (Art 2(h)).

The 1983 Riyadh Convention[26] provides that enforcement may be refused if the award is "contrary to the Moslem *Shari'a*[27], public policy or good morals"

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[21] Article V.2(6), as adopted, refers to the award being "contrary to the public policy of that country". There has been some debate as to whether this drafting change broadened or narrowed the scope of the defence - see van den Berg, n.1 above, p.361.

[22] Report of the Committee on the Enforcement of International Arbitral Awards, 28 March 1955, UN Doc. E/2704 and E/AC.42/4/Rev.1.

[23] Convention for the Execution of Foreign Arbitral Awards, made at Geneva, 26 September 1927, *League of Nations Treaty Series* (1929-1930), vol. XCII, p. 302.

[24] Inter-American Convention on International Commercial Arbitration, made in Panama, 30 January 1975. This Convention was modelled on the New York Convention and has been ratified by fifteen Latin American countries and the United States.

[25] Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, made in Montevideo, 8 May 1979.

[26] Convention on Judicial Co-operation between States of the Arab League, made in Riyadh, 6 April 1983. The 1983 Convention was intended to replace the 1952 Convention of the Arab League. The earlier Convention is still in force in many countries because they have not yet ratified the 1983 Convention.

[27] The reference to the Moslem *Shari'a* was not included in the earlier 1952 Convention.

of the signatory State where enforcement is sought (Art. 37). On the other hand, the 1987 Amman Convention[28] refers simply to "public policy".

The 1965 Washington (ICSID) Convention[29] does not expressly refer to "public policy". Article 52 sets out various grounds for annulment, which include: 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. The first two of these would generally fall within the scope of international public policy. Enforcement of an ICSID award cannot be challenged in the courts of the enforcement country, save on grounds of sovereign immunity. In *Société Ouest Africaine des Bétons Industriels -v- State of Senegal*,[30] the French *Cour de Cassatio*n affirmed unequivocally that public policy (international or otherwise) was not an issue that the judge should consider when dealing with enforcement of ICSID awards.[31]

UNCITRAL Model Law

The 1985 UNCITRAL Model Law owes its origins to a request made in 1977 by the Asian-African Legal Consultative Committee for a review of the operation of the New York Convention. The Committee maintained that there was an apparent lack of uniformity in the approach of national courts to the enforcement of awards. The Secretary-General of UNCITRAL concluded that harmonisation of the enforcement practices of States, and the judicial control of the arbitral procedure, could be achieved more effectively by promulgation of a model or uniform law, rather than by any attempt to revise the New York Convention.[32] The final text was adopted in 1985.[33] The Model Law includes "public policy" as a ground for setting aside an award by the courts at the seat of the arbitration (Art. 34) and as a ground for refusing recognition and enforcement of a foreign award (Art. 36), in essence reflecting Article V.2 of the New York Convention. The Model Law does not, however, define "public policy".

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[28] Convention of the Arab League on Enforcement of Arbitral Awards, made in Amman, 14 April 1987. This Convention has not come into force, because it has not yet been ratified by the stipulated minimum requirement of seven States.

[29] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, made on 18 March 1965, *UN Treaty Series* (1966), vol. 575, p. 160, fn. 859.

[30] Cass. Civ. 1re, translated in 30 *ILM* 1167; and see Carias-Borjas, "The Decision of the French Cour de Cassation in SOABI -v- Senegal", (1991) 2 *American Review of International Arbitration* 354.

[31] The question of whether public policy should be allowed as a valid ground for refusal to enforce an ICSID award was the subject of much debate when the Convention was adopted. Arguably, the US has reserved the right - through its reference to "full faith and credit" in the law implementing the Convention (222 USC paras. 1650-1650a) - to verify at least that the tribunal had jurisdiction and that due process was respected.

[32] Report entitled "Study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", UN Doc. A/CN. 9/168.

[33] See n.2 above. See Holtzmann and Neuhaus, *Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1989) and Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1990).

During discussions concerning Article 34(2)(b)(ii), the United Kingdom delegation expressed concern that "public policy", as understood in Common Law jurisdictions, might not cover all cases of procedural injustice. It gave as examples awards tainted by fraud, corruption or perjured evidence.[34] Doubts were raised as to whether the requirements of equality of treatment (Art. 18) and of giving the parties a full opportunity to present their respective cases (Arts. 18 and 34(2)(a)(ii)) adequately covered these situations. The discussions 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).[35] It was eventually decided not to expand the list of the grounds for setting aside but that the position should be clarified in the Commission's Report. The Report stated:[36]

> "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 is in conflict with the 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."

Article 36, like Article V.2(b) of New York Convention, refers to the public policy of the State in which enforcement is sought. Again, there was no overt attempt to harmonise the definition or application of public policy.

OHADA Uniform Act

L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) was created by the Treaty relating to the Harmonisation of Laws in Africa, signed on 17 October 1993, in Port-Louis.[37] OHADA is open to members of the Organisation of African Unity, and to date sixteen States have joined.[38] On 11 March 1999, the Council of Ministers of OHADA adopted a Uniform Arbitration Law. Article 31 provides that recognition and enforcement shall be refused if the "award is manifestly contrary to a rule of international

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[34] See Broches, *ibid*., at p. 191; and UN Doc. A/CN. 9/263 Add. 2, paras. 29-35.

[35] The Canadian and Australian delegations, however, stated that they had understood the term "public policy" in the sense of the French *ordre public* rather than in the restricted Common Law sense. Professor Böckstiegel has written that at the outset, and for a long period, "*ordre public*" was used as a more general term while public policy was used more in connection with specific applications of the principle: "Public Policy and Arbitrability" in ICCA Congress Series No. 3, see n.3 above, p.179. We consider that the two terms are now synonymous.

[36] UN Doc. A/40/17, para. 297. This clarification by the Commission also applies to Art. 36(1)(b)(ii), *ibid*., para. 303.

[37] See www.refer.org/camer_ct/eco/ecohada/ohada.htm.

[38] Benin, Burkina-Faso, Cameroon, Chad, Central African Republic, Cote d'Ivoire, Congo, Camores, Gabon, Guinea, Guinea-Bissau, Equatorial-Guinea, Mali, Niger, Senegal, Togo.

public policy of the member States".[39] The *Cour Commune de Justice et d'Arbitrage*, based in Abidjan, Côte d'Ivoire, is to supervise the application and interpretation of the Law, and a decision not to allow enforcement may be appealed to that court. This is the first attempt, of which we are aware, to harmonise public policy within several sovereign States.[40]

National legislation

The terminology used in referring to public policy in national legislation varies considerably, from expressly stipulating "international public policy" through to referring to national norms.

The enforcement legislation in France[41], Portugal[42], Algeria[43] and Lebanon[44] makes reference to "the principles of international public policy".

A similar intent to distinguish between public policy as applied to domestic awards and public policy as applied to foreign awards is manifest in the Tunisian legislation, which makes reference to "public policy as understood in private international law".[45] The same approach is adopted in the Romanian legislation.[46]

The legislation of a number of countries refers simply to "public policy".

Most countries, however, refer to public policy of "Country X", which is the wording of the New York Convention and the UNCITRAL Model Law, or else they have simply adopted the New York Convention.

Some countries refer to public policy (or public order) and good morals, for example: Japan[47]; Libya[48]; Oman[49]; Qatar[50]; and The United Arab Emirates[51].

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[39] Contrast Article 26, which provides that an award may be annulled "if the arbitral tribunal has violated a rule of international public policy of the signatory States to the Treaty".

[40] It might be said that the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters has created a similar regime whereby issues relating, *inter alia*, to public policy may be referred to the European Court of Justice, and as a result harmonisation is achieved. In *Krombach -v- Bamberski*, C-7/98, 28 March 2000, the ECJ after referring to the objectives of the Convention, including its uniform application, stated: "… while it is not for the Court to define the content of the public policy of a Contracting State, it is nonetheless required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court of another Contracting State."

[41] Article 1502 of Title V of the Code of Civil Procedure (1981).

[42] Article 1096(f) of the Code of Civil Procedure (1986).

[43] Article 458 bis 23(h) of Decree No. 83.09 (1993).

[44] Article 817(5) of Decree-law No. 90 (1983). It is notable that this was enacted at a time when Lebanon had not yet ratified the New York Convention. See El-Ahdab, "The Lebanese Arbitration Act", (1996) 13 *Journal of International Arbitration* 39.

[45] Article 81.II of the Tunisian Arbitration Code (1993).

[46] Articles 168(2) and 174 of Law 105/1992 on the Settlement of Private International Law Relations, which provide that enforcement will be refused if the award "*violates the public policy of Romanian private international law*". See Capatina, "Romania", *Handbook*, Suppl. 21, Aug. 1996, p. 49, in which the author states that "public policy is understood here as the public policy of private international law, which is narrower than domestic public policy".

And Yemen[52] makes reference to public order and the Moslem *Shari'a*.

