Public Policy Concepts in International Arbitration

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Abstract

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Arbitration is a popular dispute resolution method. It is distinct from a typical proceeding in that it is a consensual procedure in which the parties select individuals or institutions to render a judgment in a dispute. Thus, parties enjoy a certain level of autonomy in the arbitral settlement proceedings. arbitration is preferable in international commerce because it enables parties to avoid the risk of different national legal cultures that might prevent them from transacting with one another.

When a dispute arises, in the light of the complex nature of international trade, question may arise as to whether a dispute is an international or national one. But this is a secondary point. The more critical issue is that an arbitral award is enforceable in different jurisdictions.

For a long period, the lack of public interest and lack of a strong judicial enforceability kept international arbitration unpopular and thus negatively impacted international commerce. To promote arbitration and thus international commerce, the international community began ratifying international conventions to improve arbitration perception. In that regard, a watershed moment was the adoption of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which took a pro-enforcement stand. Many countries adopted the New York Convention. This in turn created predictability in the enforcement of arbitral awards, which in turn began to engender more and more confidence in international arbitration.

But the New York Convention did provide a framework for national courts to refuse enforcement of arbitral awards based on "irregularities" related to the status of the award, the conduct of the arbitral proceedings, and validity of the arbitration agreement.

Public policy is also one of the irregularities that the New York Convention lists as a manner of denying the enforcement of arbitral awards. It allows national courts not to give effect to an award that contradicts the fundamental principles of the forum state's legal system. The public policy exception is the focus of this study.

Since the New York Convention entered into force, national courts have formulated wide-ranging interpretations of public policy. The public policy exception presents a safety zone in which the national courts can decide whether an arbitral award and its recognition or enforcement is contrary to the public policy of the forum State where its enforcement is being sought. The New York Convention's language allows state courts to enjoy wide discretion on the application of public policy. Public policy is subject to moral, cultural, economic and social essentials of each state. However, as social construction of nations has inevitably changed extremely in the last century, the criteria of public policy is subject to the same progressive manner. But the realities of today's international transaction require a fully functional arbitration system and the finality of an arbitral awards. The more ambiguity there is in the ability to enforce an award based on various states' public policy, it creates the more uncertainty it pertains to the law.

This study preliminary focuses on the concept of public policy, whether its application has contravened the New York Convention's pro-enforcement stance, and how the exception has impacted international arbitration and international commerce. This paper also looks into whether there is a standardized application of the public policy globally.

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TABLE OF CONTENTS

1. INTRODUCTION

Dispute settlement mechanisms may be categorized into two groups: adjudicative and alternative. The adjudicate method involves dispute resolution in national or international courts that have typically been formed by constitutional or statutory mandate. The alternative method refers to dispute resolution in a private forum selected by the parties (typically by contract).

Arbitration is preferred as an alternative dispute resolution mechanism over other methods such as negotiation, mediation, or conciliation—especially in the field of international commerce.[1] Although arbitration has the trappings of a judicial proceedings, it is a consensual procedure in which private parties agree to a specific arbitral forum and agree that private arbitrators may render a resolution award. There are several hallmarks to arbitration that make it attractive to parties. First, arbitration gives the parties discretion over dispute resolution methods (applicable rules, location etc.) that they would not have in a judicial proceeding. This is particularly important in international transactions because it enables the parties to a dispute to avoid national legal cultures and "hometowning."

Secondly, one another strong point of arbitration is its international nature—which provides certain benefits by immunizing the proceedings from domestic law. Although it has become more complicated to distinguish whether a dispute is an international or a domestic legal problem, an arbitration is international if the dispute is not directly connected to the State where the dispute has arisen. But it is wrong to presume that if a dispute in an arbitral proceeding includes as parties international corporations or a state, that dispute is automatically international.

The discussion of whether a dispute is international or national is particularly important in the enforcement context. It is more difficult to have an arbitral award recognized and enforced if an arbitration is categorized as categorized as international.[2]

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[1] For the practice of international commercial arbitration, see INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE SURVEY, ICOC 45 (Pedro J. Martinez-Fraga, Nuray Eski & William K. Sheehy eds., 2007)

[2] U. N. Convention on the Choice of Court Agreement, *opened for signature* June 30, 2005, U.N.T.S. I-53483 (entry into force Oct. 1, 2015); See ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, NEW YORK CONVENTION IN PRACTICE (Emmanual Gaillard & Domenico Di Pietro eds., 2008); RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS (2008); U.N. Comm. on the International Trade Law Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, annex I and A/61/17, annex I, 1985 (UNCITRAL Model Law) (June 21, 1985), Art. 1, para. 3 (hereinafter UNCITRAL Model Law); U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S. 4739 (entry into force June 7, 1959) (hereinafter New York Convention). The New York Convention limits its application to "non-domestic" or "foreign" awards without defining of the concept of international arbitration; see FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Emmanuel Gaillard & John Savage eds., 1999), at 52.

Many scholars accept that international arbitration is a transnational legal system for resolving civil and commercial disputes that has become an independent legal order distinct from national systems of justice.[3] Particularly developing countries—whose systems of justice rightly or wrongly do not engender as much confidence in the international order—have increasingly accepted arbitration and arbitral awards through legislation comporting with post-World War II international standards relating to the recognition of arbitration and arbitral awards (to, among other things, encourage direct foreign investment). This has contributed to the considerable development of international arbitration practice.[4]

Compared with domestic courts, arbitration is a product of party autonomy which provides a private basis for the parties to a dispute where they determine the whole procedure.[5] Thanks to the international instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter The New York Convention) and UNCITRAL model law, now the most important benefit of arbitration is related to its enforcement.[6]

It would be fair to say that the New York Convention was the turning-point in propelling for international arbitration to its most favored status over other alternative dispute mechanism procedures because it enabled the recognition and enforcement of foreign arbitral awards with relative ease.[7] International arbitration would not have the appeal that it now has if the New York Convention did not provide such powerful legitimacy. If we are able to talk about the bright future of international arbitration today, the New York Convention's contribution in this regard is undeniable.

Indeed, the New York Convention is considered one of the most successful international treaties and is now considered one of the most authoritative sources of global law governing

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[3] TONY COLE *ET AL*., THE LEGAL INSTRUMENTS AND PRACTICE OF ARBITRATION IN THE EU, A STUDY FOR THE DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS (2014) at 35; CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION (Julian D.M. Lew eds., 1987), at 12.

[4] Galliard & Savage, supra, at 1.

[5] See Giuditta Cordero-Moss, *Institutional Arbitration: Features of Selected Arbitration Institutions in Europe, in* INTERNATIONAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES (Giuditta Cordero-Moss eds., 2013), at pp.107–378; Carita Wallgren-Lindholm, *Ad-hoc Arbitration v. Institutional Arbitration, in* INTERNATIONAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES (Giuditta Cordero-Moss eds., 2013), at pp. 61–81; Sundra Rajoo, *Institutional and Ad hoc Arbitrations: Advantages and Disadvantages,* THE LAW REVIEW, 2010 (June 5, 2018, 13:00) http://sundrarajoo.com/wp-content/uploads/2016/01/Institutional-and-Ad-hoc-Arbitrations-Advantages-Disadvantages-by-Sundra-Rajoo.pdf, at pp. 547-558. International arbitration is preferable because it has less economical cost, but more effectiveness, adequate problem-solving, easy enforceable and more satisfactory justice.

[6] Currently, 159 states are parties to the New York Convention.

[7] Albert Jan van den Berg, *The New York Convention of 1958: An Overview, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, NEW YORK CONVENTION IN PRACTICE (Emmanual Gaillard & Domenico Di Pietro eds., 2008), at 39-68.

international commercial arbitration.[8] It has contributed to the development of international arbitration to a great extent, conferring on international arbitration predictability—a core element for creating a trustworthy and legal system. The New York Convention and other international instruments legitimizing international arbitration have benefitted the development of international arbitration.

Another powerful benefit of arbitration is the enforceability of arbitral awards with relative ease and speed.[9] The enforceability of arbitral awards, in turn, has played a critical role in facilitating international business transactions because it has given parties the confidence that their disputes will be fairly resolved and arbitral awards will not be hollow.

But the benefits of international arbitration would turn out to be disadvantages where the exceptions provided in the New York Convention have been interpreted broadly. In this regard, the recognition and enforcement of awards rendered in international arbitration has a crucial role. The New York Convention is the well-recognized instrument in which parties to this Treaty(the States) are under obligation to recognize and enforce foreign arbitral awards. Not only an arbitral award but also the future practice of international arbitration depends on the recognition and enforcement, which is a pre-step for a foreign award being acknowledged and executed respectively by the enforcing country. International actors as a matter of course want to reach a decision, which has the capacity of enforcement. An arbitral tribunal may provide a just award, but if it is not recognized in countries in which it is sought to be enforced, it would greatly weaken the practice of international arbitration.

Although the New York Convention provides a wide range of application for enforcement, a host country may still refuse to recognize and enforce and arbitral award based on "irregularities." Such 'irregularities' may relate to the status of an award, conduct of an arbitral proceeding, and the validity of an arbitration agreement (or clause in an agreement). Article V of the New York Convention includes seven defenses that are sufficient justification for a court to refuse recognition and enforcement of an award. These are "the absence of a valid arbitration agreement or incapacity of a party", "lack of a fair opportunity to be heard", "matters not covered by the arbitration agreement", "improper composition of the arbitration tribunal", "non-binding award", "non-arbitrability", and "violation of public policy."

Among these, the public policy defense is one of the most important and disputed bases for refusing recognition and enforcement of an international arbitral award. While the parties may seek to set aside an arbitral award on the grounds provided in the New York Convention, national courts also take into consideration of annulment of the award on specific conditions of arbitrability[10] and public policy.[11]

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[8] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2008), at 219.

[9] *Id*.

[10] Piero Bernardini, *The Problem of Arbitrability in General, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, NEW YORK CONVENTION IN PRACTICE (Emmanual Gaillard & Domenico Di Pietro eds., 2008), at 501-522.

This study preliminary focuses on the concept of public policy which enables judicial interpretation to refuse recognition and enforcement of arbitral awards in the country where their enforcement is sought. Public policy is one of the unique and exceptional clauses of permitting the judge not to give effect to an award that would contradict the fundamental principles of the host state's legal system.[12] Article V(2)(b) of the New York Convention regulates the public policy exception by which the recognition or enforcement of an arbitral award may be refused if a court finds that it would be contrary to the public policy of the forum State.[13]

Although the parties involved in an international commercial dispute may seek resolution through arbitration, the award of the resolution needs to be brought before the forum state's court system where the enforcement of the arbitral award is sought. The public policy exception presents a safety zone for States that may consider that a foreign arbitral award would weaken their foundational basis. The national courts are to decide whether an arbitral award and its recognition or enforcement would be contrary to the public policy of the forum State where its enforcement is being sought. Since the New York Convention entered into force, national courts have formulated wide-ranging interpretations of public policy which have caused certain difficulties in recognition and enforcement of arbitral awards internationally.[14]

The public policy exception to enforceability of arbitral awards has been a matter of debate for conflict of laws scholars.[15] Scholars have considered whether the public policy exception is one of the threats[16], or loopholes[17] to the use of arbitration in commercial disputes. If the public policy exception is interpreted broadly, it creates the risk of weakening the extent

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[11] Bernard Hanotiau & Olivier Caprasse, *Public Policy in International Commercial Arbitration, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, NEW YORK CONVENTION IN PRACTICE (Emmanual Gaillard & Domenico Di Pietro eds., 2008), at 787-828.

[12] Giuditta Cordero-Moss, *International Arbitration is not only International, in* INTERNATIONAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES (Giuditta Cordero-Moss eds., 2013), at 19.

[13] National procedural laws and the UNCITRAL Model Law also contain provisions for the refusal of enforcements of an award on the grounds of public policy (Art. 34 (2) UNCITRAL Model Law). The UNCITRAL Model Law Article 36 (2) (b) states that an arbitral award may be refused on the grounds that "the recognition or enforcement of the award would be contrary to the public policy of this State."

[14] Inae Yang, *A comparative Review on Substantive Public Policy in International Commercial Arbitration,* 70 DISP RESOL J., 49 (2015), at 51.

[15] G. De Nova, *Conflicts of Laws and Functionally Restricted Substantive Rules*, 54 CALIF. L. REV. 1569 (1966); Mark A. Buchanan, *Public Policy and International Commercial Arbitration,* 26 AM BUS L J., 511 (1989). Indeed, the public policy is rooted in both private international law and public international law. For a detailed understanding of the relationship between public policy and international law in general see PEDRO J. MARTINEZ-FRAGA & C. RYAN REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW, RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL AREA (2015).

[16] Joel R. Junker, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards,* CAL. W. INT'L L.J. 228, 229-30 (1977).

[17] Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards,* 1(2) OHIO ST J DISP RESOL. 365 (1986), at 373.

and potency of international treaties and the resulting skepticism regarding the effectiveness of international arbitration.[18] But the practice developed so far indicates that the public policy exception is not merely a theoretical exception, it is rather a perceptible defense where enforcement would result in unfair and unacceptable outcomes.[19] The practice of the public policy defense in developing countries is, in fact, one of the obstacles for development of international arbitration. But the case law and precedents gathered from different countries have provided a useful platform for understanding a common sense of public policy, with different national courts referring and citing the other national courts' justifications for the public policy defense. Although some limitations exist, these international discussions allow a universal understanding amongst national courts which can lead to a global legal culture to flourish. In the long term this promises to be clear gain for the practice of international arbitration.

This thesis studies the public policy principle and focus on whether it is construed narrowly, and whether its application confirms the Convention's pro-enforcement purpose. Before investigating whether its application has caused any irregularities in international arbitration, one has to examine the origins of the public policy concept. As might be expected, there are numerous issues that come to light. Is it a part of a broader concept? Is it categorically a vague or a concrete concept? Is it a byproduct of national law or international law? Is it possible to draw a line between private and public autonomies in which mandatory rules of forum State disregards private autonomy? Would it be a balancing test of public versus private interests? What are the limits for recognition or enforcement of an award for the purpose of securing the integrity of the legal order of forum State?

The public policy exception concerns protecting the parochial public interest.[20] The problem is how this is applied when the public policy exception has an international character originated in international treaties. How does the public policy exception function internationally while it limits the access of foreign law to the forum state's system and why does its interpretation differ among developed and developing countries? Or in this new age, can one acknowledge a standardized application of public policy globally? These questions are crucial since any good or bad choice of possible answers directly affects international law and international trade practice.

The origin of public policy is rooted in the sovereignty of each state. As the concept of sovereignty has blurred in recent decades so has the concept of public policy. Global governance has become a nominal standard in which sovereigns have surrendered a certain degree of their powers to international or regional organizations. In this era, private actors such as individuals and companies have taken hold of more power than they used to have. Private autonomy has started to compete with public autonomy. Arbitral proceedings have prospered as new form of private sector dispute settlement mechanisms. But public policy as an exception to recognition

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[18] *Id*., at 366.

[19] Eloise Henderson Bouzari, *The Public Policy Exception to Enforcement of International Arbitral Awards, Implications for Post-NAFTA Jurisprudence*, 30 TEX. INT'L L. J. 205 (1995), at 218.

[20] MAURO RUBINO SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE (2nd ed. 2001), at 503. Foreign law is generally accepted within given limits only.

and enforcement of arbitral awards has been an obstacle to international arbitration procedures. Still, the practice of state courts has showed that public policy might serve as a balancing test between private and public standards. This paper aims to clarify the elements of the public policy concept and demonstrate the prevalent appeal of such a concept before national courts in comparative context.

The first chapter analyzes the international arbitration in general. It looks for an answer as to why arbitration is preferred and applied widely in the developed world. A comparative approach is provided for understanding arbitration in general and the application of public policy in that context. The second chapter advances a deeper analysis on whether the concept of public policy is a vague or concrete concept. Public policy is examined categorically in which the character of the concept and its transformation is discussed. The chapter later discusses public policy's procedural and substantial scope in the context of the application of the New York Convention. In the latter chapters, the application of the public policy exception in the United States, the European Union and the Republic of Turkey are discussed in detail. These chapters seek an answer for the question of how the public policy concept is understood, applied and remedied in these countries.

2. THE COURSE OF INTERNATIONAL ARBITRATION

2.1. Introduction to International Arbitration

There are different types of alternative dispute settlement methods preferred by parties to a dispute in both domestic and international contexts. The most acknowledged methods are negotiation, mediation, arbitration and conciliation. But today arbitration has become the prevailing dispute resolving method—particularly in the area of international transactions and business.

There is no easy universal definition of arbitration. The most common and adopted definition of the concept is that it is a mechanism for resolving a dispute between parties (typically contractual) through a decision by an arbitrator (or arbitral panel) instead of a court.[21] According to Anyichie, arbitration is a consensual procedure to which not less than two parties have consented and that they have granted to arbitrators the power to render a dispute resolution award.[22]

Moreover, the difference between international and domestic arbitration is critical. In that regard, the question is what makes an arbitration "international." The Hague Choice of Court Convention defines the concept of "international" by examining different elements. For instance, for the purposes of jurisdiction, a case is international "unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State."

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[21] HALSBURY'S LAWS OF ENGLAND (Lord Hailsham eds., 4th ed., 1991), at 332.

[22] Chika Stella Anyichie, *Recognition and Enforcement of an Arbitral Award: A Comparative Analysis of England and Wales, Nigeria and United States of America*, DIGITOOL (Aug. 2, 2018, 14:55 pm), http://digitool.abdn.ac.uk/webclient/StreamGate?folder_id=0&dvs=1544490967736~160

For purposes of recognition and enforcement, a case is "international where recognition or enforcement of a foreign judgment is sought."[23]

The next question is under which circumstances international arbitration differs from domestic arbitration. Under the UNCITRAL Model Law, an arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the consequence of the agreement, their places of business in different Countries; or

(b) one of the places below is situated outside the Country in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where an important part of the obligations of the business relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected;

or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.[24]

The New York Convention limits its application to "non-domestic" or "foreign" awards without defining of the concept of "international arbitration."[25]

Today, international arbitration is regarded as a transnational legal system in civil and commercial areas and an independent legal order from national justice systems.[26] Julian refers "international arbitration" as most satisfactory and effective system for the settlement of disputes arising out of international commercial arrangements.[27]

From the perspective of States, arbitration is generally accepted as a private system of dispute settlement and is subjected to domestic laws. For this reason, it is significant to determine the approach of national laws to the difference between domestic and international arbitration. In some countries, the applicable law to arbitration does not differentiate between domestic and international arbitration. In both international and domestic legal matters, current State rules of arbitration apply. As to some other jurisdictions, national law sets two different arbitration regimes. To this end, if the dispute has purely domestic nature, the resolution rules

[23] See Article 1 of The Hague Choice of Court Convention.

[24] UNCITRAL Model Law, Art. 1, para. 3.

[25] Gaillard & Savage (eds.), supra, at 52.

[26] Cole *et al*., supra, at 35.

[27] Lew (ed.), supra, at 13.

have been specified for this type of disputes. In the latter circumstance, a dispute related to international legal relationship will be subjected to certain provisions of national law.[28]

Different countries have different standards for determining whether an arbitration is international. For example, the 1987 Private International Law Statute of Switzerland, which regulates rules for international arbitration, examines whether "at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland." The 1994 Italian Arbitration Law determining "international arbitration" based on the economic criterion that stipulates a movement of goods and services across national borders.[29]

Over the last thirty years, there has been a considerable growth in international arbitration.[30] Today, developing countries have increasingly accepted arbitration by adopting new legislation of compliance with international standards and adopting the New York and Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - Washington Convention (1965).[31]

Scholars have been looking for an answer as to why parties prefer arbitration as their dispute settlement mechanism rather than applying to State courts. The most obvious reason is "party autonomy." Party autonomy is valid in all phases of the arbitration procedure. That is, the parties determine the appropriate circumstances for themselves.[32] Further, the parties are free to decide on the scope of arbitration, choice of arbitrators, and the place and language of arbitration.[33]

In contrast with traditional judicial proceedings, the principle of party autonomy provides arbitration with a private basis. This is especially significant in terms of international arbitration, since parties do not prefer to subject the dispute to the other party's national jurisdiction.[34] For these reasons, arbitration is more flexible than ordinary proceedings of national courts in which power of judges is given directly by law.

In international transaction, arbitration has particularly pronounced benefits [35] For instance, as to enforcement, the New York Convention, to which 159 states are parties, stipulates that the national courts of each state must enforce foreign arbitral awards with some limited exceptions. It has become a common practice of recognizing or enforcing international arbitral

[28] *Id*. at 36.

[29] Gaillard & Savage (eds.), supra, at 54.

[30] *Id*.

[31] Lew (ed.), supra, at 12.

[32] Rajoo, supra, at 547.

[33] Moses, supra, at 17.

[34] Cordero-Moss (ed.), supra, at 62-65.

[35] Gaillard & Savage (eds.), supra, at 57.

awards in accordance with the New York Convention. In addition, confidentiality agreements can protect a party from the other party or arbitrator from disclosing its sensitive information. Also, the parties can stipulate that the arbitrator has expertise in particular subjects—such flexibility in choosing a judge that is an expert in a field is typically not available in traditional court proceedings. Further, international arbitration usually allows parties to obtain a "final" and "binding" award in shorter time than in a court proceeding.[36]

But some have argued that the perceived benefits of international arbitration can turn out to be disadvantages. For example, the lack of appealability of an international arbitral award may be an advantage in terms of finality, if a decision rendered by an arbitrator is clearly wrong, the party against whom the decision is made has no recourse to correct the award. Also, unlike courts, arbitrators do not have power to penalize parties and non-parties who do not comply with the arbitrator's decision.[37]

2.2. Sources of International Arbitration

In general, sources of international arbitration include international instruments, rules of arbitral institutions, and national legislations.

2.2.1. International Treaties

International instruments have played a crucial role in the development of arbitration. In this respect, the New York Convention to which 159 countries are parties[38] is the most significant treaty and has contributed to the effective enforcement of international arbitration awards in accordance with party autonomy.[39] It has made arbitration a more effective resolution method for settling disputes.[40]

The process concerning recognition and enforcement of non-domestic awards is generally designated by the New York Convention. The Treaty applies to awards made "in the territory of a State other than the State where the recognition and enforcement of such awards are sought."[41]

In the field of international investment arbitration, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the Washington Convention" is another important treaty to which 153 states are contracting parties. The International Centre for Settlement of Investment Disputes (ICSID) was established by the

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[36] Cordero-Moss (ed.), at 107-109.

[37] *Id.*

[38] The New York Convention, *Contracting States*, NEWYORKCONVENTION.ORG (June 7, 2018, 11:30 a.m.), http://www.newyorkconvention.org/countries

[39] Gaillard & Savage (eds.), supra, at 22.

[40] MAURO RUBINO SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE (3rd ed. 2014), at 53.

[41] See Article 1 of the New York Convention; see also Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, NEWYORKCONVENTION1958 (JUNE 1, 2018, 17:30 P.M.) http://newyorkconvention1958.org/index.php?lvl=author_see&id=432&opac_view=6

Convention. Due to a state's accession to the Washington Convention, an investor may not make "a request for arbitration" against the state's consent. The consent of the state which is based on an agreement between the investor and the state is necessary to arbitrate with the investor.[42] Therefore, investment arbitration is often regulated under either bilateral investment treaties or multilateral investment agreements.[43]

In addition to international instruments mentioned above, there are two regional arbitration instruments. The European Convention on International Commercial Arbitration of 1961 involves European countries aims to enhance arbitral exercises in field of international commerce.[44] The Inter-American Convention on International Commercial Arbitration (the Panama Convention) involves the U.S. and 11 Latin American States are parties.

In addition to aforementioned treaties, there are a number of bilateral conventions in international arbitration which enable recognition and enforcement of arbitral awards administered abroad.[45]

2.2.2. Arbitration Rules

Arbitration rules deemed "optional instruments" by certain academics[46] and "soft law" by other scholars.[47] The examination of these rules is generally examined under two parts: arbitration rules designed by United Nation commissions and by arbitral institutions.

2.2.2.1. Rules of the UNCITRAL

A number of arbitration rules were designed by the specialized commission of the United Nations Commission on International Trade Law (UNCITRAL). Parties to international agreements have extensively preferred to use the UNCITRAL rules d in ad hoc arbitration and in institutional arbitration.

The first instrument in this respect was the Rules of the United Nations Economic Commission for Europe of 1963 with an annex including a list of Chambers of Commerce and other institutions, which were in effect until 1976. The second instrument was the Rules of the

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[42] Cole *et al*., supra, at 23.

[43] For example, the North American Free Trade Agreement (NAFTA), *opened for signature* Dec.17, 1992, EXEC. DOC. 12889, 32 ILM 289, 605 (entry into force Jan. 1, 1994) and the U.N. Energy Charter Treaty, *opened for signature* Dec. 17, 1994, 2080 U.N.T.S 36116 (entry into force Sept. 30, 1999).

[44] ZHENG SOPHIA TANG, JURISDICTION AND ARBITRATION AGREEMENTS IN INTERNATIONAL COMMERCIAL LAW (2014), at 16-17.

[45] Joni T. Hiramoto, *A Path to Resources on International Commercial Arbitration 1980-1986,* 4 BERKELEY J INT'L L., 299 (1986), at 303.

[46] Gaillard & Savage, supra, at 104.

[47] Cole *et al*., supra, at 23.

United Nations Economic Commission for Asia and the Far East, through its Centre for Commercial Arbitration.[48]

But the most significant international instrument, in this regard, is the UNCITRAL Model Law on International Commercial Arbitration, originally issued in 1985 and amended in 2006. The Model Law has contributed to modernization of international arbitration by encouraging the states to harmonize their law in accordance with the Model Law.[49] But some commentators believe that the Model Law is silent as to certain important issues.[50]

The goal of the Model Law is to set criteria for controversial issues on international arbitration, such as enforcement, recognition and reasons for the intervention of courts.[51] Under the Model Law, no distinction between civil and commercial arbitration is made, however there is a broad definition in favor of commerciality.[52]

The UNCITRAL Model Law has been internationally recognized and provided inspiration for the foundation of national arbitration laws and rules of several countries. Moreover, the Model Law suggests that a national lawmaking body simply adopts the criteria of the New York Convention for recognition and enforcements of foreign arbitral awards.[53] In fact, the Model Law attempts to reduce dissimilarity between national arbitration laws and administration of arbitration agreements as well.[54]

2.2.2.2. Rules of Arbitral Institutions

There are several institutions in the field of international arbitration (particularly in commercial arbitration) worldwide; however, only the leading arbitral institutions[55] are examined in this study. The major international arbitral institutions have introduced a number of arbitration rules in the form of a quasi-legal instrument. The Rules of major institutions, in this respect, are the Arbitration Rules of the American Arbitration Association Commercial (AAA)[56], the Arbitration

[48] Gaillard & Savage, supra, at 104.

[49] *Id*. at 70.

[50]Luca Radicati Di Brozolo, *International Arbitration and Domestic Law, in* INTERNATIONAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES (Giuditta Cordero-Moss eds., 2013), at 46.

[51] Cole *et al*., supra, at 23.

[52] Gaillard & Savage, supra, at 36.

[53] Gaillard & Savage, supra, at 70.

[54] Hiramoto, supra, at 305.

[55]GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2nd ed. 2014), at 174-199.

[56]American Arbitration Association, Commercial, Arbitration Rules and Mediation Procedures, ADR.org (June 13, 2018, 15:40 p.m.), https://www.adr.org/sites/default/files/CommercialRules_Web.pdf

Rules of the International Court of Arbitration of International Chamber of Commerce(ICC),[57] and the Arbitration Rules of the London Court of International Arbitration.[58]

Alongside with the UNCITRAL Model Law, the arbitration practice of the arbitral institutions has provided instrumental dispute resolution settings in commercial disputes. As generally accepted, when the parties agree to bring a dispute to an arbitral institution, as a rule, the parties are bound by decision.[59]

Although the institutional arbitration process has a contractual basis, it sometimes competes with the municipal law. In other words, the arbitration rules regulate the whole stages of arbitral proceedings, from the constitution of arbitral tribunal to rendering of awards.[60] For example, according to Article 182 of the Swiss Private International Law Statute, national law has a secondary role when the arbitration process is initiated.[61]

2.2.2.3. National Legislation

National law plays a crucial role for arbitration process. Ideally, an arbitration-friendly state should try to strike a balance between strengthening party autonomy and fair settlement of disputes by promulgating more flexible legal instruments to promote arbitration.[62]

The New York Convention emphasizes the above-mentioned matter in its Article III: "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles." Therefore, national authorities must consider the requirements of the New York Convention[63] in their national law.

"Arbitration seat" is the legal jurisdiction to which the arbitration is tied.[64] Although arbitration theoretically does not need take place in the territory of the seat, the majority of arbitration disputes take place in the territory of the seat because the arbitration proceedings

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[57] *Commercial, Arbitration Rules and Mediation Procedures,* AMERICAN ARBITRATION ASSOCIATION, (JUNE 13, 2018, 15:40 P.M.) https://www.adr.org/sites/default/files/CommercialRules_Web.pdf

[58] *LCIA Arbitration Rules,* LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA) (May 11th, 2018, 11:00 p.m.) http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

[59] Cole *et al.*, supra, at 23.

[60] Gaillard & Savage, supra, at 182.

[61] Gaillard & Savage, supra, at 181.

[62] S.I. Strong, *International Commercial Arbitration: A Guide for U.S. Judges,* FEDERAL JUDICIAL CENTER (June 3, 2018, 13:50 p.m.) https://www.fjc.gov/sites/default/files/2012/StrongArbit.pdf

[63] *Id.*

[64] Irish Arbitration Center, *Why the Seat is Important?,* ARBITRATION IRELAND (May 28, 2018, 14:00 p.m.), https://www.arbitrationireland.com/why-the-seat-is-important.

require the support of the national courts of the seat. Divorcing arbitral proceedings from the territory of the seat, it may undermine the effectiveness of the arbitration.[65]

2.3. Elements of Arbitration

2.3.1. Arbitration Agreement

The Arbitration agreement is crucial in setting the framework for the dispute settlement mechanism of parties' disputes. Hence, a well-prepared agreement is critical for efficiently and economically resolve possible disputes.[66] An international arbitration agreement is an agreement in which two or more parties agree to submit a dispute having an international nature to a third-party dispute resolving mechanism.[67] Because the arbitration agreement is based on parties' consent, any individual or entity not party to the agreement is not bound by it.[68]

The arbitral agreement appears in two different forms: the arbitration clause and the submission agreement. The former is a clause in a contract in which the parties undertake to refer to disputes arising out of the contract.[69] Arbitration clause focuses on unknown, but foreseeable disputes and it may also be argued that it encompasses unforeseeable dispute arising out of the main contract.

A submission agreement is an agreement to submit a dispute to arbitration after the dispute has arisen. A submission agreement, also known as an "arbitration deed," includes more details; such as legal seat and names of arbitrators than arbitration clause. Because, it refers to an existing dispute between the parties.[70] Although early conventions[71] drew a concrete distinction between an arbitration clause and a submission agreement, today, both arbitration agreements are considered together.[72]

A simple and short arbitration clause is generally adequate; a complex and detailed clause are not needed for arbitration. An arbitration clause usually includes coherent rules to which the parties consent with a particular referral to an arbitral institution.[73] Additionally, an arbitration agreement is required to be in writing regardless of whether the agreement is for an institutional

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[65] Cole *et al*., supra, at 22.

[66] Moses, supra, at 39.

[67] Gaillard & Savage, supra, at 193.

[68] Cole *et al*., supra, at 24.

[69] Gaillard & Savage, supra, at 193.

[70] Cole *et al*., supra, at 24.

[71] Article 1 of the U.N. 6. Protocol on Arbitration Clauses, *opened for signature* September 24, 1923, 27 U.N.T.S. 157, (entry into force July 28, 1924) (also known as Geneva Protocol Arbitration Clauses in Commercial Matters)

[72] Gaillard & Savage, supra, at 194.

[73] Moses, supra, at 40.

or ad hoc arbitration. According to the New York Convention[74] and UNCITRAL Model Law,[75] the agreement is required to be in written especially for its enforcement procedure.[76] The parties must also sign the agreement or decide to exchange letters.[77]

Today, in accordance with the technological developments, many arbitration laws and rules, such as UNCITRAL Model Law,[78] accept arbitration agreements in the form of email, fax and other telecommunications as having the same legal consequences as hand-written and signed copies. In addition, some jurisdictions now enable arbitration agreements to be purely oral. While there is tendency in some jurisdictions to allow unwritten arbitration agreements, this practice appears in small number of instances; hence countries usually adopt more flexible regulations of what gives to an arbitration agreement legal form of "written" than to adhere completely with the writing requirement.[79] Because of the legal consequences of an arbitration agreement, parties to the agreement are required to possess legal competence which is designated by the law applicable to the parties.

Several arbitral institutions have offered sample arbitration agreements.[80] For example, according to the recommendation of the London Court of International Arbitration (LCIA), [81] "any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause."[82]

As understood in the aforementioned explanations in this chapter, the main principle governing an international arbitration agreement is the principle of party autonomy. This principle has two different meanings. First, it refers to the "autonomy" of an arbitration clause from the main contract. Second, it refers to the "separability" of an arbitration agreement from all national laws regarding the rules for the assessment of the validity of an arbitration agreement. This approach can be seen in the case law of the French courts.[83]

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[74] The New York Convention, Art. II.

[75] UNCITRAL Model Law, Art. 7(2).

[76] Cole *et al*., at 24.

[77] R. Doak Bishop, *A Practical Guide for Drafting International Arbitration Clauses,* 1 INT'L ENERGY L. & TAX'N REVIEW 16, 3 (2000).

[78] UNCITRAL Model Law, Art. 7(3)-(5).

[79] Cole *et al*. 6, at 25.

[80] Moses, supra, at 41.

[81] *LCIA Arbitration Rules,* LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA) (May 11th, 2018, 11:00 p.m.) http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

[82] Moses, supra, at 42. This type of arbitration clause will be sufficient for many arbitration agreements only by fulfilling the blank areas.

[83] Gaillard & Savage, supra, at 197.

The scope of an arbitration agreement is important because if an issue is not covered by an arbitration agreement, it cannot be referred to arbitration tribunals.[84] Issues not covered by arbitration clause are adjudicated through litigation in national courts. By the nature of an arbitration agreement, it does not cover all disputes or claims alleged by parties against each other.[85]

2.3.2. Arbitral Tribunal

The constitution of an arbitral tribunal is the first significant step in any arbitration.[86] Particularly in international disputes, parties feel more comfortable before an arbitral tribunal appointed according to their will than before a national court where they may face perceived or actual biases.[87]

The distinction between ad hoc arbitration and institutional arbitration because the distinction impacts the private sources of international arbitration law. If parties commence an ad hoc arbitration, they organize it themselves and choose arbitrators for their dispute without the constraints of any arbitration institution rules. But in institutional arbitration, parties rely on an arbitration institution to form an arbitral tribunal for resolving their dispute.[88] To this end, when parties agree to refer the dispute to an institutional arbitration, the institution chosen will provide rules for the procedure of arbitration, if the arbitration agreement does not include its own procedural rules. Once the arbitration is commenced, an arbitral tribunal should be formed as rapidly and properly as possible. Unlike a litigation in a national court, an arbitral tribunal does not exist until it is formed by the parties.[89]

International instruments and various national laws regarding arbitration have specified the same principle of party autonomy in appointing arbitrators. Article 2 of the 1920 Geneva Protocol on Arbitration Clauses in Commercial Matters states that "the constitution of the arbitral tribunal shall be governed by the will of the parties." Similar to the Geneva Protocol, the 1958 New York Convention states that "[t]he composition of the arbitral authority ... was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

The 1961 European Convention[90] also gives parties a great autonomy to determine the arbitrators, such as their number and the method of their appointment. Similarly, Article 179 of

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[84] Cole *et al*., supra, at 25.

[85] Moses, supra, at 42.

[86] Pierre A. Gagnon, *The Constitution of the Arbitral Tribunal,* 22 REV. GEN., 445 (1991).

[87] *Id.*

[88] Gaillard & Savage, supra, at 451.

[89] Cole *et al*., supra, at 26.

[90] U.N. The European Convention on International Commercial Arbitration, *opened for signature* April 21, 1961, 484 U.N.T.S 389 (entry into force Jan. 7, 1964), Article IV, para 1.

the 1987 Swiss Private International Law Statute directly states that "the arbitrators shall be appointed ... in accordance with the agreement of the parties."

Parties generally prefer a single arbitrator or a panel (tribunal) of three arbitrators. For example, the International Centre for Settlement of Investment Disputes (ICSID) established by the Washington Convention determines a list of arbitrators nominated by each contracting state or by the Chairman of the Administrative Council. But parties are not under obligation to choose the arbitrators from the list.[91] Unless specified otherwise by the parties in the arbitration agreement, one arbitrator is nominated by each party and a third arbitrator is appointed by mutual agreement of the parties.[92] If there is a sole arbitrator, he or she will also be nominated by consensus of the parties.[93]

Although there is no obligation of parties to choose an arbitrator having particular qualifications stipulated by the *lex arbitri*,[94] in practice, parties generally choose individuals who are practicing attorneys. If there is a need for technical or specialized knowledge, the appointment of an expert is essential to get a fair resolution for arbitration.[95]

The powers and jurisdiction of an arbitral tribunal or a sole arbitrator are derived from the arbitration agreement entered into by parties. In case of determination of the validity of the arbitration agreement,[96] the separability principle discussed briefly above mandates that the validity of the arbitration agreement must be determined separately from the validity of the main contract. If an arbitration agreement itself legally valid, but the main contract is invalid for certain reasons, has jurisdiction to decide the dispute. On the contrary, if the main contract is legally valid, however the latter is invalid, the arbitral tribunal will not have jurisdiction to hear the dispute.[97]

According to the system of competence-competence, which is now controversial in practice of international arbitration, arbitral tribunals have the right to rule on their own jurisdiction. When one of the parties to an arbitration agreement commences arbitration, during

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[91] Article 40, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), World Bank (July 12th, 2018, 2:40 p.m.) https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf

[92] Cole *et al*., supra, at 27.

[93] Gaillard & Savage, supra, at 460-461.

[94] Jacomijn J van Haersolte-van Hof & Erik V Koppe, *International Arbitration and the lex arbitri*, 31 ARB INT'L 1, 27 (2015).

[95] Cole *et al*., supra, at 27.

[96] Emmanuel Gailllard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, NEW YORK CONVENTION IN PRACTICE (Emmanual Gaillard & Domenico Di Pietro eds., 2008), at 257-274; Ozlem Susler, *The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative Effect of Competence-Competence*, 6 MACQUARIE J BUS L, 119 (2009).

[97] Cole *et al*., supra, at 47.

the arbitral proceedings, the respondent party may object that the arbitration clause is not valid or binding for particular reasons. In case of claiming the invalidity of the arbitration agreement, even if it must be heard through litigation in state courts, under the mechanism of competence-competence, the arbitral tribunal will decide on its own jurisdiction.[98]

2.3.3. The Conduct of Arbitration Proceedings

In accordance with the principle of party autonomy which provides freedom at all stages of international arbitration, parties are free to determine any procedural rules unless their agreement undermines fairness of the arbitration proceedings.[99]

Due to the nature of international arbitration, individuals and entities as parties and arbitrators from different jurisdictions are involved in process of international dispute. As a result, procedures of one jurisdiction used during arbitration proceedings may prevail over another. But today for the process of international arbitration, a standardized and combined system is adopted by virtue of getting elements from common and civil law.[100] For example, reflection of common law practices is seen in the exchange of information and documents. As to civil law, its practice is reflected in early presentation of evidence to the arbitral tribunal.[101]

The first controversial issue related to arbitration process is the commencement of arbitration proceedings. For example, the Rules of the International Centre for Dispute Resolution (ICDR) under the AAA, determines the date as when the administrator is sent an arbitration notice in writing by the claimant.[102] According to the UNCITRAL Model Law,[103] arbitration commences on the date when respondent is sends a request for arbitration. If commencement of arbitration is specified by parties' consent or by virtue of an international instrument, the parties must take those considerations into account when determining the date when the arbitration begins.[104]

Once the arbitral tribunal is formed, arbitrators usually organize an initial meeting with the parties or their representatives to discuss the arbitral proceedings. This process is common in practice and designated by related institutional rules. But the Rules of the ICC[105] do not require a

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[98] Susler, supra, at 125.

[99] Cole *et al*., supra, at 28.

[100] Moses, supra, at 151.

[101] Strong, supra, at 51.

[102] Article 2(2), *The Rules of the ICDR, International Dispute Resolution Procedures*, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (May 27, 2018, 4:35 p.m.) https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf

[103] Article 3(2) of the UNCITRAL Model Law.

[104] Moses, supra, at 151-152.

[105] Article 18, International Chamber of Commerce, *Arbitration Rules*, ICC (May 18, 2018, 16:30 p.m.), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

meeting but rather stipulate that parties and arbitrators must sign a document named Terms of Reference in order to exchange information.

Even though there are no standard procedural rules for arbitration, written submission and hearings may be needed to consider the merits of the case. Some institutional rules stipulate that the arbitral tribunal hold a hearing[106] or require a hearing upon request of any party.[107] But because as a rule, a claimant has to prove his claims in dispute, an arbitrator must typically evaluate testimony and petitions and hold hearings. In addition, for fair arbitration proceedings, the respondent must be given equal opportunity by the arbitral tribunal to participate in all stages of the proceedings and make written submissions.[108]

Parties to a dispute and their representatives are allowed to collect facts, present witnesses and other evidences.[109] In international arbitration, rules concerning evaluation of evidence are considered to be at the discretion of arbitral tribunal. Some institutions have adopted rules related to taking evidence as guidelines for arbitrators and parties during arbitral proceedings. For example, the International Bar Association (IBA) has adopted the Rules on Taking of Evidence in International Commercial Arbitration. The IBA Rules aim to harmonize the principles which are used during international arbitrations for collecting evidence.[110]

As to cost of arbitration, it includes the arbitrators and experts' fees, as well as expenses associated with the arbitration. In institutional arbitration, the relevant institution is responsible for obtaining payments of costs and fees in advance. In ad hoc arbitration, the tribunal asks parties to make payments for costs at the beginning of arbitral proceedings.[111] Cost of arbitration is generally shared equally between the parties. In case one party pays costs, that party will ask the tribunal to order the other party pay its share in a final or interim away.[112]

2.3.4. Arbitral Awards

The general definition of an "award" is that it is a binding decision of an arbitrator or an arbitral tribunal settling the matters presented by the parties. Although, in most arbitration, a single award is given by the tribunal to resolve all issues or disputes of the parties, the arbitral tribunal has the power to issue more than a single award in different stages of the arbitration.[113] For example, as mentioned above, if one party does not pay its share of fees and expenses, the

[106] Article 20(1) of the ICDR.

[107] Article 15(2) of the UNCITRAL Model Law.

[108] Moses, supra, at 164.

[109] Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395 (2009), at 397.

[110] Moses, supra, at 164.

[111] Gaillard & Savage, supra, at 685.

[112] *Id*.

[113] Cole *et al*., at 29.

tribunal can issue an award resolving only this matter. A decision by the arbitrator resolving all matters of the parties is called as "final award," but the other decisions are "partial awards."

Most international instruments governing international arbitration do not include a definition of "arbitral award."[114] For example, in the New York Convention, states solely that an arbitral award "shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."[115]

The UNCITRAL Model Law also gives no definition of arbitral award.[116] It only sets some formalities for making an award by the arbitrator(s). The Model Law, for example, stipulates that the opinion of the single arbitrator or the majority of the tribunal must be reflected in the decision[117] and an award must be signed by all the arbitrators.[118]

In The New York Convention also advances the concept of "foreign award." Similar to "arbitral award," "foreign award" is not also defined. It is interpreted as an award which are not accepted as "domestic" or "national" because of some features of the dispute at hand were resolved in international arbitration proceedings.[119]

In some circumstances, the parties come to agreement for their disputes while arbitral proceedings continue. In such cases, they may enter into a contract and terminate the proceedings of that arbitration. Alternatively, they may ask the arbitral tribunal to formalize their decision in the arbitration process as an award.[120] This type of award is called as "consent award" which reflects a decision of the tribunal. Consent awards have same legal consequences as a final award rendered by the tribunal at the end of the arbitral proceedings. It is also significant that a consent award can be enforced and recognized in national courts under ordinary procedures of the enforcement of arbitral awards.[121]

Another common type of award in practice is "default award." If one of the parties does not participate in the proceedings, it may lead to a default award.[122] A default award may have

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[114] RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS (George A. Bermann eds., 2017), at 13.

[115] Article 1(2) of the New York Convention.

[116] *e.g.* At the drafting stages of the UNCITRAL Model Law, a definition was given as following: *" 'award' means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine[s] any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award."*

[117] Article 29 of the UNCITRAL Model Law.

[118] Article 31(1) of the UNCITRAL Model Law.

[119] Gaillard & Savage, supra, at 966-967.

[120] *Id.*, at 744.

[121] Cole *et al*., supra, at 30.

[122] Gaillard & Savage, supra, at 744.

more serious consequences than a default in judicial proceedings because a default arbitral award is generally not appealable.

2.3.5. Enforcement and Challenge of an Award in International Arbitration

The recognition and enforcement of awards rendered in international arbitration are largely designated by the New York Convention. In this respect, the State parties to this Treaty are under obligation to recognize and enforce foreign arbitral awards. Recognition is a pre-step for enforcement and requires a foreign award to be acknowledged by the enforcing country. As to enforcement, it is a process whereby a foreign award is executed as a domestic judgment against the losing party.[123]

The New York Convention specifies two significant rules in enforcement of an award: burden of proof and the position of courts. The party asking for the enforcement of the award must present certain documents regarding the content of the award and the arbitration agreement.[124]

According to provisions of the New York Convention, recognition or enforcement of an award may be refused by the host country on certain grounds. These grounds are called as "irregularities" and are related to the status of the award, the conduct of the arbitral proceedings, and validity of the arbitration agreement.[125] The party against whom enforcement is sought must argue irregularity.

Additionally, the court may raise other grounds as to why an arbitral award should not be recognized and enforced. These grounds include arbitrability and unconformity of the award with international public policy.[126]

A party against which the award is invoked typically will challenge enforcement in the national courts of the seat of the arbitration. This challenge is called an "annulment procedure." Parties cannot usually challenge the enforcement of an award on the same grounds of national court decisions. Therefore, the award may be annulled only in certain circumstances—usually for violation of provisions of procedural law.[127] The UNCITRAL Model Law specifies certain grounds for the annulment in its Article 34(2).[128] For example, a lack of proper notice of the

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[123] Cole *et al*., supra, at 31.

[124] Article V of the New York Convention.

[125] Gaillard & Savage, supra, at 969.

[126] *Id.*

[127] Cole *et al*., supra, at 33.

[128] Article 34(2) of the UNCITRAL Model Law: *"(i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or*

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

arbitration proceedings to the claimant party may constitute a ground giving rise to the annulment of the enforcement of the award.

2.4. Types of International Arbitration

International arbitration disputes are mostly international commercial arbitrations. They are results of commercial transactions of private parties. Another noteworthy category of international arbitration comprises "investment" or also known as "investor-state" arbitrations. The arbitration proceedings in "investment-state" arbitrations are usually conducted pursuant to multilateral or bilateral investment treaties between states.

The types of arbitration related to the formation of the arbitral tribunal will be examined under this section: ad hoc arbitration and institutional arbitration.

2.4.1. *Ad Hoc* Arbitration

The UNCITRAL Model Law[129] defines "ad hoc arbitration" as one that "is not administrated by an institution as the arbitration agreement does not specify an institutional arbitration." Like institutional arbitration, ad hoc arbitration may also include domestic and international arbitration.[130]

Ad hoc arbitration has both strengths and weaknesses compared to institutional arbitration. The advantages of ad hoc arbitration generally include wider flexibility to design the arbitral panel's composition, including the number and qualifications of the arbitrators, as well as arbitration procedures according to the parties wishes.[131] In addition, in ad hoc arbitration, parties can avoid institutional costs and fees and negotiate arbitrator fees.[132] Additionally, parties in ad hoc arbitration are also free to select arbitration rules, such as the UNCITRAL Arbitration Rules which were adopted in 1976 and are acceptable in many countries. Although it is also

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(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State."

[129] Article 2(a) of the UNCITRAL Model Law.

[130] Rajoo, supra, at 548.

[131] Gaillard & Savage, supra, at 534-535.