A number of countries do not refer to public policy *per se*. For example, Austrian law draws a distinction between mandatory laws[53] and "the basic principles of the Austrian legal system".[54] The Swedish legislation provides that enforcement of a foreign award may be refused where the court finds that "it would be clearly incompatible with the basic notions of the Swedish legal system to recognise and enforce the award." [55] Polish legislation provides that an award will not be enforced if it "offends the legality or the principles of social coexistence in the Polish People's Republic".[56] The legislation of the Republic of Korea requires a foreign judgment being compatible with "good morals and the social order of the Republic of Korea".[57] In China, the legislation refers to enforcement of a foreign award being refused if it "goes against social and public interest".[58]

At the far end of the spectrum (in terminology and application), the legislation in Brazil provides that enforcement will be denied if "the decision is offensive to national public policy".[59]

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47 Article 118(3) of the Code of Civil Procedure (1996), which refers to a foreign judgment not being contrary "the public order or good morals in Japan".

48 Articles 407(4) and 408 of the Code of Civil and Commercial Procedure.

49 Article 53 of the Arbitration Act 1997.

50 Article 380(4) of the Code of Civil and Commercial Procedure.

51 Articles 235(vi) of the Code of Civil Procedure (1992).

52 Article 285 of the Code of Civil Procedure.

53 Article 6 of the Federal Statute on Private International Law (1978) provides that a "provision of foreign law shall not be applied when its application would lead to a result irreconcilable with the basic tenets of the Austrian legal order".

54 Article 595(1).6 of the Code of Civil Procedure (1983). See Melis, "Austria", *Handbook*, Suppl. 10, June 1989, Annex I. In a 1983 case, the Austrian Surpreme Court held that Art.V.2(b) of the New York Convention does not contemplate a distinction between domestic and international public policy as Art.V.2(b) refers clearly to cases where an award is contrary to the public policy of the country where it shall be enforced: reported in (1985) X *Yearbook* 421. Cf. two recent cases holding that EC law is part of Austrian public policy, nn. 93 and 94 below.

55 Section 55(2) of the Swedish Arbitration Act 1999.

56 Articles 712(1)(4), 1146 and 1150 of the Code of Civil Procedure (1964). See Szurski and Wiśniewski, "Poland", *Handbook*, Suppl. 14, Apr. 1993, p. 29. The authors do note, however, that these provisions "must be given a very narrow interpretation and be applied only in the case of infringement of the primary rules of the system of Polish law".

57 Article 203 of the Code of Civil Procedure (1991). See Lee, "Republic of Korea", *Handbook*, Suppl. 21, Aug. 1996, p. 25, where the author states that the "rules of Korean public policy, which in its scope and nature is very similar to international public policy".

58 Article 260 of Chapter 28 of the Law of Civil Procedure (1991). See Houzhi and Shengchang, "People's Republic of China", *Handbook*, Suppl. 25, Jan. 1998, p. 43, where the authors state: "Public social interest (public policy) is subject to strict interpretation in China so far as both Chinese domestic arbitration and foreign-related (international) commercial arbitration are concerned. The concept of international public policy has not yet been developed in the Chinese court decisions." See also Wang, "One Country: Two Arbitration Systems", (1997) 14 *Journal of International Arbitration* 5 at 28.

59 Article 39.II of Law No. 9.307/1996. Brazil is not a party to the New York Convention. See Netto, "Brazil", *Handbook*, Suppl. 25, Jan. 1998, p. 24, in which the author states that the notion

Approach of the courts

Notwithstanding the differences in terminology in the legislation, the case law and commentaries we have reviewed indicate that courts of many countries apply a concept of international public policy, which is generally regarded as more restrictive than domestic public policy.[60]

For example, as noted above, the French and Portuguese legislation makes reference to "international public policy". The courts of several European civil law countries expressly apply international public policy, for example: Germany; Italy; and Switzerland. Others apply public policy restrictively, for example: Denmark; the Netherlands; Norway; Spain; and Sweden. In Argentina,[61] Dr Grigera Naón states that the courts will not enforce foreign arbitral awards that violate Argentine *ordre public international*.

In addition, Common Law countries have restricted the scope of public policy.

There is also no doubt that the United States, which has given legislative effect to the New York Convention and the Panama Convention,[62] applies a restrictive concept of public policy: for example, Judge Smith's famous dictum in *Parsons & Whittemore*[63] that enforcement of the foreign award should only be denied "where enforcement would violate the forum's state's most basic notions of morality and justice". The same year (1974), the Supreme Court, in *Scherk -v- Alberto-Culver Co.*[64] recognised the difference between international and domestic public policy. It enforced 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. Holtzmann writes[65] that the Courts recognise that, particularly since accession by the United States to the New York Convention, the international public policy of the United States favours the enforcement of international arbitration as an essential element in promoting foreign trade and world peace; and that this international policy has been given precedence over national public policies expressed in domestic laws (and he cites the well known cases concerning arbitrability of securities and anti-trust disputes[66]).

The English Arbitration Act 1996 provides that recognition or enforcement of a New York Convention award may be refused if "it would be contrary to

of international public policy is "unknown".

[60] For a review of State practice, see the paper of Rapporteur Sheppard presented to the Committee at the ILA Conference in Taiwan in 1998. See also the relevant commentaries in the *ICCA Handbook*.

[61] Article 517.2 of the National Code of Civil and Commercial Procedure (1967), which refers to the award not affecting principles of public policy of Argentine Law. See Grigera Naón, "Argentina", *Handbook*, Suppl. 11, Jan. 1990, p. 30.

[62] US Federal Arbitration Act, sections 201 and 301, respectively.

[63] See n.8 above.

[64] 417 U.S. 506 (1974).

[65] Holtzmann, "United States", *Handbook*, Suppl. 13, Sept. 1992, p. 39. See also Born, *International Commercial Arbitration in the United States* (Kluwer, 1994), pp. 527 - 545.

[66] *Shearson/American Express, Inc. -v- McMahon*, 482 U.S. 220 (1997); *Rodriguez de Quijas -v- Shearson/American Express, Inc.* 109 S.Ct 1917 (1989); and *Mitsubushi Motors Corp. -v- Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985).

public policy to recognise or enforce the award".[67] Although the English courts have not yet expressly mentioned international public policy, they have recently affirmed the importance of finality of awards when considering an objection to enforcement on grounds of illegality, and effectively endorsed a restrictive concept of public policy.[68]

In India, the Supreme Court, in *Renusagar Power Co. Ltd -v- General Electric Co.* [69] (1994), has interpreted public policy more restrictively than before. The Court held that 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. It held that the phrase "public policy" must be construed in the sense in which the doctrine of public policy is applied in the field of private international law; and that enforcement of a foreign award would be contrary to public policy if it was contrary to (a) fundamental policy of Indian law; (b) the interests of India; and (c) justice and morality.

The Hong Kong Court of Final Appeal[70] in 1999 rejected the suggestion that public policy under the New York Convention meant some international public policy or "standard common to all civilized nations". Nevertheless, it construed public policy narrowly. It stated that in order to refuse enforcement of a New York Convention award on public policy grounds, "the award must be so fundamentally offensive to that jurisdiction's notion of justice that, despite it being a party to the Convention, it cannot reasonably be expected to overlook the objection". And the Court did accept that it would be appropriate to examine how far the courts of other jurisdictions had been prepared to go in enforcing Convention awards made in circumstances that did not meet their domestic standards. Another judge noted that in many instances, the relevant public policy of the forum would coincide with the public policy of so many other countries that the relevant public policy could accurately be described as international public policy.[71]

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[67] Section 103(3). Geneva Convention awards are governed by section 99 of the 1996 Act and Part II of the Arbitration Act 1950 including section 37 which provides that "enforcement thereof must not be contrary to the public policy or the law of England".

[68] Veeder, "England", *Handbook*, Suppl. 23, Mar. 1997, p. 66; where the author states that the "Court has developed a narrow view of public policy for the enforcement of awards". See also Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd edn., Butterworths, 1989), pp. 65 and 283; Sutton, Kendall and Gill, *Russell on Arbitration* (21st edn., Sweet & Maxwell, 1997), para. 8.022; and Meakin, *Arbitration Law* (Lloyds, 1997), para. 17.28. As for recent cases, see: *Soleimany -v- Soleimany* [1998] 3 WLR 811; *Westacre Investments Inc. -v- Jugoimport-SDPR Holding Co. Ltd* [1999] 2 Lloyd's Rep. 65; *Omnium de Traitement et de Valorisation SA -v- Hilmarton Ltd* [1999] 2 QB 222; *Minmetals Germany GmbH -v- Ferco Steel Ltd* [1999] 1 All ER (Comm.) 315. And for comments thereon see: Harris and Meisel, "Public policy and the enforcement of international arbitration awards: controlling the unruly horse", [1998] 1 *LMCLQ* 568; Wade, "Westacre v. Soleimany: What Policy? Which Public?" [1999] *Int. ALR* 97; and Brown, "Illegality and Public Policy - Enforcement of Arbitral Awards in England" [2000] *Int. ALR* 31.

[69] AIR 1994 SC 860; also reported in (1995) XX *Yearbook* 681.

[70] *Hebei Import and Export Corporation -v- Polytek Engineering Co. Ltd* [1999] 2 HKC 205, also reported in (1999) XXIV *Yearbook* 652, per Bokhary PJ.

[71] *Ibid.*, per Mason NPJ.