[132] Cordero-Moss (ed.), supra, at 69.

possible to resort to institutional proceedings in ad hoc arbitration, some authors argue that selecting institutional rules in ad hoc arbitration may cause ineffective results.[133]

As to the disadvantages of ad hoc arbitration, particularly in international arbitration, a party may choose inexperienced arbitrators in his country or lack sufficient information of arbitrators outside his country. In some circumstances, the arbitration may need external assistance to deal with technical issues; compared to institutional arbitration, ad hoc arbitration may lack this supporting function.[134]

2.4.2. Institutional Arbitration

Compared to ad hoc arbitration, parties typically prefer institutional arbitration: according to recent studies, most arbitral awards, 86 %, are issued through institutional arbitration.[135] Indeed, arbitration institutions have wide experience of arbitral proceedings. They publish their set of arbitration rules which reflect their institutional experience, and overhaul these rules in step with developments in the international commercial law and other areas of international law.[136] Moreover, arbitral costs are predictable and accessibility to the process is relatively easy.

Also, many arbitral institutions provide experienced personnel to manage the process. In this respect, the staff of institution will assure that arbitral tribunal is assigned.[137] Further, arbitral institutions usually specify time limits for arbitration proceedings, including for the exchange of parties' written statements, hearings and the announcement of the final award, allowing predictability in the process.[138]

But there are weaknesses to institutional arbitration as well. Institutional costs end fees can be significant where the value of case in dispute is high.[139]

2.4.2.1. International Court of Arbitration (The International Chamber of Commerce (ICC))

International Court of Arbitration (ICC) is the major arbitral institution in the world. Its headquarter is in Paris and it has been influenced by French law. The ICC is a global institution in the field of arbitration. One particular feature of the ICC is the final examination of the arbitral awards delivered by the tribunals. According to arbitration rules of the ICC, every award

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[133] Cordero-Moss (ed.), supra, at 89.

[134] Cole *et al*., at 38.

[135] School of International Arbitration, *International Arbitration: Corporate Attitudes and Practices 2008*, QUEEN MARY UNIVERSITY OF LONDON (June 4th, 2018, 2:25 p.m.) http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf

[136] Rajoo, supra, at 555.

[137] *Id*.

[138] *Id*., at 557.

[139] Cordero-Moss (ed.), supra, at 69.

rendered by an arbitral tribunal, before being sent to the parties, must be submitted to the ICC for approval in order to consider it binding.[140]

2.4.2.2. International Centre for the Settlement of Investment Disputes (ICSID)

The ICSID was set up by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) as an intergovernmental institution to deal with foreign investment disputes between States and private foreign investors. Under Article 54(1) of the Convention, the award issued by the ICSID must be treated in the contracting states as if were a final judgment of the state court. The aim of the ICSID Convention, as stated in its preamble, is to provide economic development through the promotion of private international investment.

2.4.2.3. International Centre for Dispute Resolution of the American Arbitration Association (ICDR-AAA)

The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA) that deals with international arbitration. The Rules of the ICDR have been amended in light of global developments and are more flexible than some other arbitral institutions' rules, such as the ICC and the LCIA rules. According to the Rules of the ICDR, parties have competence to designate arbitrators with or without the administrator's assistance.[141]

2.4.2.4. The London Court of International Arbitration (LCIA)

The London Court of International Arbitration (LCIA) is another major institution in the area of international arbitration. Although it is headquartered in London, it is an international institution with the majority of its members outside of the United Kingdom. The LCIA has dealt with a number of commercial disputes including in the areas of foreign trade, energy and technology. The latest LCIA Rules concerning provisions on the conduct of parties were amended in 2014.[142]

2.5. Arbitration Law and Practice in the Developed World

Under this chapter, after a general overview of international arbitration law and practice in the U.S. and some European states, several topics will be explained taking a comparative approach.

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[140] Cole *et al*., at 101.

[141] EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J.WARE, ARBITRATION LAW IN AMERICA A CRITICAL ASSESSMENT (2006), at 252.

[142] For detail information see, *LCIA Arbitration Rules,* LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA) (May 11th, 2018, 11:00 p.m.) http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

2.5.1. Arbitration and the U.S.

Before ratification of the New York Convention by the U.S. Congress in 1970, international arbitration in the U.S. was subject only to the 1925 Federal Arbitration Act (FAA). The FAA which is called the "national statute of the U.S. on arbitration,"[143] has established a framework of international commercial arbitration. It was enacted in 1925 specifically to eliminate the reluctance of the judiciary to enforce arbitral agreements[144].

Section 1 of the FAA specifies that it covers arbitration agreements in "maritime transactions" and "transactions including commerce." Under this Article, "commerce" is defines as "among the states or with foreign nations" and between any state or territory of the United States and a "foreign nation." Broadly speaking, the FAA does not stipulate any obligatory procedural rules for arbitration.[145]

The New York Convention which is related to international commercial arbitration was ratified and then entered into force in the U.S. in 1970. This Treaty applies to arbitrations seated both outside and within the U.S. and imposes the recognition and enforcement of foreign arbitral awards by the U.S. courts.[146] For purposes of legal modernization and conformity, on the same date that the New York Convention was ratified, the FAA was also amended to add new Chapter (Chapter 2). Section 201 of the FAA specifies that the New York Convention will be enforced in the U.S. in accordance with Chapter 2 of the FAA. The U.S. Supreme Court stated that goal of the adoption of the New York Convention as follows and the related amendment of the FAA as follows: "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." [147] In addition, the FAA was broadened in 1990 by the enactment of Chapter 3 regarding arbitration regulated under the Panama Convention.[148]

The U.S. courts regularly cite the FAA for determining their competence on many judicial matters regarding arbitration, such as, enforcement of arbitral awards, appointment of arbitrators, and appealing some orders concerning arbitration. Moreover, the FAA confers federal jurisdiction in issues regarding international arbitration which has arisen under the New York and Panama Treaties.

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[143] Lew (ed.), supra, at 45.

[144]Joel H. Samuels & Jan Kleinheisterkamp, *U.S. Report on Commercial Arbitration - The Impact of Uniform Law on National Law: Limits and Possibilities, 2009* (July 8th, 2018, 12:30 p.m.)
SSRN: https://ssrn.com/abstract=1394223

[145] Levent Cagri San, *The Role of Arbitration in Competition Law, International Business Law*, MASTER THESIS, TILBURG UNIVERSITY (July 11, 2018, 11:35 a.m.) http://arno.uvt.nl/show.cgi?fid=134472

[146] Strong, supra, at 12.

[147] See Scherk v Alberto-Culver Co., 417 U.S. 506 (1974)

[148] San, supra, at 9.

Chapter 2 and 3 of the FAA are called the "international chapters" because they incorporate the New York Convention and the Panama Convention, respectively into national law. But the FAA contains additional provisions concerning the application of these treaties in the courts to ensure that they are given proper domestic effect. Additionally, Chapter 2 regarding the implementation of the New York Convention does not stipulate any territorial limitation; in other words, it covers arbitrations taking place both in the U.S. and abroad.[149]

As mentioned above, the New York Convention does not define "international arbitration" but refers to the concepts of "foreign awards" and "non-domestic awards." The first concept refers to arbitration outside the U.S. As to non-domestic awards, they involve arbitration in the U.S. but involve: i) a U.S. party and a foreign party; ii) only foreign parties; or iii) only U.S. citizens but with international links.[150]

Even if a dispute is related to interstate arbitration, the FAA does not prevent the application of state arbitration laws if they are not in conflict with the FAA.[151] The case of *Preston v. Ferrer* is an example of preemption of the FAA over the state arbitration law. In that case, the Supreme Court held that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum."[152]

2.5.2. Arbitration and Europe

The framework of arbitration law and practice in Europe is not identical. In this section, the understanding and practice of arbitration will be analyzed in four European states having a prominent arbitration culture: Switzerland, England, France and Sweden.

When considering the general approach in European countries, there appears to be a trend in liberalizing the ability to take part in arbitration.

But this is not the case for all European countries. For example, prior to 1998, Belgian public law entities were limited in forming arbitration agreements. Similarly, the French Civil Code generally precludes French public entities from entering into arbitration agreements. Although these types of limitations are not common amongst European countries, Article 2 of the 1961 European Convention on International Commercial Arbitration make such limitations possible. The article states that if a member state prefers to limit the ability of its public law bodies to enter into arbitration agreements, it should so reserve at the end of the convention.

There is no provision clearly referring to arbitration in European Treaties.[153] While

[149] Strong, supra, at 27.

[150] For the text of the FAA see, Legal Information Institute, *U.S. Code. Arbitration*, Law Cornell (23rd June, 2018, 10:30 a.m.) https://www.law.cornell.edu/uscode/text/9

[151] San, supra, at 9.

[152] 552 U.S. 346, 349 (2008).

[153] The main European Treaties: European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, *opened for signature* Dec. 13, 2007, E.T.S. 2007/C 306/01 (entered into force Dec. 1, 2009); European Union, Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, opened for signature Dec. 11,

Article 220 of the 1957 Treaty of European Economic Community (EEC-founding Treaty) imposed the duty to enforce arbitral awards on the member States, The Lisbon treaty revoked Article 220 of the EEC in 2007 after the adoption of the New York Convention.[154] But the Lisbon Treaty gives power to the European Union to take measures for the developments of alternative dispute resolution.[155]

2.5.2.1. Switzerland

Switzerland has adopted two different and independent legal systems in the field of arbitration.[156] International arbitration governed by the 12th Chapter of the Swiss Private International Law Act (PILA). Arbitration is "international" if at least one of the parties to the arbitration agreement is domiciled or habitually resident outside Switzerland at the time of the conclusion of the arbitration agreement.[157] Therefore, Switzerland differs from many jurisdictions which adopt the difference between international arbitration and domestic arbitration on the basis of the nature of the legal relationship between parties.[158]

Domestic arbitration is governed by the 3rd title of the Swiss Civil Procedure Code (CPC).

2000, E.T.S. 2001/C 80/01 (entry into force Feb. 1, 2003); European Union: Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, opened *for signature* Nov. 10, 1997, E.T.S. C 340 (entry into force May 1, 1999); European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, *opened for signature* Feb. 7, 1992, E.T.S. C 325/5 (entry into force Nov. 1, 1993); European Union, Single European Act, opened for signature Feb. 17, 1986, E.T.S., 25 I.L.M. 506 (entry into force July 1, 1987); European Union, Treaty establishing a Single Council and a Single Commission of the European Communities, Merger Treaty, opened for signature April 8, 1965, E.T.S. (expiration May 1, 1999); European Union, Treaties of Rome: The European Economic Community (EEC) and the European Atomic Energy Community (Euratom, or EEAC), *opened for signature* March 25, 1957, E.T.S. 298 (entry into force July 1, 1967).

[154] Article 220 of the EEC: *"so far as is necessary . . . into negotiations with each other with the view to securing to the benefit of their nationals: . . . the simplification of formalities governing the reciprocal recognition and enforcement of . . . arbitration awards."*

[155] Jürgen Basedow, *EU Law in International Arbitration: Referrals to the European Court of Justice*, MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW RESEARCH PAPER SERIES, 15/16, 2015 (July 13th, 2018, 2:50 p.m.) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642805.

[156] Daniel Eisele, Tamir Livschitz & Anja Vogt, *Comparative Legal Guide Switzerland: Arbitration*, NIEDERER KRAFT FREY (July 13, 2018, 3:00 p.m.) https://www.nkf.ch/wp-content/uploads/2018/06/IHL-Comparative-Legal-Guide-Switzerland-Arbitration.pdf

[157] Article 176(1) of the PILA.

[158] Cole *et al*., at 183.

But parties to an international arbitration dispute may opt for the provisions of the CPC to apply to their dispute.[159] Similarly, parties to a domestic dispute may declare the provisions of the PILA to apply to the arbitration dispute.[160]

Switzerland is one of the most important jurisdictions in the area of international arbitration, and therefore is often preferred as an arbitral seat.[161] The PILA pays great deference to the principle of party autonomy. It's substantive provisions regulating international arbitration, especially related to the arbitration agreement, are liberal.[162] But the PILA does include several mandatory provisions, such as provisions requiring providing for the lack of independence as a reason for challenging arbitral awards (Article 180 (1-c) of the PILA).

Although the Swiss arbitration system is not based on the UNCITRAL Model Law, there are no fundamental differences between the two systems. Further, Switzerland's legislation and judicial approach to the validity and scope of arbitration agreements is more liberal rather than other member States of the E.U.[163]

The successful management of arbitration in Switzerland is operated by the Swiss Chambers' Arbitration Institution and arbitration courts, such as the Court of Arbitration for Sport (CAS) and the Swiss Arbitration Association.[164]

2.5.2.2. England, Wales, and Northern Ireland

Similar to Switzerland, the combined jurisdiction of England, Wales, and Northern Ireland (hereinafter, England) is regarded as one of the leading jurisdictions in international arbitration. The traditional English common law system and colonial history contribute to this.[165] Additionally, England's social and legal composition have played crucial role in its development as an arbitration center.[166]

After a lengthy preparation period, the Arbitration Act of 1996 was enacted and entered into force in 1997. This Act is extensive and comprises 110 sections. In comparison with the previous law, the Arbitration Act gives more freedom to parties and arbitrators.[167]

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[159] Article 167(2) of the PILA.

[160] Eisele *et al*.; Cole *et al*., supra, at 182.

[161] Cole *et al*., supra, 183.

[162] Gaillard & Savage, supra, at 77.

[163] Cole *et al*., supra, at 183.

[164] Eisele *et al*., supra, at 5.

[165] Cole *et al*., supra, at 83.

[166] *Id*.

[167] Gaillard & Savage, supra, at 73. The principle of party autonomy is entitled in arbitration agreement under the Act. It applies to arbitration disputes where the arbitration seat is in England.

The distinguishing feature of the English arbitration regime is the participation of barristers in arbitration proceedings as arbitrators and counsel to parties. Although there will be a conflict of interest if a barrister to serves as an arbitrator in arbitration proceedings in which a member of his law firm represents one of the parties, English courts hold that barristers who work for same chambers are independent from their colleagues.[168]

There are a number of leading arbitral institutions in England: the London Court of International Arbitration (LCIA), the Centre for Effective Dispute Resolution (CEDR), the London Maritime Arbitrators Association (LMAA).

2.5.2.3. France

France also has a well-established history of arbitration practice. French arbitral courts and institutions tend to support reformist approach for the regulation of arbitration.[169]

The sources of French arbitration law are the Code of Civil Procedure, Decrees, and case law. Besides, France is contracting party to many international instruments, namely the New York Convention, the Washington Convention and the European Convention.

The Code of Civil Procedure was first amended by the 1980 Decree regarding domestic arbitration and the Decree of 1981 concerning international arbitration. The 1980-81 Decrees introduced the principles of party autonomy and the restriction of courts' intervention in arbitral proceedings.[170] They also provide arbitrators the authority to decide jurisdictional questions. As seen in the Decrees, similar to Switzerland, France also adopts two separate legal regimes for domestic arbitration and international arbitration.

French case law is distinctive in the field of international commercial arbitration because of its uniformity, which results from the fact that awards issued in France are centralized in the Tribunal de Grande Instance in Paris and the Court of Appeal of Paris.[171] The New Decree of 2011[172] introduces the principles adopted by case law into the framework of the 1980-81 Decrees. For instance, it requires courts to support the arbitration process by appointing judges called *juge d'appui*. It also gives the parties more autonomy to design arbitration according to their own wishes. Finally, the New Decree provides a very limited basis for denying the

[168] Cole *et al.*, supra, at 84.

[169] *Id.*, at 93.

[170] Ozlem Susler, *Jurisdiction of Arbitration Tribunals in France*, 17 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 87, 94 (2013) (May 5, 2018, 15:00) https://works.bepress.com/ozlem_susler/2/download/

[171] *Id*.

[172] Guido Carducci, *The Arbitration Reform in France: Domestic and International Arbitration Law*, 28 ARB INT'L 1, 125 (2012), at 158.

recognition and enforcement of international awards—namely, if the arbitration award or agreement breaches international public policy.[173]

2.5.2.4. Sweden

Sweden's perceived political neutrality has made it one of the most developed arbitral centers in the world. Stockholm's recognition as an arbitration hub dates back to the 1970s. At that time, the U.S. and Russia agreed that Stockholm was a preferable venue for east-west arbitration. Following that, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) adopted modern rules to promote Stockholm as a center of international arbitration.[174] Sweden also ratified the New York Convention in 1972 and the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention).

The Swedish Arbitration Act of 1999, which is heavily based on the UNCITRAL Model Law, applies to both international and domestic arbitration. Certain provisions of the Act relate to "international issues and disputes" and "the recognition and enforcement of foreign arbitral awards."[175] One of the most significant provisions is that parties who are not domiciled or have a place of cannot seek to set aside an arbitral award issued in Sweden.[176]

Swedish statutes designate the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the Rules of Arbitration of the International Chamber of Commerce (ICC) as the rules governing arbitration. In 2017 the SCC Arbitration Rules entered into force and there were significant amendments, including in the areas of i) multi-contract disputes (Article 14) and ii) clarifications related to the consolidation of arbitrations (Article 15).

2.5.3. A Comparative Analysis on Arbitration in the U.S. and in Europe

This chapter offers a comparative analysis of certain important elements of arbitration law and practice in the U.S. and the European states.

2.5.3.1. Arbitral Institutions

The U.S. has only one key institution concerning the international arbitration, namely American Arbitration Association (AAA), while there are many leading arbitral institutions in Europe (*e.g.*, LCIA, SCC, CAS, CEDR). This is a result of a more well-established arbitration culture in Europe than in the U.S.[177]

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[173] Susler, supra 168, at 11.

[174] Claes Lundblad, *International Arbitration in Sweden and Finland*, ROCHIER (August 21, 2018, 10:30 a.m.) https://www.roschier.com/sites/default/files/international_arbitration_in_sweden_and_finland.pdf

[175] Gaillard & Savage, supra, at 79-80.

[176] *Id*.

[177] Igor M. Borba, *International Arbitration: A Comparative Study of The AAA And ICC Rules*, MASTER'S THESIS, MARQUETTE UNIVERSITY (August 21st, 2018 01:20 p.m.) https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1019&context=theses_open

With the analyses of cases handled by the ICC Court (*the International Court of Arbitration of the International Chamber of Commerce*) and AAA(cases submitted to "*International Centre for Dispute Resolution*"), several facts come to light. The parties of the cases before the ICC Court typically involve parties are from E.U. countries, who select the laws of E.U. member states as the applicable law. On the other hand, AAA cases typically involve at least one party from the U.S. or Canada and U.S. law as the selected applicable law.[178]

Compared to the ICC Rules, the *International Centre for Dispute Resolution* has more efficient arbitration rules and many more cases filed each year.[179] But the ICC rules and ICC Courts are better-established and have more expertise in international arbitration. Additionally, the International Court of Arbitration of the International Chamber of Commerce provides parties better access to information with respect to arbitral procedures and is more transparent in publishing its cases.[180]

2.5.3.2. Scope of Application (international and domestic arbitration)

In the U.S., the Federal Arbitration Act (FAA) distinguishes between international and domestic arbitration on the basis of the criterion of the "international commercial system."[181] In the FAA, domestic and international arbitration are regulated under separate chapters, namely Chapter 1 concerning domestic arbitration and Chapters 2 and 3 regarding international arbitration. In conformity with the New York Convention, the FAA was amended to recognize and enforce foreign arbitral awards.

In Europe, there is no identical approach to the distinction between international and domestic arbitration. The majority of the European jurisdictions, including England, Sweden, Italy, Germany, Portugal, the Netherlands and Spain, do not distinguish between them. On the other hand, France, Switzerland, Bulgaria and Greece do adopt separate regimes for domestic and international arbitration. As discussed above, in Switzerland, international and domestic

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[178] *Id*.

[179] For example, in 2016 the AAA had new cases filed in number of 248,117, see *Annual Report & Financial Statements, International Centre for Dispute Resolution 2016*, AMERICAN ARBITRATION ASSOCIATION (August 22, 2018, 2:45 p.m.) https://www.adr.org/sites/default/files/document_repository/AAA_AnnualReport_2017.pdf); but in the ICC only 966 cases filed in 2016. See *ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes*, INTERNATIONAL CHAMBER OF COMMERCE (August 22nd, 2018, 3:00 p.m.) https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes

[180] Borba, supra, at 127.

[181] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 73 U.S. 614 (1985). The U.S. Supreme Court held that "[the] 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 require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."

arbitration are governed by different laws, namely the Swiss Private International Law Act (PILA) and the Swiss Civil Procedure Code (CPC), respectively.

2.5.3.3. Arbitrability

The scope of arbitration is typically limited by national legal systems in all around the world. In other words, national laws determine in which circumstances arbitration can substitute litigation in certain fields of law. Whether a dispute is subject to arbitration is generally known as "arbitrability."[182]

Article V(2)(a) of the New York Convention addresses arbitrability. According to this provision, a national jurisdiction can refuse to recognize and enforce an arbitral award if the subject matter of the dispute is out of the scope of the arbitration agreement. Hence, national legislation regarding arbitrability is significant because it determines which disputes can be settled through arbitration.[183] But in recent years, many countries have enacted new laws in favor of arbitration.[184]

Compared to Europe, the U.S. interprets the scope of arbitrability broadly[185] Although, arbitrability is not explicitly regulated by the FAA, U.S. case law has examined the issue extensively. In *First Options of Chicago, Inc. v. Kaplan* the court ruled that "the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute."[186] Indeed, the approach of U.S. courts to arbitrability is more liberal than other countries' courts.

For instance, in French law, disputes can be referred to arbitration upon the parties' consent. But issues concerning public policy may not be referred to arbitration regardless whether the dispute is related to domestic or international issues, thus we may state that French courts interpret public policy limitations more broadly than U.S. courts.[187] Other European countries' approaches are similar to French method. For example, in Switzerland, the possibility of resorting to arbitration can be restricted because of public policy. In Bulgaria, while pecuniary claims are arbitrable, disputes regarding public interest and non-transferrable rights of individuals may not be referred to arbitration.

But the German and Polish legal systems are more similar to American approach. In Germany, all economic and non-economic claims are capable of settlement through arbitration. Similarly, Polish law adopts that all civil law relationships can be referred to arbitration.[188]

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[182] Cole *et al*., supra, at 40; Bernardini, supra, at 502.

[183] *Id*.

[184] San, supra, p. 5.

[185] *Id*.

[186] 514 U.S. 938, 938 (1995)

[187] San, supra, at 6.

[188] Cole *et al*., supra, at 41-42.

2.5.3.4. Form of Arbitration Agreement

The New York Convention and the UNCITRAL Model Law stipulate that parties must enter into an agreement in writing. Similarly, U.S. law (the FAA), requires an arbitration agreement to be in writing, but signatures are not mandatory.[189] This writing requirement was promulgated in *Tinder v. Pinkerton Security*[190] by the Federal Court. But some State courts have adopted more contemporary approach to this requirement, for example, the Delaware Chancery Court recently acknowledged the validity of an arbitration agreement in the form of an email exchanged between counsel of parties.[191] This is similar to the UNCITRAL Model Law's approach.[192]

On the European front, the majority of jurisdictions, namely Spain, Belgium, Germany, Austria, and Bulgaria have adopted the written form requirement. But some States recognize an arbitration agreement in oral if there is sufficient evidence of the intention of the parties.[193] Therefore, compared to the strict approach of the U.S. law to this requirement, despite the limited number of states, it can be said that the European perspective is more flexible in terms of the requirement of arbitration agreement in writing.

2.5.3.5. Determination of the Validity of Arbitration Agreement

With respect to the question of "who decides" the validity of an arbitration agreement, two separate concepts come into play—namely, separability and competence-competence.[194]

In terms of U.S. law, the FAA does not address whether the arbitral tribunal or the court should rule on the validity of an arbitration agreement in case of objection by one of parties to arbitration proceedings.[195] Despite the FAA's silence, the U.S. Supreme Court held that arbitral tribunals have power to decide disputes regarding their own jurisdiction.[196] In other words, the U.S. courts have adopted the principle of competence-competence. But this matter is subject to agreement between the parties as well; if the parties agreed to refer this question to arbitration, it will be decided through arbitration. If the parties opt for courts, the issue is determined through litigation.[197]

As to the European approach, there are three separate models. The first group of states, including Finland and Sweden, adopt a perspective similar to the U.S. Supreme Court. The

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[189] Section 3 of the FAA.

[190] 305 F.3d 727, 736 (7th Cir. 2002).

[191] Gomes v. Karnell, No. 11814-VCMR (Del. Ch. Nov. 30, 2016)

[192] UNCITRAL Model Law, Art. 7(3)-(5).