IV. CONTENT OF PUBLIC POLICY

Within the broad concept of public policy, the following sub-categories of rules and norms can be identified: (1) mandatory laws/*lois de police*; (2) fundamental principles of law; (3) public order/good morals; and (4) national interests/foreign relations. Some prohibitions (e.g. corruption, smuggling) may fall into more than one category. In this part of the report, we seek to identify which rules and norms are included within the scope of public policy.

Public policy includes both substantive and procedural categories (see, for example, the comments in the 1985 UNCITRAL Commission's Report[72] quoted above).[73]

In restricting the concept of public policy and applying an international public policy standard, the courts have recognised the importance of finality - which is itself an aspect of public policy. Since an overly broad interpretation of the concept of public policy defeats arbitral finality and the objectives of arbitration, the public policy exception is narrowly construed.

Public policy may, of course, evolve (albeit very slowly). The relevant public policy is usually that which applies at the time of recognition/enforcement. However, when a new *loi de police* is enacted after the award has been made, it should not be a bar to recognition/ enforcement.

The public policy ground (in Article V.2(b) of the New York Convention and Article 36(1)(b)(ii) of the Model Law) is closely related to the arbitrability ground in Articles V.2(a) and 36(1)(b)(i), respectively, which provide that recognition and enforcement of a foreign arbitral award may be refused if: "the subject matter of the difference is not capable of settlement by arbitration under the law of that country".[74] It has been said that arbitrability forms part of public policy and that therefore Article V.2(a) is superfluous.[75] The topic of arbitrability is beyond the scope of this Report.[76]

A. Finality

Courts in a number of countries have referred to a policy in favour of giving effect as far as possible to the finality of international arbitral awards and discouraging the relitigation of issues already determined. This reflects the "general pro-enforcement bias" of the New York Convention.[77] In *Mitsubushi Motors Corp. -v- Soler Chrysler-Plymouth Inc.*[78] (1985), the US Court of Appeals restat-

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[72] UN Doc. A/40/17, paras. 297 and 303, n.36 above.

[73] The French *Cour de Cassation* has recently confirmed that French international public policy includes requirements both of a substantive and procedural nature (in that case, the requirement of impartiality): *Excelsior Film TV, Srl -v- UGC-PHOA*, decision dated 24 March 1998.

[74] See Böckstiegel, "Public Policy and Arbitrability" in ICCA Congress Series No. 3, n.3 above, p. 177.

[75] See van den Berg, n.1 above, p. 360.

[76] See, for example, articles by McLaughlin, Park, Branson, Kerr, Beechey and Blessing in (1996) 12 *Arbitration International* 113, Arbitrability Special Issue; and Kirry, "Arbitrability: Current trends in Europe", (1996) 12 *Arbitration International* 373.

[77] See comments of Judge Smith in *Parsons & Whittemore*, n.8 above, approved in many subsequent cases.

[78] 373 U.S. 614 (1985)

ed its strong presumption of favouring and upholding international arbitration agreements and awards in light of concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes. And as a Singaporean judge has said[79] (1996): "the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist".

The English courts have articulated a pro-enforcement policy. For example, in *Omnium de Traitement et de Valorisation SA -v- Hilmarton Ltd* (1999)[80], the well known and protracted saga between these two companies moved to England (after a number of appearances in the Swiss and French courts). Hilmarton was engaged to approach public servants and the Algerian government officials with a view to obtaining a drainage project in Algiers for OTV. Such activity was in breach of Algerian law, which prohibited the intervention of middlemen in connection with any public contract within the ambit of foreign trade. Hilmarton brought a claim for unpaid consultancy fees. An arbitral tribunal applying Swiss law and sitting in Geneva made an award in favour of Hilmarton, finding that, absent any evidence of bribery, the agreement was not unlawful under Swiss law. OTV sought to resist enforcement in England. Timothy Walker J. held:

> "It may well be that an English arbitral tribunal, chosen by the parties, and applying English law as chosen by the parties, would have reached a different result. It may well be that such a tribunal would have dismissed Hilmarton's claim …
>
> But I am not adjudicating upon the underlying contract. I am deciding whether or not an arbitration award should be enforced in England. In this context it seems to me that (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point. Indeed, the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced."[81] [Emphasis added].

It is difficult to ascertain whether the practice of courts is less rigorous when asked to recognise/enforce a foreign award than they are when asked to set aside an award made in their own jurisdiction.

The French courts developed a theory of the "mitigated effect of public pol-

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[79] *Re an arbitration between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte. Ltd* [1996] 1 SLR 34 at 46, per Judith Prakash J.

[80] [1999] 2 QB 222, also reported at (1999) XXIV *Yearbook* 777.

[81] See also the cases dealing with alleged corruption referred to in n.68 above.

icy" (*effet atténué de l'ordre public*),[82] namely that a distinction is to be made between the reaction of public policy to the effects in France of a right already acquired abroad, on the one hand, and the reaction of public policy to the acquisition of a right in France, on the other hand. In the first case, the demands of public policy may be diminished or attenuated, but in the second, they apply with their full vigour. However, Fouchard *et al* comment that this theory has no place in international arbitration, because court control of compliance with international public policy is already carried out very sparingly, even where the award is made in France, leaving no room for further attenuation.[83]

Generally, the courts will sever that part of the award that offends public policy and enforce the non-offending part.

B. Substantive categories of public policy

Substantive public policy (*ordre public au fond*) goes to the recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award (as opposed to procedural public policy, which goes to the process by which the dispute was adjudicated).

1. Mandatory laws/lois de police

(a) General

A mandatory rule has been described by the Chairman of our Committee, Professor Mayer, as follows: [84]

> "a mandatory rule (*loi de police* in French) is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. To put it another way: mandatory rules of law are a matter of public policy (*ordre public*), and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws."

Public policy may require the applicable law to be displaced by a mandatory law of the forum, or a mandatory law of a relevant foreign or supra-national legal system.[85] Professor Mayer notes that among the mandatory rules of law most frequently encountered, the following may be cited: competition laws; currency controls; environmental protection laws; measures of embargo, blockade or boycott; or laws falling in the rather different category of legislation designed to protect parties presumed to be in an inferior bargaining position, such as wage-earners or commercial agents.

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[82] Enunciated by the Cour de Cassation in *Riviere -v- Roumiantzeff*, *Rev. Crit*. 1953, 412. See Batiffol and Lagarde, *Droit International Privé* (8th edn., 1993), pp. 580-584.

[83] See n.13 above.

[84] Mayer, "Mandatory rules of law in international arbitration", (1986) 2 *Arbitration International* 274 at 275; see also Mayer, "La sentence contraire a l'ordre public au fond", (1994) *Rev. Arb*. 615.

[85] For the effect of mandatory laws on the choice of law by national courts, see Articles 7 and 16 of the 1980 Rome Convention on Applicable Law.

The extent to which an international tribunal must have regard to the mandatory rules of: the law governing the parties' relationship; the law of the forum; any supranational order; and the law at potential places of enforcement; has been said to be one of the most difficult issues in international arbitration.[86] It is beyond the scope of this Report to consider the problems facing a tribunal but this issue has been commented upon in some detail.[87]

An enforcement court may be faced with similar issues. A national court cannot sanction a contract or action which is illegal under its own laws. There may also be circumstances where the court must have regard to whether enforcement is illegal and/or impossible under another legal system (see "Whose public policy?" in Part V below). But the courts of many countries have concluded that not all of their respective prohibitive or proscriptive laws are relevant when considering whether or not to enforce a foreign award. Put most simply: every public policy rule is mandatory, but not every mandatory rule forms part of public policy.

On the other hand, Professor Mayer contends that the common observation that international public policy is narrower than internal public policy (because the former focuses only on the most fundamental norms) has no relevance for the applicability of *lois de police*. This is because *lois de police*, by their nature, are necessarily applicable, regardless of how "international" the arbitration may be. In addition, the body of international public policy rules can in fact be wider, not narrower, than domestic public policy, because there is a number of *lois de police* that apply only to international relationships (e.g. rules relating to foreign investment).

The Swiss Federal Supreme Court has held (in 1995) that substantive public policy is not necessarily violated where the foreign provision is contrary to a mandatory provision of Swiss law.[88] Likewise, the Indian Supreme Court has

[86] See Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration", (1997) 14 *Journal of International Arbitration* 23; also Blessing, "Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts", vol. 9 of the *Swiss Commercial Law Series*, 1999; also Blessing, "Impact of Mandatory Rules, Sanctions, Competition Laws" in "Introduction to Arbitration - Swiss and International Perspectives", vol. 10 of the *Swiss Commercial Law Series*, 1999.

[87] As well as Mayer and Blessing above, see: Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration" in ICCA Congress Series No. 3, n.3 above, p. 205 (1986); Guedji, "Theory of the Lois de Police - A Functional Trend in Continental private International Law (a Comparative Analysis with Modern American Theories", 39 *American Journal of Comparative Law* 660 (1991); Hochstrasser, "Choice of Law and Foreign Manadatory Rules in International Arbitration", (1994) *Journal of International Arbitration* 57; Lazareff, "Mandatory Extraterritorial Application of National Law," 1995 *Arbitration International* 137; Enonchong, "Public Policy in the Conflict of Laws: a Chinese Wall Around Little England", (1996) 45 *International and Comparative Law Quarterly* 633; Voser, "Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration", (1996) 7 *The American Review of International Arbitration* 319; Böckstiegel (ed.), *Acts of State and Arbitration* (Carl Heymanns Verlag KG, 1997). See esp. von Hoffmann, "Internationally Mandatory Rules of Law before Arbitral Tribunals", at p.3.

[88] *Inter Maritime Management SA -v- Russin & Vecchi*, 9 January 1995, reprinted in (1997) XXII *Yearbook* 789. In that case, the applicant argued that an award of compound interest was contrary to Swiss law. In any event, the court noted that according to recent doctrine compound interest was not prohibited under Swiss law.

said (in 1994): "In order to attract the bar of public policy, the enforcement of the award must involve something more than the violation of the law of India".[89]

We would submit that it is only in those situations where the dispositive aspect of the award requires the doing of some act which is unequivocally prohibited in the forum State that recognition/enforcement should be refused.

(b) Special application: competition law

Article 81 (ex Article 85) of the Treaty Establishing the European Community ("EC") (formerly known as the Rome Convention[90]) prohibits practices which restrict or distort competition between Member States. Agreements that do so are void under Article 81(2) unless an exemption is granted under Article 81(3). The European Court of Justice has elevated this rule to the level of international public policy (at least within Member States). Accordingly, in our opinion, an arbitrator who finds that a violation has occurred should, of his own motion, refuse to recognise the agreement. Likewise, an European Union national court faced with an arbitral award which breaches Article 81 EC should refuse enforcement on grounds of public policy or refer the matter to the European Court of Justice under Article 234 EC (ex Art. 177).[91] (Arbitral tribunals cannot, however, refer a question to the ECJ.[91a])

In *Eco Swiss China Time -v- Benetton*[92] (ECJ, 1999), Benetton purported to terminate a licence agreement relating to the manufacture and distribution of watches bearing the Benetton name. An arbitral tribunal, applying Dutch law, in a Partial Final Award found in favour of Eco Swiss, and in later Final Award awarded damages of over USD 26 million. Benetton sought to have the award set aside on grounds, *inter alia,* that the award was contrary to public policy by virtue of the nullity of the licensing agreement under Article 81 EC (ex Art. 85) (even though neither party nor the tribunal had raised the point during the arbitration). The matter reached the Supreme Court of the Netherlands, which upheld the award, concluding that Article 81 was not to be regarded as a mandatory rule "which is so fundamental that no restrictions of a procedural nature should prevent it from being observed", but it did refer the question to the European Court of Justice.

The ECJ noted that it was in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and therefore that an annulment or refusal should be possible only in exceptional circumstances.

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89 In *Renusagar,* n.69 above, at 880.

90 The Treaty of Rome was amended by the Treaty of Amsterdam, dated 2 October 1997. Article 85 is now 81 and Article 177 is now 234.

91 See *Municipality of Almelo -v- Energiebedrijff Ijsselmij NV*, Case C 393/92 [1994] 1 ECR 1477; and Van Haersolte-van Hof (1995) 6 *American Review of International Arbitration* 83.

91a See the decisions in *North Sea* CJEC 102/81 LR 1982, 1095, *Danfoss* CJEC 109/88 LR 1989, 3199; and *re Commune d'Almelo* CJEC 393/290 LR 1994, 1477.

92 *Eco Swiss China Time Ltd (Hong Kong) v. Benetton International NV,* Court of Justice of the European Union, 1 June 1999, C-126/97, [1999] 2 All ER (Comm) 44.

Nonetheless, the ECJ ruled that where "its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on a failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC". The ECJ further found that the provisions of Article 81 constituted fundamental provisions essential for the accomplishment of tasks entrusted to the Community and for the functioning of the internal market. Accordingly, they were to be regarded as a matter of public policy within the meaning of the New York Convention.

Benneton's application to set aside the tribunal's Partial Final Award which determined liability had, however, been made out of time. The ECJ concluded that the competition provisions at Article 81 were not so fundamental as to override otherwise valid procedural rules relating to limitation periods and the finality of arbitration proceedings. Accordingly, the Partial Final Award was allowed to stand.

In 1998, the Austrian Supreme Court reached a similar conclusion on the status of European Community Law. It held in two decisions that any provision of European Community Law, which is directly applicable in the Member States, is - according to its supremacy - automatically part of Austrian national public policy. Therefore, in its opinion, an arbitral award which was in conflict with any directly applicable community law could be quashed. The first case[93] concerned Articles 81 and 82 EC (ex Arts. 85 and 86) (although the Supreme Court had never in the past held Austrian cartel law to be part of Austrian public policy). The second case[94] concerned a provision of the Sixth VAT Directive.

2. Fundamental principles of law

(a) General

Principles of law may or may not be a category distinct from mandatory rules. Some courts use this phrase to refer to more general principles, rather than to specific legislative provisions. For example, in Switzerland, the party wishing to invoke a violation of public policy when applying to set aside an award under Swiss Private International Law Act has to establish concretely what fundamental principle of law was violated by the award.[95] Among these principles are those of *pacta sunt servanda*, the prohibition of the misuse of the law, the principle of good faith, the prohibition of uncompensated expropriation, the prohibition of discrimination, and the protection of those incapable to act.[96]

Whilst a Common Law lawyer may be surprised to see such a reference to good faith, the Paris Court of Appeal has also held that there is a "general principle of international public policy whereby contracts are to be performed in good faith".[97]

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93 3 Ob. 115/95, dated 23 February 1998, reported in (1999) *Rev. Arb*. 385.
94 3 Ob. 2372/96 m, dated 5 May 1998.
95 See Briner, "Switzerland", *Handbook*, Suppl. 13, Sept. 1992, p. 33.
96 ATF 116 II 634, reported in (1992) XVII *Yearbook* 279.
97 *Republique de Cote d'Ivoire -v- Norbert Beyrard*, 12 Jan. 1993, (1993) *Rev. Arb*. 685.

(b) Special application: unlawful relief

The substantive law of many countries does not allow the award of punitive or exemplary damages, for example Germany.[98] In ICC Case No. 5946,[99] a claim for punitive damages was refused in an arbitration taking place in Geneva with New York governing law, on the basis that damages beyond compensatory damages constituted a punishment of the wrongdoer contrary to Swiss public policy. The notable exception is the United States[100], where it has been confirmed that a claim for punitive damages is arbitrable under federal law.[101] Such an approach is said to accord with policy considerations favouring arbitration as a viable alternative to litigation. The federal courts will also enforce a foreign award with a punitive damages component.[102]

Laminoirs-Trefileries-Cableries de Lens SA -v- Southwire Co.[103] (ND Ga., 1980) is one of the few reported cases in which a United States Court has refused to enforce a foreign arbitral award under the New York Convention on public policy grounds: the Georgia Court concluded that the arbitrators' decision that interest rates should rise by an additional 5% p.a. two months from the date of the award in accordance with the French statute was penal rather than compensatory, and, therefore, that portion of the award would not be enforced. Given that United States federal courts will enforce awards of punitive damages (see above), this case may no longer be good law.

(c) Moslem shari'a

Dr El-Ahdab gives as examples of matters which may be contrary to the Moslem *Shari'a*: an arbitral award granting legal interest under Egyptian or Syrian law, or granting contractual interest under Libyan law, could in Kuwait be held to be partially against the Moslem *Shari'a* and consequently that part of the award could not be enforced;[104] awards dealing with the concept of profit (which is not recognised by the *Hanbali* Moslem doctrine) and awards made by non-Muslim arbitrators (which is contrary to Saudi law);[105] and aleatory contracts.[106]

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98 BGH 1992, 3096.

99 Reported in (1991) XVI *Yearbook* 97.

100 Exemplary damages have also been awarded by the Australian courts for fraud (*XL Petroleum NSW Pty Ltd -v- Caltex Oil (Aust.) Pty Ltd* (1985) 155 CLR 448) and deliberate misstatement in a policy of insurance (*Lamb -v- Cotogno* (1987) 74 ALR 188).

101 *Willis -v- Shearson and American Express Inc*. 569 F. Supp. 821 (DCNC, 1983)

102 See *In the matter of an arbitration between Marco Barbier and Shearson Lehman Hutton Inc*. (1991) 6 *Mealey's International Arbitration Reports* 14 at B1, in which Ward J. in the District Court of the Southern District of New York distinguished and confined the decision in *Garrity -v- Lyle Staurt Inc*. 40 N.Y. 2d 354 (1976), in which the New York Court of Appeal struck down an award of punitive damages on the basis that it was *contra bonos mores*, to domestic arbitrations.

103 484 F. Supp. 1063. (ND Ga., 1980)

104 El-Ahdab, *Handbook*, n.10 above, p. 23

105 El-Ahdab, "Saudi Arabia Accedes to the New York Convention", (1994) 11 *Journal of International Arbitration* 87 at 91.

106 See El-Ahdab, "Arbitration in Saudi Arabia under the New Arbitration Act 1983" (1986) 3 *Journal of International Arbitration* 23 at 57.