[193] Cole *et al*., at 43.

[194] *See the title of* "Arbitral Tribunal".

[195] Strong, supra, at 40.

[196] *First Options of Chicago*, 514 U.S. at 943.

[197] *Id*.

second group of jurisdictions, including Italy and Germany, hold that when an action is brought before a national court concerning the validity of an arbitration agreement, the court has the competence to rule on the validity of the arbitration agreement (where appropriate, the court refers the parties to arbitration).[198] The last group of states, including France, hold that a state court cannot rule on the validity of an arbitration agreement in full detail. In other words, a court can evaluate whether an arbitration agreement exists, but all other determinations on jurisdiction are at the discretion of the arbitral tribunal.[199]

3. THE CONCEPT OF PUBLIC POLICY

3.1. The Meaning of Public Policy

3.1.1. Introduction

The public policy exception enables courts of a country to refuse recognition and enforcement of arbitral awards in the country where their enforcement is sought.[200] This exception is codified in numerous instruments. For instance, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The 1958 Convention) provides in article V(2)(b) that recognition or enforcement of an arbitral award may be refused if a court finds that it would be contrary to the public policy of the forum State.[201] The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law) contains a similar provision in Article 36(2)(b), which states that an arbitral award may be refused on the grounds that "the recognition or enforcement of the award would be contrary to the public policy

[198] Cole *et al*., at 48.

[199] *Id*.

[200] Hanotiau & Caprasse, supra, at 789; Cordero-Moss (ed.), supra, at 19-20. "The rule of public policy has the purpose of permitting the judge not to give effect to an award that would contradict the fundamental principles of the judge's social system."

[201] Robert Briner & Virginia Hamilton, *The History and General Purpose of the Convention, the Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, NEW YORK CONVENTION IN PRACTICE (Emmanual Gaillard & Domenico Di Pietro eds., 2008), at 3-39. The New York Convention has been considered one of the most successful international treaties. It has contributed to the development of international arbitration. Arbitration has become a preferred dispute resolution method, because parties have confidence that if they hold an award, it will be promptly enforceable. See Moses, supra, at 219. "The New York Convention is the most authoritative source of global law governing international commercial arbitration…. The New York Convention seeks to promote the enforcement of arbitral agreements and thereby facilitate international business transactions on the whole." See also Yang, supra, at 50. Article V of the New York Convention includes seven defenses, which it recognizes as sufficient justification for a court to refuse recognition and enforcement of the award. These are "the absence of a valid arbitration agreement or incapacity of a party", "lack of a fair opportunity to be heard", "matters not covered by the arbitration agreement", "improper composition of the arbitration tribunal", "non-binding award", "non-arbitrability", and "violation of public policy." The public policy defense is one of the most important and disputed bases for refusing to enforce an international arbitral award.

of this State."[202] National procedural laws contain similar endorsements of the public policy exception.

Because even parties who consent to international commercial arbitration must ultimately petition the national court system for the enforcement of the arbitral award, they will come face-to-face with the public policy exception. [203] The public policy exception represents a safety net for unusual situations in which a legal system cannot recognize and enforce an award without undermining its very foundations.[204] The courts are the competent authorities[205] to decide whether the recognition and enforcement of an arbitral contravenes the forum State's public policy (*lex fori*). The Court has the discrete authority *ex officio*[206] to deny enforcement claims.[207] National courts have already developed varied interpretations and diverse applications of the public policy exception, which have given rise to complications in the enforcement of arbitral awards internationally.[208]

The public policy concept has been considered in great depth by conflict of laws scholars.[209] Many scholars consider the public policy defense exception as one of the greatest threats,[210] or at least a concerning loophole,[211] for commercial arbitration. But other scholars

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[202] Art. 34 (2) UNCITRAL Model Law.

[203] Yang, supra, at 49.

[204] *Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) SECRETARIAT, (April 11st, 2018, 12:45 p.m.) http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf, at 240 (April 11st, 2018, 12:45 p.m.) http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf. See Jan Paulsson, *The New York Convention in International Practice, Problems of Assimilation,* ASA SPECIAL SERIES NO. 9, 100 (1996); See also Misr Misr Insurance Co. v. Alexandria Shipping Agencies Co, [1991] COURT OF CASSATION, EGYPT, the Egyptian Court stated that "contravention of public policy in Egypt requires a contravention of the social, political, economic or moral *foundations* of the State." (emphasis added), (March 3, 2018) http://newyorkconvention1958.org/index.php?lvl=notice_display&id=384

[205] MATTI S. KURKELA & SANTTU TURUNEN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION (2nd ed. 2010), at 18. "The competent authority has right to refuse to recognize and enforce an award, but it is under no duty to do so (may refuse)."

[206] *Id*. "The competent authority may refuse the recognition and enforcement ex officio or sua sponte, i.e., no action needs to be taken or objections raised by a party or the one against whom enforcement is sought. This does not exclude such an action or objection by a party. The ground for refusal may be apparent or concealed and, in the latter case, some kind of a party action may be necessary to cause the competent authority to refuse the recognition and enforcement."

[207] Richard Cole, supra, at 371.

[208] Yang, supra, at 51.

[209] Buchanan, supra, at 512.

[210] Junker, supra, at 229-30.

[211] Richard Cole, supra, at 373, 383. According to Cole, "The public policy defense should prevail to deny enforcement of an arbitral award only when that award violates the forum's most basic notions of morality and

have noted that the public policy exception in commercial disputes is illusory, almost never succeeding as defense to the recognition and enforcement of arbitral awards.[212] Nevertheless, a broad interpretation of such a defense would almost certainly weaken the extent and potency of international conventions and spread distrust regarding the effectiveness of international arbitration.[213] But some authors have suggested that courts should review the application of the public policy defense in situations where enforcement would condone unfair and unacceptable outcomes, thus making it more than a theoretical defense.[214] At the end of the day though, the public policy defense has been used narrowly by most courts, which conforms to the Convention's pro-enforcement purpose.[215]

3.1.2. Public Policy as a Broader Concept

Public policy is part of a broader concept,[216] but is itself a vague category[217] developed in international law.[218] It draws a line between private and public autonomies where, for example, mandatory rules of the forum State disregard private autonomy. It emerges as "a basic balancing test of public versus private interests,"[219] and demands that when the foreign arbitral award

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justice, and also disregards any significantly detrimental impact on the public's interests."; Moses, supra, at 218. "[Public policy] presents the possibility of another broad loophole for refusing enforcement."

[212] Pieter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 13 INT'L L., 270 (1979). According to Sanders, in 1979, one hundred cases concerned with enforcement of arbitral awards and only three cases were refused for reasons of public policy.

[213] Richard Cole, supra, 366.

[214] Bouzari, supra, at 218.

[215] Moses, supra, at 218; See also Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974). The U.S. Second Circuit Court of Appeals, in affirming the enforcement of an arbitral award against an American company, stated that "the Convention's public policy defense should be construed narrowly"; See also Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306 (2004). "The general pro-enforcement bias informing the convention . . . points to a narrow reading of the public policy defense"

[216] UNCITRAL Secretariat Guide, supra, at 239.

[217] Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,* 19(2) LCIA ARB INT'L 249 (2003), at 251. See also, MATTI S. KURKELA & SANTTU TURUNEN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION (2nd ed. 2010), at 17. "[The article V (2) (b)] refers to breach of natural justice or due process and forms a fairly vague category. … the application provides for a serious irregularity…"

[218] Kurkela & Turunen, supra, at 22. "This analysis of an authoritative character demonstrates there is a growing sophistication in legal thinking as to hierarchy and the strength of various rules of law."

[219] Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards,* 1(2) OHIO ST J DISP RESOL. 365 (1986), at 380. In fact, the arbitral award concerns the impact of a dispute which is entirely between the parties to the arbitration. But in some cases, such as antitrust, the arbitral award may concern beyond the interests of parties where public policy involves since the arbitral award is not designed for protecting the interest of the public at large. Cole, at 382.

manifestly disrupts these interests,[220] the enforcement of the award should be refused to secure the integrity of the legal order of the forum State.[221]

In cases where derogation from statutory provisions is not possible because they protect the private interest, public policy runs its course as protecting the public interest.[222] Similarly, some jurisdictions have focused on how public policy relates to the national interest. For instance, the Indian courts have considered that for a foreign arbitral award to be in conflict with public policy, it should also be against to "the interests of India."[223]

3.1.3. International Character of Public Policy

Although domestic courts may appeal to domestic standards of public policy for direction, in the international arbitration context, they must to interpret public policy in a manner compatible with international norms because the issue is the recognition and enforcement of foreign awards. [224] The public policy concept is not merely an exclusive defense before domestic courts but also likely to be considered before international tribunals.[225] According to some commentators, if many jurisdictions recognize an issue as contrary to their public policy, it may advance international public policy and international comity.[226]

Parsons & Whittemore v. Société Générale (a case from the United States Court of Appeals for the Second Circuit) explained in the context of the New York Convention of 1958 that "[t]o read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility.[227] This provision was not meant to enshrine the vagaries of international politics under the rubric of public policy."[228] (emphasis added)

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[220] Mayer & Sheppard, supra, at, 251.

[221] Cordero-Moss (ed.), supra, at 19. "The public interest is deemed to prevail over the freedom of the parties to regulate their own interests. The legal system does not consider private mechanisms of dispute resolution as sufficiently reliable in this context and wishes to maintain the jurisdiction of its own national courts of law."

[222] Rubino-Sammartano, supra, at 503. "Foreign law is generally accepted within given limits only."

[223] Penn Racquet Sports v. Mayor International Ltd., [2011] HIGH COURT OF DELHI, INDIA.

[224] Rubino-Sammartano, supra, at 506. "Domestic public policy includes the remaining principles of [international] public policy which operate only internal domestic relationships, and which consequently do no prevent access to the legal system by different foreign provisions."

[225] Richard Cole, supra, at 374.

[226] Kurkela & Turunen, supra, at 19.

[227] Parsons & Whittemore v. Société Générale, supra, at 974. Following the outbreak of the Arab-Israeli Six Day War, the Egyptian government severed diplomatic ties with the U.S. and ordered most Americans out of Egypt. A U.S. corporation claimed force majeure because it had to abandon its project in Egypt.

[228] *Id*., at 974. Following the outbreak of the Arab-Israeli Six Day War, the Egyptian government severed diplomatic ties with the U.S. and ordered most Americans out of Egypt. A U.S. corporation claimed force majeure because it had to abandon its project in Egypt.

*National Oil Corp. v. Libyan Sun Oil Corp.*is also illustrative of when international politics and international public policy intersect.[229] In that case, the American company Sun Oil had a contract with a Libyan state-owned company for oil research in Libya, National Oil. The political conflict between American and Libyan governments led the American government to order measures against Libya. Sun Oil suspended performance in that country.[230] Although Sun Oil claimed force majeure, while the Libyan party rejected it, the arbitral tribunal ruled that just as other American companies continued to provide service to Libya by hiring non-American staff, so too could Sun Oil, since their Canadian subsidiary could take over performance. National Oil company brought the issue before a U.S. federal court, which overruled Sun Oil's claim on the ground that the issue did not constitute a breach of U.S. public policy. The Court held that "public policy may be invoked only in the event of the enforcement [of the award] conflicting with the deepest notions of morals and justice of the *lex fori*."[231] The court referred to the *Parsons & Whittemore* case, where the public policy defense was held to be more than a parochial device to protect the national interest.[232]

Public policy includes both domestic and international features. On the one hand, public policy operates in its entirety in domestic relationships. But when applied to international arbitration, it serves as a limitation on the access of foreign law to the domestic system.[233]

Jurisdictions differ on whether public policy is a domestic or international concept. For instance, in Switzerland, it is a domestic concept: "the Swiss lawmakers, when choosing the terms 'public policy,' necessarily had in mind the system of values prevailing in the part of the world where the country of which they are entrusted with adopting the laws is located, as well as the founding principles of the civilizations to which this country belongs."[234]

The New York Convention of 1958) sought to limit the scope of the public policy as much as possible because to prevent domestic courts from undermining international arbitration.[235] This logic suggests that the drafters of the instrument believed that international arbitration has positive effects on international trade, no country should be able to regulate

[229] 733F Supp. 800 (D.Del. 1990)

[230] *Id*., at 804 ff.

[231] *Id*., at 820.

[232] *Id*.

[233] Rubino-Sammartano, supra, at 506.

[234] S.p.A. [X] v. S.r.l. [Y], [2006] FEDERAL TRIBUNAL, SWITZERLAND, ARRÊTS DU TRIBUNAL FÉDÉRAL, 132 III 389, at para 2.2.2 (April 12th, 2018, 11:30), http://www.swissarbitrationdecisions.com/sites/default/files/8%20mars%202006%204P%20278%202005.pdf

[235] Sanders, supra, at 271. It is also evidenced in varying linguistic interpretations. For example, the French term 'ordre public' referred in other conventions with special note by drafters when they intended to reveal a broader interpretation. See Robert A.J. Barry, *Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards Under the New York Convention: A Modest Proposal,* 51 TEMPLE L. Q., 840 (1978).

international trade exclusively on their own terms[236] and thereby claim international supremacy,[237] and the concept of public policy in the international arbitration context goes beyond serving a parochial national interest.[238]

That said, the term "public policy" as used in Article V(2)(b) of the New York Convention refers to the public policy of the forum state.[239] But both scholarly and judicial interpretations identify that, in assessing the international or domestic dimensions of public policy, a mere violation of domestic law is unlikely to constitute grounds for refusing recognition or enforcement.[240]

Various jurisdictions have taken different approaches to the question of whether the concept of public policy has a universal or transnational dimension. For instance, the Supreme Court of India held that a transnational definition of "public policy" was not reasonable and the "public policy" at play is that of the enforcement forum.[241]

On the other hand, Italian courts have held that public policy constitutes "a body of universal principles shared by nations of the same civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions."[242] Similarly, in Traxys Europe S.A. v. Balaji Coke Industry, the Federal Court of Australia stated that the public policy exception should not only be used to give effect to "parochial and idiosyncratic tendencies of the courts of the enforcement state."[243] Some commentators have argued that the Italian and Australian approaches acknowledges "international public policy," where they view public policy from the perspective of the enforcing state, "while allowing

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[236] Scherk v. Alberto Culver Co., "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

[237] Richard Cole, supra, at 380.

[238] *Id*., at 377. See Moses, supra, at 218. "[Public policy] to be used parochially to protect national political interests." See also Mayer & Sheppard, supra, at 256. "Norms designed to serve the essential political, social or economic interests of the State, these being known as lois de police or public policy rules. [for example, antitrust law]"

[239] ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION: HISTORY, INTERPRETATION AND APPLICATION (2013), at 54.

[240] *Id*.; See Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd., FEDERAL COURT, AUSTRILIA (March 23, 2012), at 105, (April 15, 2018, 7:20 p.m.) https://lainachanbarrister.com/wp-content/uploads/2013/08/Traxys-v-Balaji-2012_201_FCR_535.pdf. "[T]he scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement…[The public policy] should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state."

[241] Renusagar Power Co. Ltd. v. General Electric Co., [1993] SUPREME COURT OF INDIA, YEARBOOK XX (1995), at pp. 681-738.

[242] Allsop Automatic Inc. v. Tecnoski Snc., [1992] CORTE DI APPELLO, YEARBOOK XXII (1997), at pp. 725-726.

[243] Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd., at 105.

leeway (compared to 'domestic public policy') for the fact that various international elements are involved in enforcing foreign awards."[244]

Public policy term is generally a creature of the principles or rules of a particular state. But a few considerations come into play when determining whether a court should refuse to recognize or enforce an international arbitration judgment based on its public policy. For instance, one consideration is whether the public policy at issue is shared by a substantial number of states.[245] Another consideration is the international nature of the arbitral case, its connection with the legal system of the forum State, and the existence of a consensus within the international community. These elements may provide for international justification of refusal of enforcement of a foreign arbitral award.[246]

The report of the ILA on public policy indicated that the concept is international because it is defined by international instruments and the state bears a responsibility to "respect its obligations toward other States and international organizations," such as U.N. resolutions imposing sanctions.

The French discussion on the international character of public policy is slightly different.[247] Article 1502 and Article 1484 of the French Code of Civil Procedure use almost the same wording. Article 1502/5 states that arbitration awards decided outside France (or in international arbitration in France) must comply with "international public policy." On the other hand, Article 1484 directly mentions only "public policy." The distinction between Articles 1484 and 1502 has been subjected to court decisions. The courts have interpreted it within a domestic and international scope as a negative relationship,[248] where the violation of domestic public

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[244] Albert Monichio, Luke Nottage & Diana Hu, *International Arbitration in Australia: Elected Case Notes and Trends*, 19 AUSTL INT'L J., 181(2012), at 203.

[245] Kurkela & Turunen, supra, at 21.

[246] *Id*.

[247] Gaillard & Savage, supra, at 953-955.

[248] *Id*., at p. 954. "[T]he only relationship between international public policy under Article 1502 5° and French domestic public policy is purely negative: as international public policy is at the heart of domestic public policy, a rule which is not even a matter of domestic public policy could not be considered as belonging to international public policy." See also Rubino-Sammartano, supra, at 504. "The traditional, or negative, role of public policy consists in acting as a limit to the application of foreign law or to the recognition of foreign judgments." On the other hand, some commentators identified the positive role of public policy. "Apart from the cases of its exceptional 'derogation' to the normal functioning of the conflict rule, the same idea (of protection of fundamental principles of the legal order) intervenes in a different manner, in order to ensure the application of certain rules, having priority, of the lex fori. This is the 'positive function' of public policy, a function which aims at imposing the application of the law of the forum, by means of unilateral conflict rules, or of 'special reservations of public policy' or, according to a terminology which has become somewhat fashionable in Europe, of laws of necessary or immediate application." Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration, in* COMPARATIVE ARBITRATION: PRACTICE AND PUBLIC POLICY IN ARBITRATION (Pieter Sanders eds., 1987), at 262-263.

policy does not necessarily "provide the grounds on which to appeal against a ruling granting enforcement in France of a foreign arbitral award . . . ."[249]

Russia also appears to advocate an international approach to public policy, holding that an arbitral award may not be enforced if it is "contrary to the universally recognized moral and ethical rules or threatening the citizens' life and health, or the State's security."[250]

3.1.4. Transnational Character of Public Policy

Some have argued that public policy is derived from "the comparison of the fundamental requirements of national laws and of public international law in particular."[251] Other commentators consider "transnational public policy" perfectly legitimate when applied by arbitrators, who have the advantage of not belonging to any particular legal system.[252] But it is not clear whether this distinction helps to understand the scope and elements of public policy.[253]

Unlike domestic judges, arbitrators do not have a system of conflicts of laws rules that can assist them when they deal with foreign law. For arbitrators, the distinction of *lex fori* and foreign law does not come into play when they deliver their judgments. This lack of assistance from a system of conflicts of law rules weakens arbitral proceedings in contrast to court proceedings.[254] Moreover, it makes the arbitrator's job difficult when public policy matters need to be identified and addressed.[255]

According to Gaillard, notwithstanding whether the case in domestic or international, a breach of public policy, as a set of values, cannot be tolerated by the national legal order.[256] The aim of the court is to assess whether the arbitral award is enforceable in the national legal order. As a result, the court should examine the enforcement demand in accordance with the

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[249] Gaillard & Savage, supra, at 954.

[250] Ansell S.A. v. OOO MedBusinessService-2000, [2010] HIGHEST ARBITRAZH COURT, RUSSIAN FEDERATION, RULING NO. VAS-8786/10 (April 15th, 2018, 7:35 p.m.) http://newyorkconvention1958.org/index.php?lvl=notice_display&id=859. Another universal determination of the public policy from the Russian courts is "fundamental and universal legal principles of highest imperative nature, of particular social and public significance, and forming the basis of the economic, political and legal system of the State" at Presidium of the Highest Arbitrazh Court, Russian Federation, Information Letter No. 156 of 26 February 2013, retrieved from UNCITRAL Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 244.

[251] Lalive supra, at 283.

[252] Gaillard & Savage supra, at 955.

[253] Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20 LCIA ARB. INT'L (2004).

[254] Rubino-Sammartano, supra, at 507.

[255] *Id*.

[256] Gaillard & Savage supra, at p. 955.

fundamental considerations of its own law. But there is nothing to prevent the court from adopting other instruments inspired from concepts broadly accepted outside of that nation.[257]

The public policy term, as discussed before, refers to principles or rules admitted by the legal system of a State. But it also concerns other elements such as similar procedural principles of states, the international nature of the arbitration process, and the consensus within the international community.[258] The international consensus among states becomes concrete when those states agree on international conventions by creating dispute resolution systems. If an award is contrary to these conventions, it justifies refusal of its recognition and enforcement based on this transnational character of public.[259]

In a transnational public policy context, foreign law may become relevant to the law of *lex fori*, where fundamental principles of both forums are "identical to, similar to, or in consensus with the fundamental principles of those of the international legal community."[260]

3.1.5. Is it a Principle of Law?

Many international texts and scholars define public policy as a reference of principle.[261] This discussion was at its peak during the drafting process of the New York Convention of 1958. Convention. In the context of refusing the recognition and enforcement of arbitral awards, Article 1(e) of the 1927 Geneva Convention was the first to verify that "recognition or enforcement of the award [shall] not [be] contrary to the public policy or to the principles of law of the country in which it is sought to be relied upon."[262] A similar definition appeared in the New York Convention without any reference to "principles of law."

While the New York Convention was being drafted, 1958, the representatives of governments and non-governmental organizations in the field of international commercial arbitration discussed the phrase "principles of law." The Committee on the Enforcement of Foreign Arbitral Awards (hereinafter, the Committee) expressed clearly that, in order to facilitate the enforcement of foreign arbitral awards, a new convention would be necessary which would do so while in tandem "maintain[ing] generally recognized principles of justice and respect[ing] the sovereign rights of States."[263]

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[257] *Id.*

[258] Kurkela & Turunen, supra, at 21.

[259] Mayer & Sheppard, supra, at 253.

[260] *Id.*, at 258.

[261] 'Fundamental principle', 'moral principle', even referenced as 'inspiring principles', see Cordero-Moss, supra, at p.22. "[I]t is not the national rules that must be applied through the public policy clause, but it is their inspiring principles that have to be given effect to. It remains to attempt to define what inspiring principles can be deemed to be those of public policy."

[262] Article 1(e), THE 1927 GENEVA CONVENTION

[263] United Nations, Report of the Committee on the Enforcement of International Arbitral Awards, 28 March 1955, 19th Session, E/AC.42/4/Rev.1, at 5.

Although the Geneva Convention 1927 was based on the principle of reciprocity, the Committee was inclined to agree with the International Chamber of Commerce (ICC) that the new convention should exceed the territorial limits in the enforcement of arbitral awards.[264] This evidenced the Committee's perspective on the strong pro-enforcement bias of a new convention. The Committee's proposal included the principles of law as another defense justification for refusing the enforcement of any arbitral award that "would be clearly incompatible with public policy or with fundamental principles of law ("*order public*") of the country in which the award is sought to be relied on."[265] As discussed in the Committee's report, the ICC proposed omitting the wording 'principles of law,' but the Committee justified its stance by arguing that it was intended to limit applications of this clause which "would be distinctly contrary to the basic principles of the legal system of the country where the award is invoked."[266]

The Secretary General's Report of 1956 continued to discuss the phrase "principles of law."[267] Although the usage of "principles of law" received some support from the representatives of governments,[268] the Society of Comparative Legislation, one of the NGOs contributing to the report, proposed deleting the wording "fundamental principles of the law" in sub-paragraph (h) of Article 4.269. According to the report, the wording was redundant, and moreover carried the risk of mischievous proceedings.[270] Further, the phrases "public policy" and "principles of law" are rarely at stake in a commercial context.[271]

During the drafting process of the New York Convention 1958, inter-governmental and non-governmental organizations (NGOs) contributed to the process. Some NGOs made it clear

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[264] *Id*., at 6.

[265] *Id*., at Annex p.2.

[266] *Id*., at 13.

[267] U. N. Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards: Rep. of the Secretary General, U.N. Doc. E/2822, Annex I-II (January 31, 1956).

[268] Belgium, Mexican governments approved the last draft article of the refusal of the enforcement of arbitral awards, in which 'principles of law' appeared alongside with the 'public policy' defense. Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards, supra, at 18, 21. New Zealand government also supported the terminology used as in the 1927 Convention. Recognition and Enforcement of Foreign Arbitral Awards: Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/3, at 3.