3. Contrary to good morals/public order

Certain activities are regarded as *contra bonos mores* virtually the world-over, for example piracy, terrorism, genocide, slavery, smuggling, drug traffficking and paedophilia. Agreements which aid such activities are illegal and unenforceable. No award which, on its face, determines a dispute between parties to such illegal activities will be enforced.

In *Soleimany -v- Soleimany*[107] (1998*)*, the English Court of Appeal refused to enforce an award giving effect to a contract between a father and son, which required the smuggling the carpets out of Iran, in breach of Iranian revenue laws and export controls, on grounds that the contract was illegal when made. The Beth Din (Court of the Chief Rabbi in London), applying Jewish law, had awarded the son a share of the proceeds from the sale of the carpets: the illegality of the enterprise was recognised, but held to be of no relevance, under Jewish law, to the rights of the parties to the sale proceeds.

Following the 1997 OECD Convention on Combating the Bribery of Foreign Officials in International Transactions,[108] which reflects the mounting international concern about the prevalence of corrupt trading practices, it is arguable that there is an international consensus that corruption and bribery are contrary to international public policy.[109] For example, in 1993 the Paris Court of Appeal recognised that:[110]

> "A contract having as its aim and object a traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community."

Likewise, in English law, a contract under which A promises to pay money to B if B will procure by bribery a public body to contract with A is illegal and *void ab initio*.[111] Rather than going to formation, only the performance by B

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[107] [1998] 3 WLR 811, and see the articles referred to in n.68 above. For a comprehensive review of illegality and public policy in English law, see *Chitty on Contracts* (28th edn., Sweet & Maxwell, 1999), paras. 17-001 to -157. See also "Illegal Transactions: The Effect on Contracts and Torts", UK Law Commission, Consultation Paper No.154, 1999.

[108] Signed on 17 December 1997, and came into effect on 15 February 1999.

[109] See Kosheri and Leboulanger, "L'arbitrage face à la corruption et aux trafics d'influence", (1984) *Rev. Arb*. 3; Mayer, "Le contrat illicit", (1984) *Rev. Arb*. 205; Oppetit, "Le paradoxe de la corruption à l'épreuve du droit du commerce international", (1987) 1 *JDI* 5; Mayer, "La règle morale dans l'arbitrage international", *Etudes Pierre Bellet* (Litec, 1991); Heuze, "La morale, l'arbitre et le juge", (1993) *Rev. Arb*. 179; Derains, "La lutte contre la corruption - Le point de vue de l'arbitre international", *Contribution au Congres AIJA*, Montreux 1996; Knoepfler, "Corruption et arbitrage international", *Droit International Prive et Arbitrage* 357; Rosell and Prager, "Illicit Commissions and International Arbitration: The Question of Proof", (1999) 15 *Arbitration International* 329.

[110] *European Gas Turbines SA -v- Westman International Ltd*, 30 Sept. 1993, (1994) *Rev. Arb*. 359, and reported in (1995) XX Yearbook 198.

[111] Chitty on Contracts (28th edn., Sweet & Maxwell, 1999), chapter 19.

may be illegal, in which case B cannot enforce the contract against A.

In some cases, a dispute in which, in effect, one party sought to enforce a contract for the payment of bribes has been held to be not arbitrable.[112] In other cases, the tribunal has held that it had jurisdiction to hear the dispute but that the contract was illegal.[113] In other cases, a claim for "commission" has been allowed where the agreement was entered into prior to the enactment of prohibitory legislation.[114] In other cases, courts/tribunals have drawn a distinction between agreements to exert personal influence and agreements to pay bribes.[115]

Other activities receive less international condemnation; for example, gaming contracts are illegal in some countries and not in others.

4. National interests/foreign relations

In *Parsons & Whittemore*[116] (1974), the United States Court of Appeals held that public policy did not equate with "national policy" (in the diplomatic or foreign policy sense), and it would not refuse to enforce an award in favour of the Egyptian party simply because of tensions at that time between the United States and Egypt. The arbitral tribunal had found the American defendant in breach of contract in abandoning the construction of a paperboard mill in Egypt after Egypt broke off diplomatic relations with the United States just prior to the Arab-Israeli Six Day War. It was in that case that Judge Smith articulated his oft quoted definition of public policy (see above). The court indicated that enforcement would be refused only where the conflicting national policy would forbid performance of the contract.[117]

This approach was forcefully confirmed in the later United States case of *National Oil Corp. -v- Libyan Sun Oil Corp.*[118] (Del., 1990), in which the court rejected a challenge to an award at the enforcement stage on the ground that it was in favour of Libya - "a state known to sponsor international terrorism". The Delaware court noted that the United States still recognised the government of Libya, had not declared war on it and had specifically given it permission to bring an action to confirm the award. The Court said:

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[112] E.g. decision of Judge Lagergren in 1963, reported in (1994) 10 *Arbitration International* 277.

[113] E.g. ICC case 3916 (1983) (unpublished) referred to in Kosheri, n.109 above; and ICC case 8891 (unpublished) referred to in Rossel and Prager, n.109 above - in which the tribunal itself raised the issue of illicit commissions and invited submissions, and noted in its award that the illicit character of contracts for the payment of bribes was well established in arbitral jurisprudence and that arbitrators may properly base their decisions in such matters on general principles of law or transnational public order.

[114] E.g. *Northrop Corp. -v- Triad* 593 F. Supp. 928 (1984).

[115] *Westacre Investments Inc. -v- Jugoimport-SDPR Holding Co. Ltd* [1999] 2 Lloyd's Rep. 65 at 74, per Waller LJ.

[116] *Parsons & Whittemore*, n.8 above.

[117] *Ibid.*, at 974 n.5.

[118] 733 F. Supp. 800 at 819 (Del., 1990).

> "To read the public policy defence as a parochial device protective of national political interests would seriously undermine the [New York] Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'".

In *Dalmia Dairy Industries Ltd -v- National Bank of Pakistan*[119] (1978), the English Court of Appeal rejected the argument that it would be contrary to English public policy for an English court to enforce an ICC award (made in Switzerland) between nationals of two countries which were at war (India and Pakistan) when both maintained friendly relations with England. However, the English courts would be likely to take a different approach in respect of a contract with an enemy alien, or any contract which had the avowed object of causing injury to a friendly government.[120]

Awards that breach sanctions or boycott legislation may be refused enforcement.[121] The United States has frozen the assets of certain States and their nationals. It is possible to register a foreign award made against such State, but not to enforce it without the permission of the Office of Foreign Asset Control. These are also examples of the application of mandatory laws.

The Paris Court of Appeal has stated that "the rules relating to public control over foreign investment express, via mandatory provisions, the idea of international economic public policy, because these rules aim at preserving, in the public interest, the balance of economic and financial relations with the rest of the world, by controlling the movement of capital across the border".[122]

C. Procedural categories of public policy

1. Fraud/corrupt arbitrator

There is undoubtedly an international consensus that enforcement of an award should be refused if its making was induced or affected by fraud or corruption. For example, the Report of the UNCITRAL Commission stated that: "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."[123] Australia[124], New Zealand[125], India[126] and Zimbabwe[127] have

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[119] [1978] 2 Lloyd's Rep. 223.

[120] See the examples given in Cheshire & North, n.6 above, including a loan to further a revolt, and an arrangement to defraud a foreign revenue.

[121] E.g. in the Malaysian case of *Harris Adacom Corp. -v- Perkom Sdn Bhd* [1994] 3 MLJ 504, it was common ground between the parties to enforcement proceedings that if the plaintiff was an Israeli company, it would be against Malaysian public policy to enforce an award in its favour as trade with Israel was prohibited. The court decided on the facts that neither the plaintiff nor the transaction offended the boycott.

[122] *Courreges Design -v- Andre Courreges*, 5 Apr. 1990, (1992) *Rev. Arb.* 110.

[123] UN Doc. A/40/17, paras. 297 and 303, n.36 above.

[124] International Arbitration Act 1974, s.19(a). See Pryles, "Australia", *Handbook*, Suppl. 13, Sept.

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 ICSID Convention includes as one of the grounds for annulment of the award: "that there was corruption on the part of a member of the Tribunal" (Art. 52(c)).

Fraud implies some act of deceit perpetrated on the tribunal (e.g. falsified documents[128], perjured evidence) or on the other party.

There are differences of opinion as to whether the fraud/corruption must be shown to have affected the outcome. We would submit that fraud involving the tribunal should make the award unenforceable without having to prove its effect but fraud by the successful party must have influenced the outcome before enforcement is refused.[129]

As to the extent of review by the courts when faced with a claim of perjury/fraud, see Part VI below. The enforcement court may be reluctant to consider arguments that were available at the time of the hearing and/or could have been presented to the supervisory Court in an application to have the award set aside.

2. Breach of natural justice/due process

Enforcement may be refused on grounds of public policy in the event that there has been a breach of natural justice or due process. This is in addition to the ground in Article V.1(b) of the New York Convention, which provides that enforcement may be refused if the party against whom the award is invoked was not given proper notice of the formation/identity of the tribunal or of the arbitration proceedings, or was otherwise unable to present his case.[130]

1992, p.27; Jacobs, *International Commercial Arbitration in Australia* (The Law Book Company Ltd, 1992), para. 43.620; and Miller, "Public Policy in International Commercial Arbitration in Australia", (1993) 9 *Arbitration International* 167.

[125] Arbitration Act 1996, article 36. See Kennedy-Grant, "New Zealand", *Handbook*, Suppl. 25, Jan. 1998, p.27; and also *NZ Law Commission Report No. 20* (1991), paras. 403-404.

[126] Arbitration and Conciliation Act 1996, article 48(2).

[127] Zimbabwe Arbitration Act 1996, section 36(3). See "Zimbabwe", *Handbook*, Suppl. 24, Oct. 1997, Annex I; and McMillan, "Zimbabwe Arbitration Act 1996", (2000) 15 *Mealy's Int. Arb Rep.* 42.

[128] See e.g. *European Gas Turbines SA -v- Westman International Ltd*, n.110 above, in which Westman produced a fraudulent report of its expenses. The Paris Court of Appeal held this to be contrary to French international public policy and, consequently, partially annulled the award.

[129] For an example of an award obtained by fraud in Germany, see BGH NJW 1990, 2199. The English court acknowledges that an award obtained by perjury is not enforceable in certain very limited circumstances: see *Westacre,* n.172 below. To enforce an award based on the testimony of a witness who had given a conflicting statement on a prior occasion has been held in the United States not to contravene public policy: *Waterside Ocean Navigation Co. Inc. -v- International Navigation Ltd*, 737 F. 2d 150 (2d Circ., 1984).

[130] See van den Berg, n.1 above, pp. 296-311.

Again, Australia[131], New Zealand[132] and Zimbabwe[133] (but not India) 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 "… a breach of the rules of natural justice occurred ...".

This remains a vague category of public policy and one that encompasses virtually any complaint by an unsuccessful party. There is consensus, however, that there must be serious irregularity;[134] for example, the ICSID Convention includes as grounds for annulment: "that there has been a serious departure from a fundamental rule of procedure" (Art.52(d)).

Schwebel and Lahne have noted that the fundamental policy requirements for the conduct of arbitral proceedings are acutely obvious and, as such, rarely controversial.[135] These principles, which they describe as general principles of "international due process" 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 both parties; and, should the tribunal elect to pay heed to *ex parte* extrinsic material, it gives fair notice and presents the parties with the opportunity to address it on that extrinsic material.[136]

In the well known *Dutco* decision[137] (1992), the French *Cour de Cassation* held (in an application to set aside the award) that failure to respect the principle of equality of the parties, namely equality in appointing arbitrators, constituted a breach of (French) international public policy.

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, e.g. failure to give reasons (see (4) below).

3. Lack of impartiality

It is generally accepted that lack of impartiality on the part of the tribunal is a ground for refusing enforcement on grounds of public policy.[138] But it is more

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[131] See n.124 above.
[132] See n.125 above.
[133] See n.127 above.
[134] For example, the Moscow City Court has noted that a minor procedural infringement in the arbitral proceedings had no relevance to the notion of public policy: see Yakovlev, "International Commercial Arbitration proceedings and Russian Courts", (1996) 13 *Journal of International Arbitration* 37.
[135] See Schwebel and Lahne, "Public Policy and Arbitral Procedure" in ICCA Congress Series No. 3, n.3 above, p. 205.
[136] See also Fouchard *et al*, n.13 above, paras. 1638-1644
[137] Decision dated 7 January 1992.
[138] E.g. *Excelsior Film TV, Srl -v- UGC-PHOA*, French *Cour de Cassation* decision dated 24 March 1998, in which it was confirmed that lack of impartiality constituted a breach of French international public policy. As did the Court of Appeal in Zurich in a 1995 case, in which it held

usual for lack of impartiality to be raised before the arbitration institution administering the arbitration at the time of commencement of the arbitration (in the context of a challenge to a prospective arbitrator) before the court with supervisory jurisdiction over the proceedings, rather than at the enforcement stage. However, it is beyond the scope of this Report to investigate bias and lack of impartiality.[139]

4. Lack of reasons

In a number of cases, it has been held that failure to give reasons (even if a mandatory requirement of any award made in the enforcement State) is not a reason to refuse enforcement of a foreign award.[140]

5. Manifest disregard of the law

The courts in a number of countries have rejected the argument that an incorrect interpretation of substantive law by the tribunal is a sufficient reason to refuse enforcement, for example: Switzerland[141]; France[142]; England[143]; Germany[144]; and the Philippines[145].

Deciding a dispute on some basis other than rules of law has been held not to be contrary to public policy. For example, the Austrian Supreme Court found no infringement of public policy where an ICC arbitral tribunal sitting in Vienna applied an "international *lex mercatoria*".[146] The French courts have reached a similar conclusion.[147] In *D.S.T. -v- Rakoil*[148] (1987), the English Court of Appeal rejected the argument that enforcement of an award based upon "internationally accepted principles of law governing contractual relations" (and more specifically, common practice in international arbitrations, particularly in the field of oil

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that a clause which referred any disputes to the lawyer of one of parties violated Swiss public policy: reported in (1998) XXIII *Yearbook* 754.

[139] See, e.g., Bishop and Reed, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration", (1998) 14 *Arbitration International* 395.

[140] See Delvolvé, "Essai sur la motivation des sentences arbitrales", (1989) 2 *Rev. Arb.* 149. See also e.g. Germany - BGH NJW 1992, 2300; Switzerland - ATF 116 II 373; Canada - *Schreter -v- Gasmac Inc.* (1992); Philippines - *Oil and Natural Gas Commission -v- Court of Appeals* (1998) 293 SCRA.

[141] Supreme Court decisions:ATF 115 II 105; ATF 115 II 291; ATF 116 II 634 (also reported in (1992) XVII YB 279).

[142] E.g. *Andre -v- Multitrade*, Cass. 1e civ., 23 Feb. 1994 (CA), (1994) *Rev. Arb.* 83.

[143] *Adams -v- Cape Industries plc* [1990] Ch. 433 at 569 (CA).

[144] BGH NJW 1990, 3210.

[145] Supreme Court decisions: *Asset Privitization Trust -v- Court of Appeals*, GR No. 121171, 29 December 1998; and *National Steel Corporation -v- The Regional Trial Court of Lanao de Nostro*, GR no. 127004, 11 March 1999.

[146] *Norsolor SA -v- Pabalk Ticaret Ltd,* (1984) IX *Yearbook* 159.

[147] *Compania Valenciana de Cementos Portland -v- Primary Coal Inc.*, Cass. 1e civ., 22 Oct. 1991, (1992) *Rev. Arb.* 457.

[148] [1987] 2 Lloyd's Rep. 246.

drilling concessions), rather than upon any national system of law, should be refused on grounds of public policy.[149] Section 46(1)(b) of the English Arbitration Act 1996, which provides that the parties may agree the basis upon which the tribunal is to determine the dispute, has removed any lingering doubt that the English courts might consider an award made on the basis of *lex mercatoria*,[150] or *ex aequo et bono*, or *amiable composition*[151] to be contrary to public policy.

In the United States, "manifest disregard of the law" is a defence to enforcement under the Federal Arbitration Act; but federal courts have held that it is not a valid defence to an enforcement action under the New York Convention, and that the manifest disregard standard does not fall within the scope of Article V.2(b).[152] However, in one recent case, the Court of Appeals for the Second Circuit held that the Federal Arbitration Act standards, including manifest disregard of the law, do apply to non-domestic awards rendered in the United States.[153] To vacate an award for manifest disregard of the law, it has been held that there must be something beyond, and different from, a mere error in the law or failure on the part of the arbitrators to understand or apply the law.[154] The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it.

6. Manifest disregard of the facts

An award may also be contrary to the facts, or fundamentally perverse or irrational. It is generally regarded that such perversity (unaccompanied by some serious procedural irregularity) is not a sufficient ground for refusing enforcement on grounds of public policy or otherwise.

A recent decision of the Supreme Court of Zimbabwe[155] (1999) is an excep-

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[149] Contrast the decision of the Court of Appeal in *Home and Overseas Insurance Co. Ltd -v- Mentor Insurance Co. (U.K.) Ltd* [1989] 3 All ER 74, which held that a clause which purported to free arbitrators to decide without regard to the law and according to their own notions of what would be fair would not be a valid arbitration clause.

[150] See Lando, "The Lex Mercatoria in International Commercial Arbitration", (1985) 34 *ICLQ* 474; Mustill, "The New Lex Mercatoria: The First Twenty-five Years", (1988) 4 *Arbitration International* 86; Lowenfeld, "Lex Mercatoria: An Arbitrator's View", (1990) *Arbitration International* 133; Berger, *The Creeping Codification of the Lex Mercatoria*, (Kluwer, 1999).

[151] See Christie, "Amiable Composition in French and English Law", (1992) 58 *Arbitration (Ch. Inst. of Arbs.)* 259.