[269] International Chamber of Commerce reclaimed its position as deleting the term (at 19). International Law Association (ILA) also proposed to delete the wording of 'principles of law'. ILA argued that this term expressed no explicit idea. Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards, supra, at 21,23.

[270] Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards, supra, at 23.

[271] *Id*., "[As it is] demonstrated by the fact that, in France, State Counsel is not represented in the commercial courts."

that the phrase "principles of law" should be omitted because the clause was ambiguous and might result in different interpretations in different jurisdictions.[272]

The government of the Netherlands argued in the report that the provision of "*order public*" should have limited scope and should be directed towards restricting its concept.[273] Alongside the Government of Netherlands, the United Kingdom also proposed to limit the scope of the concept by deleting the wording "principles of law," which coincided with the term public order. The term public policy was already sufficient to challenge cases with awards that were fraudulent, oppressive or scandalous.[274]

The discussion lead to the conclusion that "public policy" is a compatible criterion that is sufficient for the purposes of the Convention, and that the phrase "principles of law" added an additional requirement that presented the risk of enabling parties and judicial bodies to question the award and its substance within a widened orbit of interpretation.[275] The final draft displayed a clear objective of limiting the potential use of such a defense.[276]

The report of the ILA adopted in 2002 discussed the public policy concept in depth. The ILA considered public policy to embody fundamental principles concerning justice and morality, which the state perceives it has a responsibility to protect.[277] For example, prohibiting abuse of rights and the need for courts to be impartial are fundamental principles that states wish to safeguard.[278] But the ILA report highlights that the analysis of fundamental principles "should primarily be done within the framework of the rules of law of *lex fori*,"[279] and that these fundamental principles be in consensus or identical with the fundamental principles of foreign law and of the international legal community.[280]

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[272] The Federation of Indian Chambers of Commerce and Industry and The Netherlands Arbitration Institute argued retaining only the 'public policy' term. Activities of Inter-Governmental and Non-Governmental Organizations in the Field of International Commercial Arbitration: Consolidated Report by the Secretary-General, E/CONF.26/4, at 28, 29.

[273] Recognition and Enforcement of Foreign Arbitral Awards: Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards E/2822/Add.4, at 2.

[274] *Id*., at 8. Federal Republic of Germany proposed an amendment of Article IV with omitting the 'principles of law' at Federal Republic of Germany: amendment to Articles III and IV of the draft Convention, E/CONF. 26/L.34, at 1.

[275] Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/2, at 7.

[276] Richard Cole, supra, at 374. Some had thought that as an "escape clause", see Barry, supra, at 839.

[277] Mayer & Sheppard, supra, at 255.

[278] *Id*.

[279] *Id*.; See also Rubino-Sammartano, supra, at 506. "…[A]lthough the classification as public or private law by the foreign legal system is very important, the final decision belongs to the *lex fori*."

[280] Mayer & Sheppard, supra, at 255. "ILA Recommendations 2(c) introduces further rules establishing the principles of waiver as an exception to the fundamental principles as follows: Where a party could have relied on a

Establishing the principles of public policy requires not only definitions, but also a clarification of what that term does encompass. Some commentators stress the necessary distinction between principles of public policy and *bonos mores*.[281] For example, the refusal to treat the adoption of a minor as a normal commercial contract belongs to public policy, while restricting sexual freedom is a breach of *bonos mores*.[282] They also stress the distinction between public policy matter and evasion of the law (*fraude á la loi*). Public policy protects the legal system from uncontrolled intrusion of foreign laws while evasion of law involves parties intending to avoid obligations arising under national law.[283]

In one of its recent cases, the German Supreme Court held that an award violates public policy if it affects the German perception of justice: "an award violated German public policy when it violated the fundamental principles of the legal, economic and/or social order of the state in such an obvious and significant manner that the decision was unacceptable under basic national principles."[284]

Swiss courts have developed a cumulative determination of public policy which relates to prevailing principles, such as *pacta sunt servanda*, "the principle of good faith, prohibition of abuse of right, prohibition of discriminatory measures and spoliation."[285] This issue will be discussed in detail in the substantial public policy section.

3.1.6. Transformation of the Public Policy Concept in Time

The reviewing forum must take into consideration the current understanding of public policy at the time of the enforcement claim. An award whose enforcement is sought may not have complied with the public policy of the forum state at the time of arbitration, but a shift in the conception of public policy may result in it being in conformity with public policy at the time of

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fundamental principle before the tribunal but failed to do so, it should not be entitled to raise said fundamental principle as a ground for refusing recognition or enforcement or the award."

[281] Rubino-Sammartano, supra, at 505.

[282] Rubino-Sammartano, supra, at 505; Another example for *bonos mores* is, "An Argentinian claimant was claiming remuneration for his intervention with the Argentinian authorities in favor of an English company so that it was awarded a contract. The arbitrator held that the principle that contracts which grossly breach *bonos mores* cannot be enforced in court." Rubino-Sammartano, supra, at 525; see JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION, A STUDY IN COMMERCIAL ARBITRAL AWARDS (1978), at 553.

[283] Rubino-Sammartano, supra, at 505.

[284] Oberlandesgericht [OLG] Düsseldorf, Germany, VI Sch (Kart) 1/02, 21 July 2004, (April 9th, 2018, 2:40 p.m.) http://newyorkconvention1958.org/index.php?lvl=notice_display&id=1317. Another emphasis was given on the fundamental principles in relate to the public policy, in one of the cases of The Supreme Court of Cyprus. The court held that the public policy defense refers to the fundamental principles that a society identifies as guidelines for its transactions and other reflections of the life of its members, which is based the legal order of the *lex fori*. See Supreme Court of Cyprus, Appeal Jurisdiction, Civil Appeal, 28 April 1999 Yearbook XXV (2000), at 692-709.

[285] Catherine A. Kunz, *Enforcement of Arbitral Awards under the New York Convention in Switzerland, An Overview of the Current Practice and Case Law of the Supreme Court*, 34 ASA BULL. (DEC., 2016).

enforcement, and vice versa.[286] This is known as the principle of the evolving character of public policy. As such cases are the result of profound changes in public policy, they do not occur frequently in the conventional discourse of international commercial law. The arbitral tribunal may or may not have been considered the state of public policy at the time of its award. In any event, The application or discussion of public policy by the arbitral tribunal is not relevant or binding on the forum state where enforcement is sought and where enforcement may be refused *ex officio*.[287]

3.1.7. Discussions on the Definition

Some scholars have defined public policy by referring to basic notions of morality and justice that are inherent in the moral, political and economic order of the country.[288] Public policy does not concern itself with conforming to the rules and principles of the forum state's legal system,[289] but rather is at the crux of its ideas of morality and justice.[290]

Come jurisdictions have taken a similar approach. For instance, in *Parsons*, the oft-cited decision of the Second Circuit of the United States Court of Appeals, "[e]nforcement of foreign arbitral awards may be denied on [the basis of public policy] only where enforcement would violate the forum state's most basic notions of morality and justice."[291] Some scholars have argued that American courts, by interpreting public policy as a defense without a clear definition and subject to narrow construction have weakened its applicability, which in turn, has served as a gain for international commercial arbitration.[292]

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[286] Gaillard & Savage, supra, at 957.

[287] Kurkela & Turunen, supra, at 18.

[288] Cordero-Moss, supra, at p.21; see also ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (3rd ed. 1999), at 11; Dirk Otto & Omaia Elwan, *Article V(2), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION (Herbert Kronke & Patricia Nacimiento eds., 2010), at 365.

[289]Renault SA v. Maxicar SpA and Orazio Formento, [2000] C.38/98, E.C.J., at para 33. "The court of the State in which enforcement is sought cannot, without undermining the aim of the Convention, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or Community law was misapplied in that decision." From the point of view of the ECJ, "[the public policy] constitute[s] a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought." Public policy defense is applicable in cases of "a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order." at para 30.

[290] Cordero-Moss, supra, at 22.

[291] Parsons & Whittemore v. Société Générale, at 974. A number of jurisdictions outside the United States have had similar interpretations on this ruling when examining the public policy exception.

[292] Junker, supra, at 245-246.

But public policy has been defined as an "unruly horse"[293] by some and "a nebulous, concept that changes from State to State" by others.[294]

The German Court of Appeals stated in one of its judgments that "apart from violations of basic civil rights, an infringement upon public policy will result from the violation of a rule concerning the fundamental principles of political or economic life. Public policy will also be infringed upon when the arbitral award is irreconcilable with German concepts of justice."[295]

Likewise, the Federal Court of Australia stated that "it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in [the] jurisdiction [where enforcement is sought] which enliven this particular statutory exception to enforcement."[296] It continued that:

> [T]he scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defense of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state.[297]

Swiss courts have likewise approached the public policy defense with reference to the concept of justice. In an influential judgment, one Swiss court stated that "[a]ssuming a definition is needed, one could say that an award is inconsistent with public policy if it disregards those essential and broadly recognized values which, according to the prevailing values in Switzerland, should be the founding stones of any legal order."[298]

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[293] Richardson v Mellish (1824) 2 Bing 229, 252 (Burrough J), retrieved from Luke Villiers, *Breaking in the "Unruly Horse": The Status of Mandatory rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards,* 18 AUSTL. INT'L L. J., 156 (2011), at 161.

[294] Andrew I Okekeifere, *Public Policy and Arbitrability under the UNCITRAL Model Law*, 2(2) INT. A.L.R., 70 (1999).

[295] Court of Appeal of Hamburg, January 26, 1989, Yearbook Commercial Arbitration 1992, 491, retrieved from Rubino-Sammartano, supra, at 504

[296] Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd., Federal Court, Australia, 23 March 2012, retrieved from Albert Monichio, Luke Nottage & Diana Hu, *International Arbitration in Australia: Elected Case Notes and Trends*, 19 AUSTL INT'L J., 181(2012), at 203.

[297] *Id*.

[298] Federal Tribunal, Switzerland, 10 October 2011, Decision 5A_427/2011, at para 2.2.3 (April 15th, 2018, 8:10 p.m.) http://www.swissarbitrationdecisions.com/sites/default/files/8%20mars%202006%204P%20278%202005.pdf. The Swiss Federal Tribunal, in another case, has defined the public policy for situations in which is contrary to the Swiss

Similarly, the Hong Kong Court of Final Appeal described awards that are inconsistent public policy as being "so fundamentally offensive to [the jurisdiction *lex fori*]'s notions of justice that, despite its being party to the Convention, it cannot reasonably be expected to overlook the objection."[299]

In some cases, courts have found that public policy does not lend itself to a specific definition. For example, the Court of Appeal of England and Wales held that "considerations of public policy can never be exhaustively defined," however, the public policy defense covers cases in which "[i]t 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."[300]

3.2. The Scope of Public Policy

3.2.1. Arbitral Tribunals and Public Policy

When the parties rather than arbitrators choose the place of arbitration and its applicable law for the arbitral proceedings, the arbitrators are expected to apply that forum's domestic public policy even if the parties have asked that that not be the case.

In situations where the arbitrators establish the applicable law, they should consider all the ramifications of such a choice for reasons of convenience. Although it is sometimes difficult to anticipate where the award is likely to be sought, their choice of law is relevant to the award's later recognition and enforcement.[301]

Arbitrators should also take into account the principles of international public policy of the state where the arbitration take place (*lex loci arbitrai*), the place where the contract is made (*lex contractus*), and the state where enforcement of the award will be sought (*lex fori*).[302] This is

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concepts of justice as being an "intolerable manner". Similarly, an Austrian court utilized the word "irreconcilable" to define public policy, in Supreme Court, Austria, Case 3Ob221/04b, 26 January 2005, XXX Y.B. Com. Arb. 421 (2005), both are retrieved from UNCITRAL Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 241.

[299] Hebei Import and Export Corporation v. Polytek Engineering Company Limited, [1999] COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION,YEARBOOK XXIV, (1999), at 652.

[300] Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell Int'l Petroleum Co. Ltd., Court of Appeal, 24 March 1987, retrieved from Maxi Scherer, *Draft IBA Country Report England, The Public Policy Exception under Article V(2)(b) – Methodological Approaches Country Report England,* INTERNATIONAL BAR ASSOCIATION (2014) (June 3, 2018, 15:00) https://www.ibanet.org/Document/Default.aspx?DocumentUid=DB68248A-6EC4-45A7-8324-EF6266C699EE

[301] Rubino-Sammartano, at 531, 533. Difficulties may arise in establishing where the award will be enforced, in respect to the plurality of states the award concerns, such as the location of business center or substantial assets of the parties.

[302] *Id*.

important to avoid infringing foreign laws which affect or will affect the performance of the contract.[303]

3.2.2. Public Policy Exception under the New York Convention

Although various jurisdictions define public policy in different ways, case law tends to examine whether there has been a deviation from the core values of a legal system when evaluating recognition and enforcement under Article V(2)(b) of the New York.[304]

3.2.3. Procedural Content and Procedural Public Policy

Many national laws allow an arbitral award to be enforced only if it complies with the basic requirements of procedural justice.[305] But those laws also require the parties to object immediately if they have become aware of a procedural irregularity. Silence implies agreement with the way in which the proceedings were managed.[306]

3.2.3.1. Due Process

Due process[307] is also related to the concept of public policy in the sense that "due process is embodied in the broader concept of procedural public policy."[308] Some courts have denoted adherence to the fundamental notions of due process within the concept of public policy in their national law. But the principle of due process is considered a "superior principle," covering important concerns such as "equal treatment of the parties,"[309] and is examined independently of

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[303] *Id*. at 534. "This might be one of the signs of that transnational public policy.…by putting together various principles of substantive and procedural public law which are constant in decisions by courts of law and by arbitrators."

[304] UNCITRAL Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 240.

[305] Kurkela & Turunen, supra, at 22. "Legal systems focus heavily on reaching the right substantive decision but are perhaps considerably less focused on procedural matters, including ensuring that all the relevant facts are fully established before material law is applied. The role of procedure is often seen as instrumental." The distinction between procedural and substantive public policy derives from the distinction between procedural and substantive law.

[306] Gaillard & Savage, supra, at 957.

[307] *Id*. Due process is also termed as the "procedural international public policy" in regard with the arbitral procedures. See Herman Verbist, *Challenges on Grounds of Due Process Pursuant to Article V(1)(b) of the New York Convention, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, NEW YORK CONVENTION IN PRACTICE (Emmanual Gaillard & Domenico Di Pietro eds., 2008), at 679-728.

[308] *Id*., at 947, 949. "The principle of due process applies to all aspects of the arbitral proceedings. It requires that each party be given the opportunity to present its factual and legal argument, and to acquaint itself with the rebut that raised by its opponent." See Kurkela &Turunen, supra, at 22. "It is clear that due process or procedural public policy also forms a part of public policy or ordre public."

[309] Gaillard & Savage, supra, at 948.

public policy,[310] because it implicates fair trial concerns.[311] Although procedural public policy requires conformity with due process, many national laws treat the breach of due process as separate grounds for refusal of an arbitral award.

Some jurisdictions, as such French law, consider the "equality of parties" as a public policy concept. The principle of equality does not refer to rigid procedures in which the parties prepare their submissions in an exactly equal number of days or have precisely the same time to present their oral pleadings. Rather, it means that there must be a balance and equality of opportunity in procedural processes wherein parties freely present their claims,[312] but the absence of a party not resulting from an adversary's conduct does not necessarily translate into a public policy violation.[313]

3.2.3.2. Fraud

Another example of the procedural aspect of public policy is where a party or arbitrator acts to deceive the tribunal with false documentation, or by some other fraudulent conduct.[314] For example, in a case where one of the arbitrators conveyed inaccurate information to the other arbitrators, the *Cour de Cassation* found it against the public policy that the situation "had created an imbalance between the parties in violations of the parties' fair hearing."[315]

Very few procedural rules implicate public policy, and courts have confirmed that many procedural rules are out of the scope of the public policy concept. For example, in one case, a French court considered and rejected the notion that public policy requires arbitrators to give reasons for their award because French law did not requires it: "failing to give reasons would only justify non-enforcement of an award if applicable laws and rules stipulated it, in which case

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[310] *Id*. See also Kurkela &Turunen, supra, at 19. "[R]espect of a national public policy in the enforcement proceedings may be deemed to be a part of due process. But the respect is limited to the enforcement proceedings and to the public policy of the country of the enforcement procedure. The weight of this conclusion for the purposes of this research is further reduced by the right to refuse enforcement on the grounds of public policy being given to the authority of the country whose public policy is in question."

[311] Gaillard & Savage, supra, at p. 948. Due process indicates that the parties should be given an equal opportunity during the trial. "The principle of equal treatment is capable of covering more than just an equal right to be heard… For example, it may apply to the constitution of the arbitral tribunal. In any case, it is recognized in French law as a requirement of international public policy."

[312] *Id*.

[313] Rubino-Sammartano, supra, at 515.

[314] Gaillard & Savage supra, at 958.

[315] Casso Ie civ., Mar. 24, 1998, Excelsior Film TV v. UGC-PH, Dalloz, IR 105 (1998), retrieved from Gaillard & Savage, supra, at 958. Impartiality and dignity of the judicial process may also be considered as a matter of public policy. But one should be careful when examining the basis for that of principles, which is very subjective in nature. One has to considered both the due process and equality of parties alongside the concept of public policy when examining the dignity and impartiality of judicial processes.

arbitrators were noncompliant in their briefs."[316] But in a slight variation, Italy's highest Court stated that "conflicts amongst the reasons" may render an award a nullity for public policy reasons if the conflicts "are so serious as to make it impossible to identify the *ratio decidendi* and they consequently amount to a lack of reasons."[317] Taking a different view, the Court of Justice of Geneva stated that the "arbitral tribunal must clarify the reasons for its decision."[318]

3.2.3.3. Pending Cases

A further example of a situation in which the public policy concept does no impact arbitration is when there are criminal and civil cases pending along with the arbitral proceedings. Although arbitral tribunals are inclined to examine the impact of such cases on the arbitration proceedings, those cases do not suspend or terminate any arbitral proceedings.[319]

3.2.3.4. Impartiality and Appointment of Arbitrators

Courts have also discussed whether issues with impartiality[320] and the appointment of arbitrators can implicate public policy.[321] It has been argued that parties must be on an equal footing in the appointment of arbitrators.[322]

3.2.3.5. Problem of Reasoning

Another example for procedural breach of public policy involves failing to provide the reasons for an award when the parties contracted for such a requirement. For example, a Canadian court concluded that procedural public policy had been breached by a lack of reasoning in the award, and refused to grant recognition and enforcement of that when the parties' agreement called for an arbitral award to provide reasons: it "would be contrary to public policy because [the award], contrary to the express wish of the parties, does not contain reasons. . .. What is at odds with fairness, equal treatment of the parties and consequently public policy, is not that an award lacks reasons but that it lacks reasons contrary to what the parties wanted. . .. [I]n a democratic country

[316] Gaillard & Savage, supra, at 959. Another example is that a court suspended the statutory limitation period, despite having no jurisdiction. The French Cour de cassation held that such situation did not contravene with the conception of public policy. Casseo Ie civ., June 30,1998, Mediterranean Shipping Co. v. URCOOPA, 1998 Bull. Civ. 1, No. 227, retrieved from Gaillard & Savage, supra, at 960.

[317] Ceglie v. Ente Regionale di Sviluppo Agricolo della Puglia, Court of Cassation (Italy) No. 2815, (1987), retrieved from Rubino-Sammartano, supra, at 520.

[318] Sté Fougerolles S.A. v. Ministére de la Défense de la République Arabe Syrienne, Court of Justice, Geneva, December 13, 1985, retrieved from Rubino-Sammartano, supra, at 520.

[319] THE INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-SEVENTH CONFERENCE- HELSINKI 32 (1996).

[320] Rubino-Sammartano, supra, at 516.

[321] *Id*., at 521.

[322] *Id*.

one cannot imagine that the judiciary renders a decision without being able to verify if that decision is not arbitrary"[323]

3.2.4. Merits – Substantial Public Policy

In addition to procedural matters, the courts of the forum in which recognition and enforcement of an award is sought may take public policy into account when considering the merits of an award so as to ensure that nothing in it infringes on the fundamental values of the state involved.[324]

One Swiss Court explained the interplay between procedural public policy and substantive public policy as follows:

> [The] procedural public policy guarantees parties the right to an independent judgment on their submissions and the facts submitted to the arbitral tribunal, in accordance with the applicable procedural law; substantive public policy is breached when fundamental and generally recognized principles are breached, leading to an untenable contradiction with the notion of justice, so that the decision appears incompatible with the values recognized in a state governed by the rule of law.[325]

One must consider public policy in general terms when it is applied to the merits of a dispute to be settled before an arbitral tribunal. The refusal of an award, on the grounds of a breach of public policy, must be contrary to the fundamental convictions of national law at the time the enforcement of the arbitral award is sought.[326] It is worth mentioning that breaches of procedural public policy and substantive (merits) public policy are not nugatory but rather cumulative.[327]

Though courts can consider the merits of an award in a defense based on public policy, the scope of such review is not unlimited. Numerous courts have held that the party opposing recognition and enforcement can reargue the merits of a case through the guise of the public

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[323] Smart Systems Technologies Inc. v. Domotique Secant Inc., [2008] COURT OF APPEAL OF QUEBEC, CANADA, 11 MARCH 2008, XXXIII Y.B. COM. ARB. 464, (April 18th, 2018, 12:30 p.m.) http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=958

[324] UNCITRAL Guide, supra, at 247.

[325] [X] S.p.A. v. [Y] S.r.l., Federal Tribunal, Switzerland, supra, at 389. The Swiss Federal Tribunal has distinguished "substantive-material" from "procedural" public policy ("ordre public matériel et ordre public procédural"), at 2.2.1, (April 18th, 2018, 12:45 p.m.) http://www.swissarbitrationdecisions.com/sites/default/files/8%20mars%202006%204P%20278%202005.pdf.

[326] Gaillard & Savage, supra, at 961.

[327] Rubino-Sammartano, supra, at 531. "Cumulative application of two or more public policies is a solution not without interest, at least in theory but that it is quite difficult to be applied. It should be added that the cumulative application of two public policies may lead to the application of the stricter one."

policy exception. Further, the opposing party cannot claim before a *lex fori* court that the case was wrongly decided.[328]

Moreover, because courts tend to interpret public policy narrowly, it is not surprising that applications to refuse recognition and enforcement of a foreign arbitral award made under Article V(2)(b) of the New York Convention rarely have been successful. Examples in which parties have successfully argued the public policy exception are cases of religious or racial discrimination.[329] An additional example would involve contracts obtained by corruption.[330] Moreover, it is not common for entire awards to be set aside based on the violation of substantive public policy of the forum state.[331] For example, if an award validates interest at unreasonably high rates, it may be deemed contrary to the public policy. But in such case, the forum would only refuse the award in part, and dismiss only that part constituting usury.[332] We now examine instances involving challenges to arbitration awards based on substantial procedural public policy.

3.2.4.1. High Interest and Cost

Interest rates and costs must be proportional to awarded damages. A flagrant breach of this rule may result as the infringement of public policy.[333] For example, in the case of *Laminoirs v. Southwire Co.*, a Georgia (U.S.) federal court refused to enforce a foreign arbitral award based on, among other things, awarded interest.[334] In that case, and ICC arbitral panel ruled in favor of Laminoirs and decided that the French legal rate of interest on judgments should apply and

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[328] UNCITRAL Guide, supra, at 248.

[329] Gaillard & Savage, supra, at 961. Substantive grounds for public policy defense have included examples, such as "payments of excessive interest or costs", "violations of Islamic legal principles", "violations of competition laws", "violations of bankruptcy rules", "violations of consumer protection laws", "foreign exchange controls", "illegal contracts", "foreign policy, and the principle of comity."

[330] *Id*., "…[A] contract having influence-peddling or bribery as its motive or object is, therefore, contrary to French international public policy as well as to the ethics of international business as conceived by the majority of the international community." European Gas Turbines SA v. Westman International Ltd., [1993] CA PARIS, REV. ARB. 359, 1994, retrieved from Gaillard & Savage, supra, at p. 961. Not only corruption but even exercising influence is forbidden in many jurisdictions. Many arbitrators reviewed such practices against good morals and distinguished between lobbying and trading in influence. "these activities [trading in influence] … violate the notion of morality and public policy." ICC proceedings no. 5622, retrieved from Rubino-Sammartano, supra, at 526.