[152] See *M&C Corp. -v- Erwin Behr GmbH & Co. KG* 87 F 3d 844 (6th Cir., 1996); *International Standard Electric Corp. -v- Bridas Sociedad Anonima Petrolera, Industrial Y Commercial* 745 F Supp. 172 (SDNY, 1990); and *Brandies Instel Ltd -v- Calabrian Chemicals Corp*. 656 F Supp. 160 (SDNY, 1987). See also Born, n.65 above, pp. 521 - 523.

[153] *Yusuf Ahmed Alghanim & Sons, WLL -v - Toys 'R' Us, Inc*., 126 F. 3d 15 (2d Cir., 1997).

[154] *Ibid*., p.23.

[155] *Zimbabwe Electricity Supply Authority -v- Maposa*, decision dated 21 December 1999, judgment no. 114/99. The arbitrator used the wrong start date for calculating the claimant's entitlement for lost salary, which resulted in a windfall to the claimant of approximately 13 months salary.

tion. After reviewing the public policy bar to enforcement in the New York Convention and the Model Law, the Court held:

> "Under Article 34 or 36 [of the Model Law] the court does not exercise an appeal power either [to] uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

7. Res judicata

It has been said that it would be contrary to public policy to enforce an award that was contrary to, and inconsistent with, the prior judgment of a local court on the same subject matter. This is expressly referred to in the legislation of some countries, for example Egypt.[156] The English courts have also held that the principle of *res judicata* is a rule of public policy.[157] An award that disregarded, or was in conflict with, an order of the Indian High Court relating to the same dispute was accepted by the Indian Supreme Court as potentially being contrary to public policy (but it found no conflict on the facts).[158]

6. Annulment at place of arbitration

Article V(1)(e) of the New York Convention provides that recognition and enforcement may be refused if the award has been set aside at the place of arbitration. The Paris *Cour d'Appel* in *The Arab Republic of Egypt -v- Chromalloy Aeroservices Inc*.[159] has held that recognition in France of an award which had been annulled by the courts in the place of arbitration would not violate (French) international public policy.[160]

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[156] Article 58(2)(a) of the Law Concerning Arbitration in Civil and Commercial Matters; see El-Ahdab, "The New Egyptian Arbitration Act in Civil and Commercial Matters", (1995) 12 *Journal of International Arbitration* 65 at 91/93.

[157] *Vervaeke -v- Smith* [1983] 1 AC 145; and *E.D. & F. Man (Sugar) Ltd -v- Haryanto (No. 2)* [1991] 1 Lloyd's Rep. 429.

[158] *Renusagar,* see n.69 above.

[159] Decision dated 14 January 1997; reported in (1997) XXII *Yearbook* 691.

[160] A similar result was reached in France in *Omnium de Traitement et de Valorisation -v- Hilmarton*, *Cour de Cassation,* decision dated 10 June 1997, reported in (1997) XXII *Yearbook* p. 696, in which exequatur of a Swiss award which had been subsequently annulled by the Swiss Supreme Court was upheld; and in the US in *In the matter of Chromalloy Aeroservices -v- Arab Republic of Egypt*, 939 F. Supp. 907 (DDC, 1996), but contrast *Baker Marine Ltd -v- Chevron*, 191 F. 3d 194 (2nd. Cir., Aug. 1999) and *Spier -v- Calzaturifico Technica S.p.A.*, 1999 U.S. Dist. LEXIS

8. Other categories

Other principles of French international procedural public policy that have been identified[161] include: the rule that the claimant must prove its allegations of fact; and no one shall plead by proxy. On the other hand, the following principles are not considered matters of French international public policy: an action to set aside an award will lead to a stay of proceedings; the bringing of a case before a court which has no jurisdiction suspends the statutory limitation period; and civil proceedings are stayed pending the outcome of related criminal proceedings.

V. WHOSE PUBLIC POLICY?

Is it only the public policy of the forum which is relevant to the exequatur court? Or in other words, are there circumstances in which enforcement of an award might be refused where it would not offend the substantive norms of the exequatur State although it may offend the norms of another State? Like mandatory laws, the court may be asked to have regard to the law: governing the parties' relationship; the place(s) of performance; of any supranational legal order; at the place of arbitration. The answer is almost universally that it is only the forum's public policy that is relevant.

For example, Professor Böckstiegel writes that, in Germany, violation of foreign rules of law or *lois de police* cannot be raised to set aside an award.[162] In France, Fouchard *et al* note that no account should be taken account of the domestic public policy rules of a foreign jurisdiction.[163] And in *Renusagar*,[164] the Supreme Court of India opined that the words "public policy" instead of "public policy of India"[165] did not mean that the court was free to examine the validity of an award from the point of view of whether it violated that the public policy of the country in which it was rendered or the country whose law governed the contract.

European Community law may be an exception to this rule - within Member States. In *Eco Swiss China Time -v- Benetton*[166] (1999 - see above), the European Court of Justice elevated Article 81 EC (ex Art. 85) (which prohibits practices which restrict or distort competition between Member States) to the level of international public policy. However, it is arguable that European Community public policy is, in fact, part of the forum's public policy. For example, in 1998, the Austrian Supreme Court held in two decisions that any provision of European Community Law which is directly applicable in the Member States is automatically part of Austrian national public policy.[167]

16618 (S.D.N.Y., Oct. 1999) where the courts refused to enforce foreign arbitral awards vacated in the country of origin.

[161] See Fouchard *et al*, n.13 above, paras. 1655-1660.

[162] Written Memorandum provided to the Committee, dated 24 January 2000.

[163] Fouchard *et al*, n.13 above, para. 1647.

[164] See n.69 above, at 883.

[165] In s.7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act 1961.

[166] See n.92 above.

[167] 3 Ob. 115/95, dated 23 February 1998, reported in (1999) *Rev.Arb*. 385; and 3 Ob. 2372/96 m, dated 5 May 1998.

The position in England may also be exceptional. It has been said that the English Court will not enforce a contract governed by the law of a foreign and friendly country, or which requires performance in such a country, if performance is illegal by the law of that country.[168] For example, in *Soleimany -v- Soleimany*[169] (1998 - see above), 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. But there have been very few such cases and they, such as they are, have been limited to situations where performance is illegal both under English law and the actual place of performance.

The English courts will also consider the public policy of the place of performance when asked to enforce contracts of lesser moral turpitude, such as the purchase of personal influence. Contracts involving bribery and corruption, drug trafficking, terrorism, etc (and awards giving them effect) are unenforceable in England whatever their proper law and wherever their place of performance. Contracts for the purchase of personal influence, if to be performed in England, would not be enforced on the basis that they are contrary to English domestic public policy. But where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country (as well as of England) that the English court would not enforce it.[170]

VI. EXTENT OF REVIEW BY THE COURTS

The role of the enforcement court is not to review the reasoning of the tribunal, but rather it is to examine whether recognition/enforcement would violate public policy. For example, the Paris Court of Appeal has held:[171]

> "… the scrutiny of the Court … must bear not upon the evaluation made by the arbitrators with regard to the cited requirements of public policy, but on the solution given to the dispute, annulment only being incurred if enforcement of that solution violates the aforementioned public policy."

The Court may act ex officio in examining public policy.

Substantive public policy

In order to determine whether recognition/enforcement of an award will offend substantive public policy, most often the court will not need to look further than the award itself.

The circumstances in which the court would be willing to re-open the facts

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[168] See *Ralli Bros. -v- Compania Naviera Sota y Aznar* [1920] 2 KB 287; *Regazzoni -v- K.C.Sethia Ltd* [1958] AC 301; and *Chitty on Contracts* (28th edn., Sweet & Maxwell, 1999).

[169] [1998] 3 WLR 811, and see articles referred to at n.68 above.

[170] See *Lemenda Trading Co. Ltd -v- African Middle East Petroleum Co. Ltd* [1988] 1 Lloyd's Rep. 361; and *Westacre Investments Inc. -v- Jugoimport-SDPR Holding Co. Ltd* [1999] 2 Lloyd's Rep. 65 at 74.

[171] *Lebanese Traders, Distributors & Consultants -v- Reynolds*, 27 October 1994, (1994) *Rev. Arb.* 709.

when illegality or corruption is alleged was an issue in the recent English case of *Westacre Investments Inc. -v- Jugoimport-SDPR Holding Co. Ltd*[172] (1999). Enforcement of an ICC award made in Geneva applying Swiss law was resisted on grounds that the underlying consultancy agreement between the parties involved, *inter alia*, the bribery of Kuwait officials by the consultants in order to obtain an armaments contract, which was a violation of Kuwaiti law and public policy, and to enforce the award in favour of the consultants would be contrary to English public policy. The tribunal had unanimously decided that illegality had not been established. A setting aside application was rejected by the Swiss Federal Court. The defendant sought to introduce new evidence supporting its allegations of bribery before the English court.

As to whether the court should allow a re-opening of the facts, Colman J., at first instance[173], concluded that the public policy of giving effect as far as possible to the finality sustaining international arbitration awards and discouraging relitigation outweighed, on the facts of this case, the public policy of discouraging international corruption. The Judge emphasised that that conclusion was not to be read as in any sense indicating that the Commercial Court was prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the issue of illegality by reason of corruption was referred to high calibre ICC arbitrators and duly determined by them, it would be entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission.[174] The majority of the Court of Appeal (Mantell LJ. and Sir David Hirst; Waller LJ. dissenting) agreed with Colman J. that, on the facts of that case, the attempt to re-open the facts should be rebuffed.

The Paris Court of Appeal appears more willing to carry out a full-scale review. In *European Gas Turbines SA -v- Westman International Ltd*[175] (1993), EGT sought to annul an ICC award made in Paris on grounds that the award gave effect to a contract whose real object was traffic in influence and bribery. The Court opined that a review of an international award by an annulment court under Article 1502.5 of the Code of Civil Procedure (*ordre public international*) concerns all legal and factual elements justifying (or not) the application of the international public policy rule, including the evaluation of the validity of the contract according to this rule.

It appears from *Eco Swiss China Time -v- Benetton*[176] (ECJ, 1999, see above), that there is no requirement that an objection to recognition/enforcement based on violation of Article 81 EC must be raised during the arbitration. However, if the dissatisfied party seeks to set aside an award relying on Article

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[172] [1999] 2 Lloyd's Rep. 65., and see articles referred to at n.68 above.
[173] [1998] WLR 770.
[174] The Court of Appeal took a similar approach in *Sonic SACI -v- Novokuznetsk Aluminium Plant* [1998] CLC 730.
[175] Decision dated 30 Sept. 1993, (1994) *Rev. Arb.* 359, and reported in (1995) XX *Yearbook* 198.
[176] See n.92 above.

81, the European Court of Justice held that such objection must be raised within the prescribed limitation period.

Of course, Article V.2 of the New York Convention envisages that a court may refuse enforcement on grounds of public policy of its own motion (*ex officio*).

The decision of the Geneva Court of Appeal in *Hilmarton -v- OTV* is an exceptional example of the court overriding the tribunal and concluding that there had been no breach of public policy. The original tribunal found that the consultancy agreement between the parties was contrary to Swiss public policy in view of the fact that, in lobbying for the contract, Hilmarton had breached mandatory provisions of Algerian law prohibiting any intervention of intermediaries in the obtaining of a public contract. The Geneva Court rescinded the award on the ground that it had been rendered arbitrarily. In the absence of a finding of bribery or corruption, Swiss law, which was the applicable law of the contract and the curial law of the arbitration, did not consider the contract to be in breach of public policy. The Court of Appeal's decision was upheld on appeal to the Swiss Federal Court.[177]

Procedural public policy

Where a party bases its objection to recognition/enforcement on procedural public policy, the court may need to carry out a wider enquiry. However, the English courts have sought to discourage such arguments. In *Minmetals Germany GmbH -v- Ferco Steel Ltd*[178] (1999), Ferco sought to resist enforcement of a CIETAC award on grounds, *inter alia,* of public policy, namely a breach of natural justice in not providing Ferco with the evidence on which the arbitrators relied (i.e. the quantification of damages in a prior related award). Ferco had applied to the Beijing Court, which upheld the award. Colman J. held that a party who complains that the award is defective or the arbitration was defectively conducted must, in the first instance, pursue such remedies as exist under the supervisory jurisdiction of the courts of the seat of the arbitration, and that adherence to that part of the parties' agreement must be a cardinal policy consideration by an English court considering enforcement of a foreign award.[179] The Judge laid down the following considerations where enforcement was being resisted on grounds of procedural public policy:

(i) the nature of the procedural injustice;
(ii) whether the enforcee has invoked the supervisory jurisdiction of the seat of the arbitration;
(iii) whether a remedy was available under that jurisdiction;
(iv) whether the courts of that jurisdiction have conclusively determined the enforcee's complaint in favour of upholding the award;

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[177] Both decisions are reported in (1994) XIX *Yearbook* 214.
[178] [1999] 1 All ER (Comm.) 315; also reported at (1999) XXIV *Yearbook* 739.
[179] The approach of the French courts appears to be quite different, see Fouchard *et al*, n.13 above, para. 270.

(v) if the enforcee has failed to invoke that remedial jurisdiction, for what reason and in particular whether he was acting unreasonably in failing to do so.

In *Westacre*[180] (see above), it was also alleged that the award had been obtained by perjured evidence and should be unenforceable on grounds of fraud. The court held that a party will not normally be permitted to adduce in the English courts additional evidence to make good an allegation of fraud, unless it is established that:

(a) the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators; and
(b) the evidence of perjury must be so strong that it would reasonably be expected to be decisive at a hearing.[181]

These conditions are similar to the test laid down by the US court in *Bonar -v- Dean Witter Reynolds Inc*.[182] (11th Circ., 1988). First, fraud must be established by clear and convincing evidence. Secondly, the fraud could not have been discoverable by the exercise of due diligence prior to, or during, the arbitration. Thirdly, it must be shown that the fraud materially related to an issue in the arbitration.

Waiver

A party may waive its right to object. For example, in *AAOT Foreign Economic Association (VO) Technostroy Export -v- International Development and Trade Services, Inc*.,[183] the losing party (IDTS) sought to resist enforcement in the United States of a Russian award on grounds that it had evidence that the arbitration court which had appointed the tribunal was corrupt, relying on Article V(2)(b) of the New York Convention. The United States Court of Appeals rejected that argument on the basis that a party who has knowledge of facts possibly indicating bias or partiality cannot remain silent and later object. Even if IDTS thought that seeking relief through the arbitration court would have been futile, it was incumbent upon it at least to notify opposing counsel.

Likewise, the French courts have held that where a challenge could have been made before the arbitrators but no challenge was made, an action under Article 1502(5) will no longer be admissible.[184]

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[180] See n.172 above.
[181] Colman J. had a further requirement that the evidence must not have been available to the party at a time as would have enabled it to have adduced it in the court of supervisory jurisdiction to support an application to reverse the arbitrators' award if such procedure were available. Waller LJ. did not wish to express a concluded view on this.
[182] 835 F. 2d 1378 (11th Circ., 1988).
[183] 139 F. 3d 980 (2nd Cir., 1998).
[184] *Gemanco -v- SAEPA*, CA Paris, 2 June 1989, (1991) *Rev. Arb*. 87; and see Fouchard *et al*, n.13 above, para. 1606.

VIII. CONCLUSION

An English judge in 1824 described public policy as:[185]

> "... a very unruly horse, and when once 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".

Whilst the New York Convention has been acclaimed by many,[186] it was considered by some that the public policy exception would undermine the objectives of the Convention. There was concern that it was affording an unsuccessful defendant and/or the State a "second bite" at frustrating enforcement.[187] Others saw it as a necessary "safety-valve". The draughtsmen of the New York Convention sought to limit the scope of the public policy clause as far as possible.[188] In our view, Article V.2(b) has not created any serious mischief. Attempts to resist enforcement on grounds of public policy have rarely been successful.[189] As another English judge said in response to his distinguished predecessor's observations: "With a good man in the saddle, the unruly horse can be kept in control."[190]

Nevertheless, uncertainty and inconsistencies concerning the interpretation and application of public policy by State courts encourage the losing party to rely on public policy to resist, or at least delay, enforcement. Perhaps the only way ultimately to keep the "unruly horse" in control would be to adopt the radical proposal of Holtzmann and Schwebel that an International Court of Arbitral Awards be set up.[191] That proposal will very likely seem too great a step for

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[185] *Richardson -v- Mellish* (1824) 2 Bing. 228; [1824-34] All ER Rep. 258.

[186] The Convention has been described as "the single most important pillar on which the edifice of international arbitration rests" (Wetter, "The Present Status of the International Court of Arbitration of the ICC: An Appraisal", (1990) 1 *American Review of International Arbitration* 91 at 93; and one which "perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law" (Mustill, "Arbitration: History and Background", (1989) 6 *Journal of International Arbitration* 43).

[187] The American delegate said: "Certainly 'public policy' will provide considerable scope for ingenuity of defence counsel and it is quite likely that a variety of interpretations will be forthcoming from courts of different nations." (referred to in Haight, "Convention on the Recognition and Enforcement of Foreign awards - Summary Analysis of Records of the United Nations Conference" at 71).

[188] Statement of the Chairman of the Working Party No. 3, UN Doc. E/CONF.26/SR. 17.

[189] See, e.g. Toope, *Mixed International Arbitration* (Grotius, 1990), p. 129; and van den Berg, "Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few" in *Arbitration in the Next Decade (*ICC Bulletin - 1999 Special Supplement).

[190] Lord Denning MR in *Enderby Town Football Club Ltd -v- The Football Association Ltd* [1971] Ch. 591 at 606.

[191] Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards"; and Schwebel, "The Creation and Operation of an International Court of Arbitral Awards"; in *The Internationalisation of International Arbitration* (Graham & Trotman, 1995).

States jealous of their sovereignty to contemplate - at least at the present time (although the attempts by OHADA to harmonise arbitration law, including international public policy, within its sixteen member States is a very positive indication of what might be achievable in the longer term). Another and perhaps more workable way forward towards the achievement of greater predictability would be for the international arbitration community to reach a broad consensus as to which "exceptional circumstances" would justify a national court denying enforcement of a foreign arbitral award, and for the courts to have regard to any such consensus.

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