[331] Gaillard & Savage, supra, at 961. In a 1990 decision, the Paris Court of Appeals refused the enforcement of an arbitral award which violated the law concerning the regulation of investments. Those rules "aim to maintain, in the general interest, a balance in economic and financial relations with foreign countries, by controlling movements of capital across national boundaries." CA Courreges Design v. Andre Courreges, [1990] CA PARIS, REV. CRIT DIP 580, 1991, retrieved from Gaillard & Savage, supra, at 961.

[332] *Id*., at 962. On the other hand, situations related with the res judicata of court decisions and the termination of a contract would not suffice to violation of public policy considerations.

[333] Paulsson, supra, at 100.

[334] Laminors, ETC v. Southwire Co., 484 F. Supp. 1063 (N.D. Ga. 1980)

additional interest if no payment was made in two months.[335] The court found this additional rate usurious, [336] in "violat[ion] [of] this country's or this state's most basic notions of morality and justice"[337] and refused to recognize and enforce the award based on the public policy exception under Article V(2)(b):[338]

> The Court concludes that the imposition of an additional 5% interest by the arbitrators in accordance with the French statute is penal rather than compensatory and bears no reasonable relation to any damage resulting from delay in recovery of the sums awarded. Therefore, that portion of the award which purports to assess the rates of interest at 14½% and 15½% will not be enforced or recognized by this Court. 9 U.S.C.A. § 201, Art. V, par. 2(b), Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The rates of 9½% and 10½%, as imposed by the arbitrators, will continue to accrue until the date of Judgment.[339]

In *Inter Maritime Management SA v. Russin & Vecchi*, the Swiss Supreme Court reviewed whether the awarded fees and compounded interest were excessive.[340] In doing so, the court discussed whether there was any breach of Swiss international public policy. The dispute involved a retainer agreement between the law firm Russin & Vecchi ("R&V") and Inter Maritime Management ("IMM") and Maritime International Nominees Establishment ("MINE") for the legal services of R&V.[341] R&V prevailed in the arbitration. The arbitrator ordered the other party to pay R&V for damages, costs, legal expenses, and arbitration costs.[342] IMM argued that the fee was unreasonable and excessive, violating public policy under the New York

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[335] *Id*., at 1067.

[336] *Id*., at 1068. In the terms of the court, exaction of usury means ". . . [taking] a greater sum for the use of money than the lawful interest."

[337] *Id*. Having reference to the most famous case of Parsons "Article V, par. 2(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that enforcement of an award may be refused if such enforcement would be contrary to the public policy of the country where enforcement is sought. But enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum country's most basic notions of morality and justice." Parsons & Whittemore v. Société Générale, supra, at 974.

[338] Laminoir ETC. v. Soutwire, supra, at 1069.

[339] *Id*.

[340] Inter Maritime Management SA v. Russin & Vecchi, [1997] TRIBUNAL FÉDÉRAL, YEARBOOK XXII, 789-799 (1997).

[341] Russin & Vecchi presented IMM and MINE in a dispute with the Republic of Guinea. "The retainer agreement, which contained an arbitration clause, stipulated a lump-sum fee of $80,000 as costs for legal services in the United States, a daily fee of $2,000 for legal services abroad, and a contingency fee of eight percent of the sum awarded if they prevailed in the dispute. IMM and MINE prevailed in the arbitration with the Government of Guinea and R&V sought payment pursuant to the retainer agreement."

[342] Inter Maritime v. Russin & Vecchi, supra, at 790. $424,007 in damages, $7,880 for costs and legal expenses, and $16,836 for the costs of the arbitration.

Convention 1958. But the Swiss court declined the argument and stated that "the reasonableness of a lawyer's fee must be determined by multiple criteria."[343] Further, the Court clarified that "public policy opposes the enforcement of foreign arbitral awards that violate the fundamental principles of the Swiss legal system, yet public policy is not necessarily violated where the foreign provision is contrary to a mandatory provision of Swiss law."[344]

In Buyer (Austria) v. Seller (Serbia and Montenegro),[345] the Supreme Court of Austria reviewed whether an interest rate of seventy-three percent per year violated public policy[346] and should be enforced in Austria.[347] The Supreme Court concluded that an interest rate of seventy-three percent per year with daily capitalization, violated basic principles of Austrian law on debts.[348] The Court considered public policy in its reasoning. According to the court, the interest should not "lead to unjust enrichment of the creditor and cannot have a punitive and deterrent function."[349]

All that said, it various decisions from different jurisdictions do not provide an automatic ratio to examine the what interest rates do unacceptable and trigger the public policy exception.[350]

3.2.4.2. Breaches of Competition Law

The Swiss Court, when examining the concept of public policy and the nature of European Competition Law, reached conclusion that "the provisions of competition laws, whatever they may be, do not belong to the essential and broadly recognized values which, according to the

[343] *Id*., at 797.

[344] *Id*.

[345] Austrian Buyer v. Serbian and Montenegrin Seller, [2005] OBERSTER GERICHTSHOF, YEARBOOK XXX, 421-436, AUSTRIA 13, (2005).

[346] *Id*. The contract was about a purchase agreement for mushrooms. It also contained an arbitration clause. The dispute arose when the Austrian buyer failed to pay for goods received. The seller commenced arbitration. The arbitral tribunal awarded the seller DM 22,500, and mandated an additional interest which corresponds to an interest rate of seventy-three percent per year.

[347] *Id*. The District Court granted enforcement of only the main sum, holding that enforcement of a seventy-three percent annual interest rate would violate Austrian public policy. The Austrian Appeal Court reversed that ruling, finding that an annual rate of seventy-three percent that resulted from a daily capitalization of interest was "usual practice" among merchants. Both parties appealed the decision. The Austrian Supreme Court then reversed the appellate decision, reinstating the District Court's decision to enforce only the principal sum of the award.

[348] *Id*. In this case, the interest -as compensation for late payment- exceeded the main sum claimed -the sale price- already in the first year.

[349] *Id*.

[350] Monichio *et al*., supra, at 203

concepts prevailing in Switzerland, would have to be found in any legal order. Consequently, the violation of such a provision does not fall within the scope of art. 190 (2) (e) PILA."[351]

3.2.5. Mandatory Rules as Public Policy

It is not always easy to distinguish mandatory substantive law and public policy matters, since the conception of public policy embraces both procedural and substantive issues.[352] According to Villiers:

> [A] mandatory rule is an imperative provision of law that must be applied to an international relationship irrespective of the law that governs the relationship. Mandatory rules of law tend to share most of the characteristics of 'public law'; they are typically expressed in statutory form, they are regulatory, rather than elective, the they frequently vary from nation to nation and they are often enforced directly by an agency of government.[353]

Generally, national courts have developed the pro-enforcement lean of the New York Convention of 1958 by narrowly construing the public policy defense.[354] While courts typically will not restrain mandatory law under the limits of the public policy exception, "the narrow construction of public policy implies that not all failures to apply a nation's mandatory law will fall within the public policy exception."[355]

In addition, it is not enough to simply categorize the public policy exception as a "mandatory rule" (lois de police) to prevent the enforcement of foreign arbitral awards.[356] Every single public policy rule is mandatory, but not every mandatory rule forms part of public policy.[357] But in the arbitral proceedings, the arbitrator should not ignore the mandatory rules of the legal system of a choice of law by the parties.[358]

Some commentators hold that public policy involves both mandatory provisions and the principles of public policy. The former includes individual statutory provisions where derogation

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[351] Federal Tribunal, Switzerland, Decision 5A_427/2011, supra, at para 3.2.

[352] Kurkela & Turunen, supra, at 21.

[353] Villiers, supra, at 158. "Mandatory rules may also be procedural. But the obligation to apply the mandatory procedural laws at place of enforcement is uncontentious."

[354] *Id*., at 165.

[355] *Id*.

[356] Kurkela & Turunen, supra, at 24.

[357] Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*,19(2) ARB. INT'L. 217 (2003), at 231.

[358] Rubino-Sammartano, supra, at 507.

is not possible,[359] while the latter includes barriers which protect the legal system from "the risk of admission of incompatible foreign rules into it."[360] Thus, mandatory provisions are the first barrier when a foreign law attempts to enter a legal system and principles of public policy are a second but invisible obstruction that blocks the foreign law.[361]

Given that public policy tends to be understood in relation to fundamental rules of the *lex fori*, the question arises as to whether the forum's mandatory rules represent part of its public policy and are thus grounds for refusing the recognition and enforcement of an foreign arbitral award.[362]

Although certain mandatory rules clearly meet the standard of the public policy defense when it comes to recognition and enforcement of awards, the terms should not be used interchangeably.[363]Despite the fact that public policy and mandatory rules may reflect similar concerns,[364] differing views have been expressed as to whether specific sets of mandatory rules rise to that of public policy in the context of the recognition and enforcement of foreign awards.[365]

According to Voser, rules of public policy imply a higher moral standard. So, they can "be, but are not necessarily, enacted explicitly in statutory provisions."[366] On the other hand mandatory laws "are always explicit rules which the parties seek to apply in the dispute in question."[367] In the view of Mayer:

> [M]andatory 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.[368]

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[359] *Id*., at 504. "Mandatory statutory provisions set out in the public interest which compulsorily apply to all relationships which have connection with that legal system and which prevail on any contrary conflict of laws rule. … complied with to protect the political, social or economic organization of that state…"

[360] *Id*.

[361] *Id*.

[362] UNCITRAL Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 244.

[363] Villiers, supra, at 164. "In order for a failure to apply mandatory law to form part of the public policy exception, there must be some connection between the concepts of public policy and mandatory law."

[364] *Id*.

[365] Such as competition law, bankruptcy, employment and consumer protection, interest rates, foreign exchange regulations, export prohibitions, and futures contracts…

[366] Nathalie Voser, *Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration,* 7 AM REV INT'L ARB, 319 (1996), at 322.

[367] *Id*.

[368] Pierre Mayer, *Mandatory Rules of Law in International Arbitration,* 2 ARB INT'L, 274 (1986), at 275.

The criteria for the determination of whether a mandatory national law constitutes public policy often remain unspecified by national courts. The mandatory rules of the enforcement forum can be considered public policy when they reflect that forum's fundamental concepts of morality and justice, which permit no derogation. We are going to examine this issue case by case to clarify the interplay between public policy and mandatory rules.

3.2.5.1. Competition Law

In one of the cases of the Court of Justice of the European Union (CJEU), the court held that, in competition law, article 101 of the 'Treaty on the Functioning of the European Union' (TFEU), since it automatically renders certain anti-competitive agreements or decisions, constitutes "a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [Union] and, in particular, for the functioning of the internal market"[369]. The CJEU decided that it should for this reason be regarded as a matter of public policy within the meaning of article V (2) (b) of the New York Convention. The Court has accordingly imposed on EU Member States the obligation of denying recognition and enforcement to all awards that conflict with article 101 TFEU.

3.2.6. Ex Officio Review

Arbitral tribunals may also bring up the public policy issue ex officio when the economics and rationale of legal proceedings require it. The tribunal should consider this when there is the chance the final award would appear before the enforcement forum in which the public policy defense has been contended. This may enable the arbitral tribunal to discuss the public policy matter *sua sponte*, in which the parties will have the opportunity to submit their views before any ruling is taken, which will in turn potentially satisfy due process considerations.[370]

4. THE UNITED STATES, ARBITRATION AND PUBLIC POLICY

4.1. Introduction

The objective of this chapter is to review how the concept of public policy is defined by United States (U.S.) federal courts and applied in the context of enforcement and setting aside of arbitral awards. In particular, this chapter discusses the concept of public policy generally as a ground for refusal of the enforcement of awards in the U.S.[371] It first undertakes a brief discussion on international arbitration in the U.S. legal system and then provides a broad analysis of U.S. case law, which considered the concept of public policy as a means of refusing or accepting the enforcement of arbitral awards.

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[369] Eco Swiss China Time Ltd. v. Benetton International NV, [1999] Case C-126/97, E.C.R. I-3055, paras. 37-39.

[370] Kurkela & Turunen, supra, at 20.

[371] Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law,* GA. J. INT'L & COMP. L., 25 (2009-2010), at 35.

The United States have generally been consistent in recognizing and enforcing awards rendered in both domestic and foreign arbitrations.[372] This is because U.S. policy has favored agreements to arbitrate in the United States. This policy corresponds with the popular view of arbitration as a particularly suitable means for resolving disputes arising from international commercial transactions[373] and offers many attractive alternatives to litigating in the court system.[374] One crucial feature of arbitration is that U.S. courts are more willing to accept foreign arbitral awards than foreign judgments.[375] According to Martinez-Fraga, this is because of the rapid flow of transnational commercial activities, in other words, "economic globalization."[376]

The last part of this paper analyzes some of the cases decided by the U.S. courts to demonstrate the narrow construction of public policy defense. Although this paper claims no identification of an exacting test of the public policy defense, it describes courts' attempts to provide a formula for enforcing foreign arbitral awards in situations where such enforcement would be in substantial conflict with fundamental domestic legal or moral concepts. In other words, the paper explores whether the U.S. case law views the public policy concept as corresponding to "the most basic notions of morality and justice.

4.2. Sources of International Arbitration in the U.S.

There are three main legal instruments that govern the recognition and enforcement of arbitral awards in the U.S. legal framework.[377] These are: (i) the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), (ii)

[372] Although in the earlier times there has been some skepticism about arbitration, in modern times arbitration has grown as one of the preferred practices. PEDRO J. MARTINEZ FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS (2009), at 6.

[373] Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts,* 3 INT'L TAX & BUS. LAW. 249, 249 (1986), at 249. But on the other hand some commentators considered the arbitration process as "a blunt and imprecise methodology for dispute resolution."

[374] Arbitrators can be selected because of a special skill or knowledge of the subject matter in dispute; arbitration is confidential; it is not open to public; parties are less vulnerable to the uncertainties of foreign litigation.

[375] McLaughlin & Genevro, supra, at 250. A pro-enforcement arbitration policy encourages trade. Judicial unwillingness to apply exceptions to the enforcement of arbitral awards strengthens the commercial system.

[376] Martinez-Fraga, supra, at 3. "The complexities incident to multiple jurisdictions, different judicial and cultural backgrounds among business persons, increasingly intricate corporate and juridic entities serving diverse functions under the banner of 'expediency and economic efficacy' all militate in favor of a methodology for dispute resolution that comports with the parties' expectations concerning the fair administration of justice as well as the application of respective judicial cultures. Only arbitration is capable of satisfying both prongs."

[377] Brunet *et al*., supra, at 275; see also George A. Bermann, *'Domesticating' the New York Convention: The Impact of the US Federal Arbitration Act, in* INTERNATIONAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES (Giuditta Cordero-Moss eds., 2013), at 381-397.

1975 Inter-American Convention on International Commercial Arbitration[378] (the "Panama Convention"), and (iii) the U.S. Federal Arbitration Act (the "FAA").

As established in the *BG v. Argentina* case, an award may involve states that are both parties to the Panama and the New York Conventions; in such cases, according to the Article 305 of the FAA, "if a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply." But in cases where the contended arbitral award is not subject to either the Panama or the New York Convention, the domestic FAA will apply. [379] According to Article 305(2) of the New York Convention, in all other cases the New York Convention shall apply.

The United States Congress adopted Federal Arbitration Act in 1925 ("FAA"). The main goal of the FAA is to create a consistent legal framework relating to arbitration. This statute was not simply an arbitration limiting law, but rather one that encouraged the parties to arbitrate.[380] Although there had been persistent disagreement among the courts with respect to arbitration, the FAA helped reduce the hostility to arbitration agreements in the U.S.[381]

Although there was a time when the judiciary was hostile to arbitration, the FAA was an important step in putting arbitration agreements on equal footing with other contracts. [382] The FAA proved to be a turning point for arbitration. Arbitration agreements are now routinely

[378] The Inter-American Convention on International Commercial Arbitration (the Panama Convention) was promulgated in 1975. It is essentially a carbon copy of the New York Convention on a regional scale. The United States signed the Panama Convention in 1980; see Robert B. von Mehren, *The Enforcement of Arbitral Awards under Conventions and United States Law*, 9 YALE J. INT'L L. 342 (1983), at 346.

[379] The provisions of the Panama Convention are essentially the same as those of the New York Convention. The Panama convention does not distinguish between foreign and domestic awards. Article 5 of the Panama Convention provides for the same defenses as Article V of the New York Convention.

[380] THOMAS CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION (2009), at 23; For a detailed discussion on the Arbitration Law in the United States, see also IAN R. MACNEIL, AMERICAN ARBITRATION LAW, REFORMATION-NATIONALIZATION-INTERNATIONALIZATION (1992); LOUKAS A MISTELIS & STARVROS L. BREKOULAKIS, ARBITRABILITY INTERNATIONAL & COMPARATIVE PERSPECTIVES (2009).

[381] For detailed discussions, see Thomas E. Carbonneau, *Arbitration Fundamental: The Assault on Judicial Deference,* 23 AM. REV. INT'L ARB. 417 (2012); Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates,* 14 CARDOZO J. CONFLICT RESOL. 593 (2013); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act,* 63 CASE W. RES. 91 (2012); For reform attempts to change the law and some anti-sentiment approaches in the United States, see generally, Thomas E. Carbonneau, *Arbitracide: The Story of Anti-Arbitration Sentiment in the U.S. Congress,* 18 AM. REV. INT'L ARB. 233 (2007); Thomas E. Carbonneau, *The Revolution in the Law through Arbitration,* 56 CLEV. ST. L. REV. 233 (2008).

[382] TOM CARBONNEAU, CASES AND MATERIAL ON COMMERCIAL ARBITRATION (1997), at 38. "The FAA ended the era of would-be judicial hostility to arbitration in the United States.", see also Wilson, supra, at 92; see also AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, at 1746 (2011).

enforced.[383] It is formulated as a special law, which offers safeguards for legal procedures and limits the extent of arbitration to distinct situations.[384] The FAA stands as a dispute resolution method, which took time, as admitted by US courts, to come into its well-deserved place.[385] The U.S. courts acknowledged that the FAA reflects a "liberal federal policy favoring arbitration.[386]

In 1970, the U.S. accepted the New York Convention as of enactment of Chapter 2 to the FAA, in which the New York Convention is codified. The acceptance of the New York Convention and the amendment of the FAA had a considerable effect on the arbitration practice in the U.S.387 As the U.S. Supreme Court noted that "the principle purpose underlying American adoption and implementation of it [the Convention], was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[388]

The U.S. Courts have acted in accordance with the new law. But although the public policy defense continued to be a hurdle for the arbitration, with the increase of arbitral practice[389], it didn't last long. Today, the U.S. Courts has gradually adopted a narrow concept of public policy with regard to enforcement of arbitral awards.[390]

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[383] Wilson, supra, at 93. See also Todd Weiler, Heather Bray & Devin Bray, *Are United States Courts Receptive International Arbitration?*, 27 (4) AM. U. INT'L L. REV., 870 (2012), at 892.

[384] Carbonneau, The Law and Practice of Arbitration, supra, at 24.

[385] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 1985, at 473. As the Certiorari Appeal court stated: "… and, we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

[386] AT&T Mobility LLC v. Concepcion, at 1745.

[387] See generally, Abby Cohen Smutny & Hansel T. Pham, *Enforcing Foreign Arbitral Awards in the United States: The Non- Arbitrable Subject Matter Defense*, 25(6) J INT'L ARB., 658 (2008); See also Quigley Leonard, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L. J., 1049 (1961); Robert B. von Mehren & Michael E. Patterson, *Recognition and Enforcement of Foreign-Country Judgements in the United States*, 6 LAW & POL'Y INT'L L BUS., 37 (1974), at 61.

[388] Scherk v. Alberto-Culver Co., supra.

[389] Wilson, supra, at 92. Arbitration is omnipresent. American businesses have incorporated mandatory arbitration agreements into all types of contracts. See also Carbonneau, The Revolution in Law Through Arbitration, supra. Carbonneau discussed the spread of arbitration to the point of touching on "nearly all civil disputes." Examples are disputes between securities firms and their investors and employees, broad employment disputes, and consumer disputes, etc.

[390]Mistelis & Brekoulakis, supra, at 50; see also Antoine Kirry, Arbitrability: Current Trends in Europe, 12(4) ARB. INT'L. 373 (1996); Hakan Berglin, *The Application in United States Courts of the Public Policy Provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 4 (2) DICK J OF INT'L LAW 167 (1986). It is generally accepted that the decisions as persuasive evidence for a very narrow construction of the public policy provision. In fact, according to some commentators, "the courts have given the public policy defense so narrow a

4.3. Recognition and Enforcement of Arbitral Awards in the U.S.

The FAA provides grounds for refusal of arbitral awards.[391] But the introduction of the New York Convention was an important step for the internationalization of the U.S. legal system. Almost fifty years have passed since the United States accepted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). A considerable movement in favor of acceptance of the Convention came to light in the United States in early 1960's; however, it had to wait until the Senate to consent in 1968 and its implementation in 1970.[392]

Generally, there has been a strong direction favoring arbitration[393] and the enforcement of arbitral awards in the United States.[394] It is apparent from a number of federal cases that the U.S. courts have applied the exceptions prescribed in the New York Convention prior to the stages of confirmation, recognition and enforcement.[395] But it is now widely accepted by the U.S. courts

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construction that it now must be characterized as a defence without meaningful definition [and consequently leaves] the defence pragmatically useless if not altogether non-existent."

[391] Section 10 of the FAA: (1) Where the award was procured by corruption, fraud, or undue means. (2) Where there was evident partiality or corruption in arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced.(4)Where the arbitrators exceeded their powers, or so imperfectly execute them that a mutual, final, and definite award upon the subject matter submitted was not made.

[392] Berglin, supra, at 168. After the necessary implementing legislation was enacted, the United States deposited the instrument of accession with the Secretary-General of the United Nations on September 30th, 1970.

[393] Scherk v. Alberto-Culver Co., supra. In the context of an international transaction and arbitrability, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, supra. See also Robert Coulson, *So Far, So Good: Enforcement of Foreign Commercial Arbitration Awards in United States Courts, in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION (Julian D.M. Lew eds., 1987) at 358. "The Supreme Court has been strongly supportive of commercial arbitration, setting aside state statutes that stood in the way."

[394] As demonstrated in one of the recent cases, BG Group plc v. Republic of Argentina, 572 U.S. (2014).

[395] Fotochrome Inc. v. Copal Co., 517 F.2d 512 (2d Cir. 1975). In Fotochrome demonstrated a potential conflict between the Convention policy favoring enforcement of foreign awards and the policy of the United States Bankruptcy Act. The dispute arose out of a contract between a New York and a Japanese corporation. In accordance with a provision of the contract, the dispute was referred to arbitration in Japan. The New York corporation filed for an arrangement under chapter XI of the Bankruptcy Act in New York. Soon thereafter, the federal bankruptcy judge issued an order staying all proceedings by creditors, including pending arbitrations. The arbitration proceeded and an award was rendered in favor of the Japanese corporation. The bankruptcy judge ruled that because of his restraining order, he was not bound by the decision of the arbitrators but had power to reconsider the merits of the underlying dispute. The United States District Court, then affirmed by the Appellate Court, reversed the ruling of the bankruptcy judge. The District Court hold that the bankruptcy judge lacked jurisdiction over the Japanese corporation, the award was to be granted the same finality in the United States courts as it had been allowed in the Japanese courts. It clearly expressed a strong policy in favor of international arbitration and a narrow construction of the public policy provision. See Bergling, supra, at 170.

that these exceptions shall be applied after an award has been rendered.[396] The U.S. courts have been consistently acted on a pro enforcement basis and rarely refused the enforcement of the foreign arbitral awards.

The arbitral award sought to be enforced needs to be claimed from a federal district court to have the award recognized and enforced against the losing party under Article V of the Convention and Section 207 of the FAA. Nevertheless, a distinction needs to be done between a "foreign" arbitration award and a "non-domestic" award.[397] Both types of awards are international; however, the former is an award made in another country and enforced in the United States and the latter is an award made and enforced in the United States. It is important because the enforcement of a non-domestic award may meet defenses available under both the New York Convention and the FAA (Chapter 1).[398] Under Section 207 of the Convention Act, the court "shall confirm the award unless it finds one of the grounds for refusal or deferral or recognition or enforcement of the award specified in the said Convention."[399]

As will be seen in the following sub-sections the judicial practice of the U.S. courts have adopted "construed narrowly"[400] defenses when considering enforcement of the foreign arbitral award. A "pro-enforcement bias" has been established under Article V of the Convention by the U.S. courts.[401] Consequently, foreign arbitral awards have been rarely refused to enforce in the United States.

4.4. The Concept of Public Policy in the U.S.

The concept of public policy[402] as a ground for refusal of arbitral awards in the meaning of the New York Convention is codified in §207 of the FAA. According to the Article 207, "court shall

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[396] Mélida Hodgson & Anna Toubiana, *IBA Public Policy Project – Country Report, USA, March 31, 2015*, INTERNATIONAL BAR ASSOCIATION (May 2nd, 2018, 2:40 p.m.) https://www.ibanet.org/Document/Default.aspx?DocumentUid=B8552DD7-0511-4E25-BFA7-A4D4FB1E67A4

[397] Brunet *et al*., supra, at 276.

[398] *Id*. This distinction is also explained as "primary" and "secondary" jurisdiction. In case of a "foreign" award, a court in the United States has "secondary" jurisdiction. The court could only decide the award whether to enforce under the Article V of the Convention. But in case of a non-domestic award, the court where the award was made has "primary" jurisdiction. This court can refuse the enforcement under domestic arbitration law pursuant to Article V(1)(e) of the Convention.

[399] There are two types of grounds specified in Article V; (i) under Article V (1) the party must raise the grounds for refusal, (i) the grounds under Article V (2) that may be raised by a party or *sua sponte* by the court.

[400] Parsons & Whittemore v. Société Générale; see also Redfern & Hunter, supra, at 30.

[401] Brunet *et al*., supra, at 286.

[402] Berglin, supra, at 167; Stewart E. Sterk, *Enforceability of Agreement to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV., 481 (1981), at 482; Kent Murphy, *The Traditional View of Public Policy and Order Public in Private International Law*, 1 GA. J. INT' L & COMP, L. 591 (1981); Kenneth-Michael Curtin, *Redefining Public Policy in International Arbitration of Mandatory National Laws*, 64 DEF. COUNTS. J. 271 (1997); Dennis G. Terez, *International Commercial Arbitration and International Public Policy*, 81 AM. SOC'Y INT'1 L.

confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." Thus, the concept of public policy as indicated in Article V (2) (b) of the New York Convention is directly applicable in the United States.[403] Although the FAA does not specifically deal with the term public policy, the U.S. courts has admitted public policy as a common law ground for refusal of arbitral awards.

The Article V(2)(b) reads as follows; "Recognition and enforcement of the award may be refused, …the award would be contrary to the public policy of that country." Although the Convention categorized no specifics as to what "contrary to the public policy of that country" may mean, the U.S. case law has provided extensive precedents applying the exception. The main proposition of these cases is that limiting the scope of the public policy concept in order to avoid undermining the twin goals of arbitration; namely, settling disputes efficiently and avoiding long and expensive litigation.[404]

As affirmed in many cases before U.S. courts, "public policy" and "national policy" are not synonymous.[405] Arbitral award may be enforced despite any conflict with U.S. foreign policy.[406] Foreign policy disputes with another country are not enough to overcome the "supranational" policy of providing predictable enforcement of international arbitral awards.[407] This is also the case where enforcement would conflict with U.S. sanctions.[408]

It is argued that U.S. courts have interpreted the public policy exception very narrowly.[409] The narrow definition makes public policy defense hardly succeed in practice. As Judge Cardozo

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PROC. 372 (1987); Jonathan H. Pittman, *The Public Policy Exception to the Enforcement of Foreign Judgments*, 22 VAND. J. TRANSNAT'L 1, 969 (1989).

[403] For a detailed discussion on the dialogue between the U.S. Arbitration Law and the New York Convention see Martinez-Fraga, supra, The American Influence on International Commercial Arbitration, at 151.

[404] Ameropa AG (Switzerland) v. Havi Ocean Co. LLC (United Arab Emirates), [2011] 10 CIV. 3240 (TPG); see also Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 90 (2d Cir. 2005).

[405] Belship Navigation, Inc. v. Sealift, Inc.,1995 U.S. Dist. Lexis 10541, 1995 WL 447656 (S.D.N.Y. July 28, 1995).

[406] Antco Shipping Co., Ltd. v. SIDERMAR S. P. A., 417 F. Supp. 207 (S.D.N.Y. 1976), at 209.

[407] Parsons & Whittemore v. Société Générale, supra, at 974. "In equating 'national' policy with United States 'public policy,' the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis."

[408] National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 819-20 (D. Del. 1990).

[409] Ameropa AG v. Havi Ocean Co., supra; Berglin, supra, at 168: "Although the case law regarding the interpretation of the public policy defense still is sparse, United States courts undoubtedly have expressed a willingness to construe the provision narrowly. Thus, it has been said that a foreign award made in accordance with the Convention is treated much like a judgment under the Full Faith and Credit Clause of the United States Constitution." See also other commentators for 'narrowly' interpretation: Ehrenhaft, *Effective International Commercial Arbitration*, 9 L. & POL INT'L BUS. 1191 (1977); Hans Harnik, *Recognition and Enforcement of Foreign*

argued that such an exception operates only when "some fundamental principle of justice" and "some prevalent conception of good morals, some deep-rooted tradition of the common wealth is at stake."[410] Public policy exception is focused on the fundamental "cause of action on which the judgment is based," rather than on any effect enforcement of judgment may have.[411]

The concept of public policy has been gradually interpreted by U.S. courts. General attitude towards public policy of the U.S. courts appears as favoring recognition and enforcement of foreign arbitral awards. It appears that courts generally consider the New York Convention bases for recognition and enforcement.[412]

The most referenced judgment concerning the public policy is the judgment of the Second Circuit of the United States Court of Appeals in Parsons case.[413] In the words of the court, "[e]nforcement of foreign arbitral awards may be denied on [the basis of public policy] only where enforcement would violate the forum state's most basic notions of morality and justice."[414] Not only U.S. courts but also several courts outside the U.S. have mentioned of this citation when considering the public policy exception.415 As also affirmed in recent cases, public policy defense rises in case of "a judgment is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.'"[416]

Arbitral Awards, 31 AM. J. COMP. L. 703 (1983); CE Cosca & JJ Zimmerer, *Judicial Interpretations of Foreign Arbitral Awards Under the U.N. Convention*, 8 LAW & POL'Y INT'L BUS., 737 (1976); Michael Quilling, *The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: A North-South Perspective*, 11 (3) GA. J. INT. & COMP. L. 635 (1981).

[410] Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198 (1918).

[411] Bachchan v. India Abroad Publications Inc., 154 Misc. 2nd 228, 585 N.Y.S. 2d 661 (Sup. Ct. 1992). The court refused to recognize judgment based on English libel cause of action that conflicted with First Amendment. Some commentators argued that "the courts have given the public policy defense so narrow a construction that it now must be characterized as a defense without meaningful definition. The defense pragmatically useless if not altogether nonexistent." Harnik, supra, at 704.

[412] Hodgson & Toubiana, supra, at 3.

[413] Parsons & Whittemore v. Société Générale case is very illustrative for how U.S. courts have conceptualized the public policy exception. This case will be examined in the following sub-sections.

[414] Parsons & Whittemore v. Société Générale.

[415] Traxys Europe S.A. v. Balaji Coke, supra; Petrotesting Colombia S.A & Souteast Investment Corporation v. Ross Energy S.A., [2011] SUPREME COURT OF JUSTICE, COLOMBIA; Hebei Import and Export Corporation v. Polytek Engineering Company Limited, [1999] COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION,YEARBOOK XXIV, (1999)

[416] Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981); TermoRio S.A. E.S.P. v. Electranta S.P., 487 F. 3d 928 (D.C. Cir. 2007), at 938; see also Corporación Mexicana de Mantenimiento Integral v. Pemex Exploración Producción, No. 13-4022 (2d Cir. 2016); Fed. Treasury Enter Sojuzplodoimport v. Spirits Int'l B.V., 809 F.3d 737, 743 (2d Cir. 2016).

Additionally, the U.S. courts interprets the Art. V(1)417 of the New York Convention as having a "public policy gloss."[418] There have been cases where enforcement of the foreign arbitral awards have been denied by which courts using the public policy review while explaining the Art. V(1) of the Convention.[419] In this way, the U.S. courts have set a public policy exception into article V(1) of the Convention.

Lastly, arbitrability and public policy overlap in the arbitration practice.[420] Arbitrability involves whether the "subject matter can be lawfully submitted to arbitration."[421] In cases where a subject matter is considered to be crucial to public interest, defenses might be invoked.[422] In the United States, this arbitrability problem has been raised in the fields of antitrust law, securities law, patent law, etc. It was argued whether the arbitral tribunals could settle the statutory claims.[423] But after adopting the New York Convention, the United States courts embraced an international perspective on transnational cases. As a result, disputes arising from statutory claims as securities and antitrust have become arbitrable in an international context. The U.S. court have adopted a more resilient policy and reduced the application of non-arbitrability defense in international commercial arbitration.

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[417] New York Convention Art. V (1) regulates non-enforcement on grounds of (i) incapacity, (ii) procedural unfairness, (iii) the award is outside the scope of the terms of reference, (iv) the proceedings were inconsistent with the parties' agreement, and (v) the award has been set aside or suspended by a competent authority.

[418] Reed L. Freda J., *Narrow Exceptions: A Review of Recent U.S. Precedent Regarding the Due Process and Public Policy Defenses of the New York Convention,* 25 (6) J INT'L ARB, 656 (2008); See also PEDRO J. MARTINEZ-FRAGA & C. RYAN REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW, RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL AREA (2015), at 220.

[419] In the TermoRio S.A. v. Electranta S.P., the D.C. Circuit Court of Appeals overruled enforcement because the award had been set aside by a competent authority (Courts of Colombia). The court in TermoRio case referred the case of Baker Marine v. Danos and Curole Marine, in which the Second Circuit affirmed a decision of the SDNY not to enforce an award that had been set aside by the Nigerian Federal Court. See also Corporación Mexicana de Mantenimiento Integral v. Pemex Exploración y Producción, No. 13-4022 (2d Cir. 2016) 962 F. Supp 2d 642, at 656-657. The district court noted that an arbitration award may be confirmed, despite nullification in the primary state, where the nullification judgment "violate[s] . . . basic notions of justice."

[420] The arbitrability of disputes classified in two categories: substantive and contractual. See Carbonneau, supra, Cases and Materials on Commercial Arbitration, at 18; see also Karl-Heinz Bockstiegel, *Public Policy and Arbitrability, in* COMPARATIVE ARBITRATION: PRACTICE AND PUBLIC POLICY IN ARBITRATION (Pieter Sanders eds., 1987), at 181.

[421] Carbonneau, supra, Cases and Materials, at 18; Heather R. Evans, *The Non-arbitrability of Subject Matter Defense to Enforcement of Foreign Arbitral Awards in United States Federal Courts,* 21 N. Y. U. J. INT' L. & POL., 329 (1989).

[422] Brunet *et al*., supra, at 287.

[423] William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration,* 63 TUL. L. REV. 647(1989).

4.5. The Grounds for Refusal Based on Public Policy

Although the United States federal courts interpreted the public policy concept for a narrow construction, the particular facts in each case have to be included while interpreting. It will be the purpose of this part to analyze some of the cases decided to date. This part looks into whether the facts of the cases have provided a real test of how the courts interpreted the cases in enforcing foreign arbitral awards, particularly in situations where such enforcement would be in considerable conflict with substantial legal or moral notions.

4.5.1. Substantial Grounds

Although arbitration of international commercial disputes has become a worldwide practice, it still requires the assistance of national courts to enforce the arbitral awards. This part examines the U.S. case law that deals with substantive public policy concerns. Substantive public policy issues are related with the merits of arbitral awards. Substantive grounds on public policy have included; foreign policy- violations of U.S. Sanctions, criminal liability, excessive interest, violations of competition laws, violations of securities rules, antitrust law.

4.5.1.1. Foreign Policy: Violations of U.S. Sanctions

Parsons case is illustrative for how U.S. courts have conceptualized the public policy exception. In the Parsons case[424], an American corporation (Parsons & Whittemore ("Overseas")), and an Egyptian corporation (Societe Generale de L'Industrie du Papier ("RAKTA")), entered in a contract for the construction and operation of a paper mill in Egypt. When a dispute surfaced between the parties, RACTA brought the case before the arbitral tribunal under the Rules of the International Chamber of Commerce ("ICC Rules"). RACTA claimed for damages for breach of the contract. The arbitral award was rendered in favor RACTA. The award was then confirmed by United States federal district court.

Overseas appealed the case, claiming that the enforcement of the award would violate U.S. public policy.[425] The United States Court of Appeals for the Second Circuit dismissed the Overseas' objection. The Court of Appeals held that the public policy provision of Article V(2)(b) New York Convention should be understood narrowly. It delivered the aforementioned often-quoted interpretation of public policy, which has become a standard; "enforcement of

[424] Parsons & Whittemore v. Société Générale.

[425] Overseas, in fact, argued five grounds for the refusal of the award alongside with the public policy defense: (i) the enforcement of the award would violate US public policy; (ii) the award represents a decision on matters not appropriate for arbitration; (iii) the Arbitral Tribunal denied Overseas an adequate opportunity to present its case; (iv) the award is predicated upon the resolution of issues outside the scope of the contractual agreement for arbitration, and (v) the award is in manifest disregard of the law. In regard with these objections; the Court found no violation of due process under Article V(1)(b) NYC and found no excess of the Tribunal's jurisdiction under Article V(1)(c) NYC. Finally, the Court declined to determine whether there was an implied defense of "manifest disregard of the law" under the NYC, instead holding that even if there was such a defense, Overseas had failed to establish it.

foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."[426]

In the Ameropa AG v. Havi Ocean Co. case[427], Havi Ocean raised the public policy defense against the enforcement of the arbitral award. It claimed that the award violated U.S. sanctions. The Plaintiff, Ameropa-- Swiss company, and the Defendant, Havi Ocean Co.-- a United Arab Emirates company entered into a contract for sales of the Iranian sulphuric acid. A dispute arose between the parties. Because of the arbitration clause prescribed in the contract, the Plaintiff started arbitration proceedings against the Defendant.[428]

The Arbitral Tribunal held on the side of the Plaintiff. Although the Plaintiff sought to enforce the award in the United Arab Emirates, it was not successful at that time. The Plaintiff subsequently sought to enforce the award before the U.S. courts. The Defendant immediately opposed the enforcement on the ground that the enforcement of the award would be contrary to United States and New York public policy.

The Defendant argued that the award emerged from a violation of the United States sanctions against Iran. But applying the case law[429], the Federal Court for the Southern District of New York held, in contrast, that involvement of foreign policy disputes do not fulfill the threshold of where "enforcement would violate the forum state's most basic notions of morality and justice."[430] The court also reiterated that Ameropa was a Swiss company and it did not subject to U.S. sanctions.[431] According to the court a potential violation of U.S. sanctions would not rise to the high level needed to constitute a violation of public policy.[432]

4.5.1.2. Criminal Liability

In the case of AO Techsnabexport v. Globe Nuclear Services[433], the court dismissed the criminal liability claim where "the party opposing enforcement claimed that the award improperly imported and endorsed the conclusions of foreign prosecuting authorities." The U.S. court

[426] Parsons & Whittemore v. Société Générale, at 974.

[427] Ameropa AG v. Havi Ocean.

[428] Parties made the contract in 2007. The dispute brought to the arbitration proceedings in 2009 before the Arbitral Tribunal of the Chamber of Commerce of Hamburg in Hamburg, Germany.

[429] The Court held that while Article V(2)(b) NYC does not specify what "contrary to the public policy" may mean, case law applying the public policy exception to enforcement provides guidance.

[430] As to the public policy exception generally, it is granted "only where enforcement would violate the forum state's most basic notions of morality and justice." The court cited from the often-quoted case of Parsons & Whittemore v. Société Générale.

[431] See also, National Oil Corp. v. Libyan Sun Oil Corp., 733F Supp. 800 (1990). "[C]oncerning an award whose recognition and enforcement was alleged to violate the United States sanctions against Libya"

[432] Ameropa AG v. Havi Ocean.

[433] AO Techsnabexport v. Globe Nuclear Services and Supply GNSS Lmt., No. 09-2064, (5th Cir. Dec. 15, 2010).

considered that referring the result of a foreign criminal proceeding in the arbitral award did not offend the notion of public policy.[434] The Arbitral Tribunal determined the validity of the contract unsettled the outcome of a related criminal investigation in Russia. The Tribunal issued a final award in favor of Tenex after the Russian proceedings finding that the contract was invalid under Swedish law.

The tribunal's finding did not constitute an assessment of criminal law. Furthermore, the tribunal did not cite to Russian criminal law. The U.S. court, which the enforcement of the award was sought, held that the arbitral tribunal's consideration of evidence from the Russian criminal investigation did not violate the public policy interest in protecting the integrity of international arbitration by "mimicking" a Russian criminal Court.[435]

4.5.1.3. Excessive Interest Rate

In Laminoirs v. Southwire Co. case[436], the Federal District Court for the Northern District of Georgia was faced with the question of enforcing an award which granted compensatory damages and punitive damages. The dispute arose from Southwire's refusal to pay for certain quality of steel wire. Laminoirs submitted the dispute to the ICC for arbitration. The arbitral tribunal ruled against Southwire and decided Southwire to compensate Laminoirs for the higher world market price and interest. The tribunal ordered two interest; firstly, French rate for the awarded sums and secondly an additional 5% interest per year for the delay in receiving the awarded sums.[437]

Laminoirs brought the arbitral award to be enforced in the United States. The immediate response of Southwire was that the French rate was usurious so it violated public policy.[438] Although the French rate was higher than the rates in U.S. Georgia, the court ruled that higher interest rate could not establish a violation of the "forum's most basic notions of morality and justice."[439] But the court discussed the additional 5% interest rate in deep and separately analyzed the issue of escalated interest. The court found that although the additional five percent interest seems to have been in line with the French law, there were no reasonable relations to the

[434] See also Shearson/American Express, Inc. v. Mcmahon, 482 U.S. 220 (1987).

[435] International Bar Association Subcommittee, *Recognition and Enforcement of Arbitral Awards, Study on Public Policy, Country Reports*, INTERNATIONAL BAR ASSOCIATION (May 14th, 2018, 7:00 p.m.) https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx

[436] Laminoirs v. Southwire Co., at 1068, 1069.

[437] *Id.* "Increasing to fifteen and a half percent and fourteen and a half percent respectively after two months from the date of notification of the award."

[438] *Id*., at 1066.

[439] *Id*., at 1069.

damages Laminoirs was affected, which caused by the delay in receiving the awarded sums. The court considered such interest as to be punitive damages.[440]

According to the court, the additional interest was "penal rather than compensatory."[441] The court argued that the function of interest was to compensate the demander for not having the sum awarded for a period of time. Interest rates did not display actual damages. Furthermore, such compensation had to be reasonable. The court, finally, ruled that the award was partly[442] contrary to the public policy and could not be enforced. Although the court permitted to enforce the initial French interest rate, it declined the part of additional five percent interest rate to be enforced.[443] This case was one of the rare examples which the U.S. courts refused the enforcement of foreign arbitral awards.

Some authors found this decision a bit 'surprising'.[444] According to Berglin, the court's argument was not convincing. In addition, it appeared that the arbitral tribunal relied on a contractual choice of law clause agreed upon between the parties. Berglin argued that the court must have decided the case and within the category of "the most basic notions of morality and justice."[445]

4.5.1.4. Exculpatory Clause

In MIS Breman v. Zapata Off-Shore Co.[446], the U.S. courts one more time pointed out the narrow approach of public policy. A towage contract was signed by the two parties, also including arbitration as a resolution of any disputes. The contract included an exculpatory clause. The dispute was brought to an arbitral tribunal. The opponent party claimed that although the exculpatory clause was enforceable in the foreign forum, it conflicted with public policy. The U.S. Supreme Court reached the conclusion that although an exculpatory clause was contrary to U.S. public policy, it noted that "we cannot trade and commerce in world markets and

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[440] Coulson, supra, at 358, "In the United States, arbitrators are not authorized to order penalties or punitive damages."; Berglin, supra, at 180. "It seems to be a well-settled rule that punitive damages are not recoverable in actions for breach of contract, even if agreed upon between the parties. As a consequence of this policy, domestic arbitral awards granting punitive damages have been refused enforcement" for reasons elaborately stated in Publishers' Association v. Newspaper and Mail Deliverers' Union, 280 A.D. 500, 114 N.Y.S.2d 401 (N.Y. App. Div. 1952). Retrieved from Berglin, supra, at fn 175.

[441] Laminoirs v. Southwire Co., at 1069. "a foreign law [would] not be enforced if it [were] penal only and [related] to the punishing of public wrongs as contradistinguished from the redressing of private injuries."

[442] One of the distinguishing matters of this particular case was, it was enforced but rather partly refused. See McLaughlin & Genevro, supra, at 263 (1986); Coulson, supra, at 358.

[443] Laminoirs v. Southwire Co., at 1069.

[444] Berglin, supra, at 180. See also Bouzari, supra, at 216. In the words of Bouzari, Laminoirs decision was a "minor aberration."

[445] Berglin, supra, at 181.

[446] MIS Breman v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

international waters exclusively on our terms, governed by our laws, and resolved in our courts."[447]

4.5.1.5. Securities

The U.S. Supreme Court in Wilko v. Swan in 1953, ruled that the claims brought under the Securities Act of 1933 were non-arbitrable.[448] The court noted that the Securities Act prohibited waiver of a judicial remedy in favor of arbitration. The court concluded that arbitration was not available for settling securities disputes. But the court has changed its view in the later cases.

In the Scherk v. Alberto-Culver Co.[449], Alberto-Culver (American corporation) took legal action against Fritz Scherk (German citizen), under the Securities Act of 1934 for alleged fraudulent representations. The sale agreement included transferring the ownership of Scherk's enterprises to Alberto-Culver. When Alberto-Culver realized that the trademarks were not free from substantial encumbrances, it wanted to terminate the agreement on the grounds of fraudulent representations.[450] Alberto-Culver sued Scherk for damages. Schreck counterclaimed that the court has no jurisdiction, the dispute should be referred to arbitration. Although the District court dismissed the Scherk's claim, later on, the Supreme Court held that "a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[451]

This decision was another important step for the U.S. courts to acknowledge that parties to international contracts has independent rights to select the entire structure of the dispute resolution procedure. The Supreme court rejected a parochial concept that all disputes must be resolved under domestic laws and in U.S. courts.[452] The Court noted that refusing enforcement would "surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."[453] This was another contribution of the U.S. accession to the New York Convention to international arbitration in the United States. Scherk decision draw a line between the national interest and international policy considerations.

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[447] *Id*.

[448] Martinez-Fraga, supra, The American Influence on International Commercial Arbitration, at 16

[449] Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); see also a detailed discussion at Berglin, supra, at 172; Martinez-Fraga, supra, The American Influence on International Commercial Arbitration, at 20.

[450] According to Alberto-Culver Co., that action violated Section 10 (b) of the Securities Exchange Act of 1934.

[451] Scherk v. Alberto-Culver Co., at 506.

[452] *Id*., at 509.

[453] *Id*., at 516.

4.5.1.6. Antitrust Law

The main question of the *Mitsubushi v. Soler* case[454] was arbitrability of antitrust claims emerging from an international commercial transaction.455 Mitsubishi (a Japanese automobile manufacturer) and Soler (a distributor) reached an agreement, allowing Soler to distribute Mitsubishi's vehicles within certain places. When Soler could not perform the contractual minimum sales commitments as referred in the agreement, some purchase orders were cancelled. Soler offered to sell some vehicles in the U.S. and Latin America. But Mitsubishi did not agree on the offer, and brought the dispute to arbitration and before the U.S. District court.[456]

According to the arbitration clause in the agreement, arbitration was to be in line with the rules of the Japan Commercial Arbitration Association and the laws of Switzerland were to be applied to the contract. Mitsubishi claimed nonpayment for the stored vehicles, storage penalties, damage to Mitsubushi's warranties and other breaches of the agreement.[457]

Soler counterclaimed that Mitsubishi had violated antitrust law and fair-trade regulations.[458] Furthermore, Soler claimed that since the case involves public policy antitrust issues, it could not be resolved by arbitration. After a couple of conflicting decisions by the district and circuit courts, the case was finally brought before the U.S. Supreme Court.[459] The U.S. Supreme Court endorsed the arbitrability of antitrust claims. The court pointed out that the agreement between parties included "freely negotiated contractual choice-of-forum provisions." The court further argued that "[it] is reinforced by the emphatic federal policy in favor of arbitral dispute resolution."[460] The Court noted that when the international transaction was in question it is necessary for the domestic courts to support the notions of arbitrability.[461]

The court one more time embraced a narrow approach of international public policy favoring commercial arbitration. Although the antitrust regulations are strictly enforced in the

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[454] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985); see also for a detailed discussion on the case, Martinez-Fraga, supra, The American Influence on International Commercial Arbitration, at 30; Robin A. Roth, *Application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 8 (2) FORDHAM INT'L L J, 194 (1984), at 220.

[455] See also for existence of restrictive trade clause; La Société Nationale v Shaheen Natural Resources Co., 585 F. Supp. 57 (S.D.N.Y. 1983).

[456] Mitsubushi v. Soler.

[457] *Id*.

[458] Soler also claimed that Mitsubushi had violated common law fraud, breach of contract, libel, and interference with contractual relations.

[459] The District Court relied upon the Supreme Court's decision in Scherk to compel

arbitration. But the First Circuit Court of Appeals overruled the District Court's judgment.

[460] Mitsubushi v. Soler at 615.

[461] *Id*., at 639. "It will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."

U.S., and non-arbitrability of the antitrust issues viewed as a matter of public policy[462]; the court favored the international arbitration in which the dispute was purely international. In the words of the court, "the antitrust issues would not be arbitrable if this were a purely domestic dispute, but holds that the international character of the controversy makes it arbitrable."[463] The court also noted that "concerns of international comity, respect for … the sensitivity to the need of the international commercial system for predictability in the resolution of disputes required that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."[464]

Scherk and Mitsubushi cases were the landmark cases in which the U.S. Courts expanded the scope of arbitrability of statutory claims. Since then the practice of arbitration spread to many other fields which once considered non-arbitrable.[465]

4.5.1.7. Waiver of Prospective Statutory Rights

In *Puliyurumpil Mathew Thomas v. Carnival Corporation* case[466], the dispute was between a cruise ship employee (Mathew Thomas) and the cruise ship operator (Carnival).[467] It concerned the injuries suffered by Thomas during his employment. The employment contract contained an arbitration clause.[468] Despite the arbitration clause, Thomas brought a statutory claim for damages resulting from his injuries in the Florida State Court. Carnical argued against and the District Court for the Southern District of Florida ruled to compel arbitration. Thomas counterclaimed that the enforcement of the arbitration clause would violate public policy.[469]

The case was brought before the United States Court of Appeals for the Eleventh Circuit. The Appeal Court overruled the compelling arbitration decision. The Court found that although all of the jurisdictional prerequisites under the NYC were met470, Article V(2)(b) of the New

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[462] In Mitsubushi v. Soler case, the Supreme Court referred to the 'public interest' where the arbitrability issues and international policy matters came across.

[463] Id., at 658.

[464] *Id*.

[465] Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALBANY L. REV., 905 (1996). Because of the Mitsubishi ruling, non-arbitrability of antitrust claims is no longer a handy defense for the parties who aspire to stop enforcement of a foreign arbitral award.

[466] Puliyurumpil Mathew Thomas v. Carnival Corporation, 07-21867-CV-JAL (11th Circuit, July 1, 2009).

[467] Joseph R. Brubaker, *Arbitral & Judicial Decision: The Prospective Waiver of a Statutory Claim Invalidates an Arbitration Clause: The Eleventh Circuit Decision in Thomas v. Carnival Corp.,* 19 AM. REV. INT'L ARB. 309 (2008).

[468] The clause provided arbitration in the Philippines under Panamanian Law.

[469] Thomas v. Carnival,

[470] There was an agreement in writing with respect to several, but not all, of the claims; the agreement provided for arbitration in the territory of a signatory of the NYC; the agreement arose out of a commercial relationship; and the commercial relationship was non-domestic.

York Convention contains an affirmative defense. In the words of the Court, "the arbitration clause required a prospective waiver of [Thomas's] rights to pursue statutory remedies without the assurance of a subsequent opportunity for review", and therefore, the dispute was not capable of settlement by arbitration. The court cited from the *Mitsubishi* case, if "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies ., we would have little hesitation in condemning the agreement as against public policy."[471]

4.5.1.8. Arbitrators' Errors in Applying Law, (Manifest Disregard of Law)

The question arose whether the U.S. courts can recognize and enforce a foreign award where there are clear errors of fact or law? In short, Article V of the Convention, implemented by Section 207 of the Convention Act, does not permit such an evaluation. Although the judicially created defense of "manifest disregard of the law" is applicable to the non-domestic awards under the statutory grounds to vacate them in Section 10 of the FAA, it is arguably not applicable under Article V of the Convention.[472] Therefore, The U.S. courts refuse to review the award for mistakes of law and fact. Furthermore, they have never hold that enforcing an award with mistakes of law or fact is contrary to public policy under Article V(2)(b).

For example, in one of the recent cases before the U.S. courts; Sei Societa Esplosivi Industriali SpA ("SEI") and L-3 Fuzing and Ordnance Systems, Inc. ("Fuzing") agreed to a purchase order for certain electronic component.[473] The agreement contained an arbitration clause.[474] The arbitral award was in favor of SEI. Following this, SEI sought to confirm and enforce it in the United States District Court for the District of Delaware. Fuzing challenged the claim on three grounds: "(i) the award manifestly disregarded Swiss law; (ii) the award violated public policy; and (iii) the arbitrators had exceeded the scope of their authority." [475]

The United States District Court for the District of Delaware confirmed and enforced the Swiss arbitral award. It reached the conclusion that none of the Fuzing claims were applicable. The Court first noted that Article V of New York Convention presented the "exclusive grounds" for a refusal to recognize and enforce an award.[476] This contention has been confirmed in many

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[471] Mitsubushi v. Soler, supra, at 637.

[472] Brunet et al., supra, at 300.

[473] SEI Societa Esplosivi Industriali SpA v L-3 Fuzing and Ordnance Systems, Inc., 843 F. Supp. 2d 509 (D.Del., 2012)

[474] It extended to "[a]ny disputes or differences which may arise out of or in connection with" the purchase order. After a dispute arose between the parties, they entered into a Letter Agreement to arbitrate "[a]ll contract related disputes" in Switzerland pursuant to Swiss law and in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC").

[475] Sei v Fuzing, supra, at 7

[476] Hall Street Assoc 's, LLC v. Mattei, Inc., 552 U.S. 576, 584, 595-96 (2008)

cases.[477] According to the court, "mistake of law or fact" or "manifest disregard of the law" cannot be added as a defense.[478]

Secondly, the Court noted that refusing to enforce an award under Article V(2)(b) New York Convention was only possible where "enforcement would violate the forum state's most basic notions of morality and justice." Fuzing argued that the arbitrators had violated public policy by erroneously applying contract principles.[479] Fuzing claimed that the law applicable to the merits of the dispute was incorrectly applied by the arbitral tribunal. It further contended that the arbitrator violated public policy by finding a novation, not enforcing limitations of Fuzing's liability, not applying a force majeure provision.[480] These contentions simply introduced arbitrator error.

The court noted that, even if the Fuzing's claims was true, it did not meet the high threshold for non-enforcement of an award under Article V(2)(b) New York Convention.[481] The court concluded that "the public policy exception is a very narrow one, and it is not a back door through which to take claimed errors of contract law that cannot be taken through the front door."[482]

Finally, the Court rejected Fuzing's arguments, under Article V(1)(c) NYC, that the arbitrator's decision exceeded its jurisdiction. The Court held that the arbitration clause[483] included broad jurisdiction to resolve the dispute. According to the court the award was not beyond the scope of the arbitrators' authority.[484]

Similarly, in Brandeis *Intsel Ltd. v. Calabrian Chemicals Corp.*[485], the United States District Court held that the "manifest disregard of the law" defense was not available because it

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[477] Aria v. Underwriting Members of Syndicate, 618 F.3d 277, 291 (3d Cir. 2010).

[478] Sei v Fuzing, supra, at 8; see also for similar arguments: Banco de Seguros del Estado v Mutual Marine Office, Inc., 344 F.3d 255, 264 (2d Cir. 2003); M & C Corp. v Erwin Behr GmbH & Co., KG, 87 F.3d 844, 851 (6th Cir. 1996), "Nor can review for a 'manifest disregard of the law' be pigeonholed into the 'violation of public policy' basis for refusal to confirm an award contained in Article V(2)(b) of the New York Convention."

[479] Sei v. Fuzing, at 9.

[480] *Id*., at 9.

[481] *Id*.; See also for similar argument, Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306 (5th Cir. 2004), "Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention."

[482] Sei v. Fuzing, supra, at 10.

[483] The arbitration agreement clause in the Purchase Order, the Letter Agreement on arbitration and the parties' arbitral submissions.

[484] The court noted that the grant of authority to the arbitrator was broad by its terms in the parties' arbitral submission. "The words 'all' and 'contract related' suggest that a broad, and not a narrow, interpretation is appropriate. The words 'arising from' similarly suggest a broad construction." Sei v. Fuzing, supra, at 11.

[485] Brandeis Intsel Ltd. v. Calabrian Chemicals Corp., 656 F. Supp. 160, 165-67 (S.D.N.Y. 1987).

did not rise to the level of contravening public policy. The Court noted that the award displayed the arbitrators' awareness of the governing law and its application to the facts.[486] It appears from the case law, manifest disregard of the law is not a practical ground for refusing enforcement of a foreign award which was sought in the United States.[487] In another case, the U.S. court stated that in order to "vacate an arbitration award for manifest disregard of law 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."[488]

4.5.2. Procedural Grounds

This part examines the U.S. case law that deals with procedural public policy concerns. Procedural grounds on public policy have included; annulment of arbitral award, duress, violations of fundamental procedural rules; allegations of fraud; lack of impartiality; lack of reasons; and manifest disregard of the law.

4.5.2.1. Annulment of Arbitral Award

In *TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.P*. case[489], the parties TermoRio and the Electranta (a state owned public utility) entered into a power purchase agreement. According to the agreement TermoRio agreed to produce energy and Electranta agreed to buy it. The agreement included an arbitration clause. When the dispute arose, the parties submitted it to an arbitral tribunal in Colombia. The Tribunal decided in favor of TermoRio. Electranta brought the award to be set aside before the highest administrative court in Colombia. TermoRio[490] sought enforcement of the arbitration award.

TermoRio argued that, according to the Article V of the New York Convention, the United States courts have a discretion to enforce an award despite annulment in another country.[491] The United States Court of Appeals for the District of Columbia denied enforcement of the award on the grounds that recognition and enforcement must be refused if the award has

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[486] Branderies v Calabrian, supra, at 165. See also M & C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 851 (6th Cir. 1996). The Court stated that "the manifest disregard doctrine did not rise to the level of a violation of public policy that was necessary to deny confirmation of a foreign arbitral award."

[487] Daniel M. Kolkey, Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations, 22 INT'L LAW, 693 (1988).

[488] Sidarma Societa Italiana di Armamento SPA v. Holt Marine Industries, 515 F. Supp. 1302 (S.D.N.Y.), 681 F.2d 802 (2d Cir. 1981).

[489] TermoRio S.A. E.S.P. v. Electranta S.P., 487 F. 3d 928 (D.C. Cir. 2007). See a detailed discussion Pedro J. Martinez-Fraga, *On The 50th Anniversary of the New York Convention, Revisiting Annulment and Vacatur Through the Prism of In Re: Chromalloy, Baker Marine, and TermoRio,* 5 (18) REVISTA BRASILEIRA DE ARBITRAGEM, 91 (2008), at 113.

[490] There was another co-appellant; LeaseCo Group, LLC ("LeaseCo"), an investor in TermoRio.

[491] Ray Y. Chan, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy*, 17 B. U. INT'L L. J. 141 (1999).

been set aside by a competent authority.[492] The court further argued that accepting that there was a narrow public policy gloss on Article V (1)(e) of the Convention and that a foreign judgment was unenforceable as against public policy to the extent that it is "repugnant to fundamental notions of what is decent and just in the United States"[493], there remained the claimants to provide evidence that the parties' proceedings before Colombia's administrative court or the judgment of that court violated any basic notions of justice.[494]

According to the court, the administrative court in Columbia was a competent authority. Subsequently, it reached the conclusion that the arbitral award was lawfully nullified. The Court further found that the Columbian court did not violate any basic notions of morality and justice. Accordingly, there was no public policy ground on which to refuse enforcement under Article V(2)(b) of the New York Convention.[495]

This case was one of the cases where enforcement of the foreign arbitral awards have been denied by courts, using the public policy review while explaining the Art. V (1) of the Convention.[496] Enforcement in this case was not denied on V(2)(b) grounds; however, one has to acknowledge that the U.S. courts have set a public policy exception into article V (1) of the Convention. This has been denoted as 'public policy gloss' in the doctrine, which is based in principles of comity.

4.5.2.2. Duress

Enforcement would violate the country's "most basic notions of morality and justice" in case of the defendant's due process rights had been violated--for example, if defendant had been subject to coercion or any part of the agreement had been the result of duress.[497] A dispute arose between Transmarine Seaways Corporation of Monrovia ("Transmarine") and Marc Rich & Co. A.G. ("Rich") concerning a charter party. Due to an arbitration clause, the dispute was submitted to arbitration before the Arbitral Tribunal in New York. An award was rendered in favor of

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[492] Article V (1)(e) New York Convention.

[493] The court in this part cited the Tahan v Hodgson, supra, at 864.

[494] TermoRio v. Electrificadora, supra, at 507.

[495] See also, Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd. v. Danos and Curole Marine Contractors, 97-9615, 97-9617 (2nd Cir., 1999). In the Baker Marine case, the Second Circuit dismissed to enforce the arbitration awards because they had been "set aside by a competent authority of the country in which, or under the law of which, the award was made." The Court acknowledged that the contract was governed by Nigerian law and the awards were set aside by a competent Nigerian Court. As a result, the court declined to confirm the awards. Although the court did not mention the public policy exception, it was acknowledged that there was a 'public policy gloss' to Article V(1)(e) based in principles of comity.

[496] Chromalloy Aeroservices and the Arab Republic of Egypt, 939 F. Supp. 906 (D.C. Cir. 1996); Corporación Mexicana de Matenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, No. 10 Civ. 206 (AKH), 2013 WL 4517225 (S.D.N.Y. Aug. 23, 2013); Jared Hanson, *Setting Aside Public Policy: The Pemex Decision and the Case for Enforcing International Arbitral Awards Set Aside as Contrary to Public Policy*, 45 GEO. J. INT'L L. 825 (2014).

[497] Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G., 480 F. Supp. 352, 358 (S.D.N.Y. 1979).

Transmarine. It then wanted to enforce the award and brought the case before the United States District Court of the Southern District of New York.[498]

Rich, on the other hand, counterclaimed to vacate the award. Rich contented that Transmarine procured the agreement by duress. The District Court, however, confirmed the award and rejected Rich's argument. The Court held that there had been no violation of public policy under Article V(2)(b) New York Convention. The court cited the Flour Western case[499], referring that agreements exacted by duress contravene the public policy of the nation. Accordingly, duress, if established, furnishes a basis for refusing enforcement of an award under Article V (2) (b) of the Convention.[500]

The court argued that a party claiming duress has the burden to establish it. The court further noted that "the law requires an exacting standard of proof from a party claiming duress, because public policy favors the enforceability of agreements ostensibly entered into by parties willing to be bound."[501] In this particular case, Rich could not fulfill that burden. But the court's argument on duress in refusing enforcement of an award under Article V (2) (b) encounters with the validity requirement for arbitration agreements. In case which an arbitration agreement was settled under duress, enforcement could be denied under V(1)(a) of the New York Convention.

4.5.2.3. Lack of Reasoning

Prior to the ratification of the New York Convention, *Wiko v. Swan* case[502] was illustrative - alongside with the arbitrability of security claims- whether arbitrators had to provide reasoning for their judgments. In Wiko, although the U.S. Supreme Court outlined that the claim under the U.S. securities law was non-arbitrable, it pointed out that the "arbitration must make legal determinations without judicial instruction on the law and that an arbitration award could be rendered without explanation of the arbitrator's reasons and without a complete record of the proceedings."[503]

Another case related with lack of reasoning is *Daniel C. Olson ("Olson") v. Hardland Clarke Corp. ("Hardland")*.[504] Olson appealed his arbitration award, arguing that the award must be vacated "on the basis that the arbitrator failed to issue a 'reasoned opinion,' as agreed to by the parties and failed to rule on all of the evidentiary issues and claims submitted." The Appellate court, making a distinction between arbitration awards and judicial opinions, dismissed the Olson's claims.

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[498] *Id*.

[499] Fluor Western, Inc. v. G. & H. Offshore Towing Co., 447 F.2d 35, 39 (5th Cir. 1971)

[500] Transmarine v Marc Rich, supra, at 358.

[501] *Id*., at 361; McLaughlin & Genevro, supra, at 263.

[502] Wiko v Swan, 346 U.S. 427 (1953).

[503] *Id*., at 436. The Supreme Court argued that the enforcement of arbitration would decrease the extent of the protection of securities law.

[504] Daniel C. Olson v. Harland Clarke Corp., No 14-35586, US Apt C (9th Cir. 2017).

The court noted that a court must review an arbitration award on very limited grounds pursuant to the Federal Arbitration Act ("FAA"). The court cited from previous case that "arbitrators have no obligation … to give their reasons for an award."[505] The court noted that the parties' request was met by the award itself, which "included two bases for the arbitrator's determination that Harland Clarke was the prevailing party, [and] provides enough of the arbitrator's reasoning to facilitate the limited review available under the FAA."[506]

4.5.2.4. Inconsistent Testimony

International Navigation, Ltd. ("INL" as disponent owner) and Waterside Ocean Navigation Co., Inc. ("Waterside" as charterer) reached an agreement, entering into a charter party. According to the agreement Waterside agreed to hire a vessel from INL.[507] The agreement included arbitration clause. The dispute arose. The arbitrators decided in favor of Waterside, granting damages to Waterside. Waterside sought enforcement of the arbitral award before the United States District Court for the Southern District of New York. INL argued that the award was against the U.S. public policy because of the inconsistent testimony before the arbitral tribunal. The District Court and then the United States Court of Appeals for the Second Circuit, confirmed the award rejected INL's argument that confirmation would be contrary to United States public policy.[508]

The Court noted that for the recognition of an award to violate United States public policy, such confirmation must offend "the forum state's most basic notions of morality and justice." The court further argued that consideration of inconsistent testimony being contrary to the public policy "would go too far" to justify as one of the United States' most basic notions of morality and justice.[509] Although the disputed arbitral award was based on inconsistent testimony; however, the court noted that the arbitral tribunal was aware of the inconsistent testimony and no allegations of perjury was made. Consequently, the award was not against public policy.[510]

4.5.2.5. Procedural Irregularity

A dispute between China National Chartering, Corp ("China National") and Pactrans Air & Sea, INC. (Pactrans) arose when the gypsum board was damaged during transit, leading to litigation

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[505] Stead Motors of Walnut Creek v. Automotive Machinists, Int'l Ass'n of Machinists and Aerospace Workers, 886 F.2d 1200, 1206 (9th Cir. 1989); See also Biller v. Toyota Motor Corp., 668 F.3d 655, 666 (9th Cir. 2012) "Arbitrator's purported failure to provide a written decision to facilitate judicial review did not alone support vacatur under the FAA, even though such a written decision was required by the parties' agreement."

[506] Olson v. Harland, supra; See also Jamaica Commodity Trading Company Limited v. Connell Rice & Sugar Company, Inc., and L&L Marine Service, Inc., 87 Civ. 6339 US 125. US Dist. C, (S NY, 1991).

[507] Waterside Ocean Navigation Co. v International Navigation Ltd, 737 F.2d 150 (2d Cir. 1984).

[508] *Id*.

[509] *Id*., at 152.

[510] McLaughlin & Genevro, supra, at 262.

between China National and Pactrans about demurrage.[511] The agreement between the parties included an arbitration clause providing for arbitration in Beijing. China National brought the dispute to arbitration in Beijing before the China Maritime Arbitration Commission. The arbitration resulted in an award in favor of China National.[512]

China National then sought enforcement of the award before the United States courts. Pactrans counterclaimed various arguments on the validity of the arbitration agreement. Finally, Pactrans argued that confirmation of the award was contrary to public policy because the arbitral tribunal and China National were "both controlled by the Chinese Government", which indicated a conflict of interest.[513] Pactrans contended that China National's association with the Chinese Government prohibited them from obtaining a fair hearing. But the Court found it not convincing that the procedures employed by the arbitral tribunal were "indicative of a biased proceeding to substantiate a disqualifying relationship."[514]

The court concluded that Pactrans failed to show sufficient evidence that the outcome of the hearing was somehow influenced by the connection between China National and the arbitrators and showing that a bias existed. Thus, "[it] does not amount to a disqualifying claim that would be contrary to the public policy of this country."[515]

An arbitrator's impartiality is one of the fundamental requirements that must be maintained throughout the arbitration proceedings. But the appearance of bias is not sufficient to give grounds for refusal to enforce a foreign award. Alleged bias must be evidenced to resort to the public policy exception.[516]

4.5.2.6. Fraud and Corruption

Examples of fraud involves fabricated documents, perjury, and deliberate violations of discovery orders. The fraud, concerning in the public policy context, refers only to some irregularity[517] in the arbitration process. If the existence of fraud is proved in arbitration proceedings the enforcement of the arbitral award could be denied on the ground of a public policy violation.

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[511] China Nat'l Chartering Corp. v Pactrans Air & Sea, Inc., 882 F. Supp. 2d 57 (S.D.N.Y. 2012). Similar cases in regard with the irregularity in the composition of the arbitral tribunal or arbitral procedure; see also, Federal Deposit Insurance Corporation v. IIG Capital LLC, No. 12-10686 (11th Cir. 2013); AO Techsnabexport (Russia) v. Globe Nuclear Services and Supply GNSS, Limited, No 09-2064, (4th Cir. 2010).

[512] Pactrans appealed the award to the Tianjin Maritime Court as provided for in China's arbitration law. The Tianjin court affirmed the award.

[513] National China v. Pactrans, at 17.

[514] *Id.*, at 18.

[515] *Id.*, at 19.

[516] Fertilizer Corp. of India v. IDI Management, 517 F. Supp. 948, 955 (S.D. Ohio 1981). "[N]ondisclosure of Mr. [arbitrator] 's relationship with FCI has so tainted the proceedings as to nullify the award.", at 954.

[517] Brunet *et al*., supra, at 291.

In order to deny an enforcement of a foreign arbitral award three conditions has to meet: (i) the fraud must be clearly established before the court; (ii) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (iii) the person challenging the award must show that the fraud materially related to an issue in the arbitration proceedings.[518]

In *Tamimi Global Company Limited ("Tamimi") v. Kellogg Brown & Root, LLC ("KBR")* case[519], the court reviewed the question of whether confirmation of a foreign arbitral award would be dismissed on the grounds of fraud. The agreement between parties involved a prime contract in which KBR provided dining facility services to the United States military in Iraq. KBR subcontracted with Tamimi. In the agreement between KBR and Tamimi, parties agreed to arbitration in any disputes to the London Court of International Arbitration. A dispute arose when the United States declined to pay KBR.[520]

Subsequently, KBR rejected to pay Tamimi. Tamimi brought the dispute to arbitration. The arbitral tribunal decided in favor of Tamimi. Tamimi sought enforcement of the award in the United States. KBR counterclaimed that the contract was get through fraud and corruption. KBR argued that if enforcement of the award corruption would violate public policy. But the court held that such fraud allegations would not justify a refusal of enforcement on public policy grounds. The court dismissed the argument that the award was based on a contract obtained by fraud and corruption. According to the court, even if proven, these allegations "would not cause the court to refuse confirmation on public policy grounds", because "to the extent Tamimi was paying kickbacks to obtain dining services subcontracts, it was KBR's managerial employees who were accepting those kickbacks."[521]

The Court further noted that "public policy does not favor allowing a party that engaged in fraud from concealing that fraud and then, when the fraud is later discovered by a third party, attempting to use the fraud as a defense to a valid arbitration award in favor of its alleged co-conspirator." [522]

Similarly, in *Indocomex Fibres Pte., Ltd. (an American company) v. Cotton Company International, Inc. (British buyer)*[523,] Indocomex Fibres agreed to sell raw cotton to Cotton company. Indocomex did not send the cotton on the grounds that Cotton company's letter of credit was deficient. The Cotton company claimed breach of contract. The dispute brought to

[518] Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306 (5th Cir. 2004), at 306. See also Meadows Indemniry Co. v. Baccala & Shop Ins. Services, 760 F.Supp. 1036 (E.D.N.Y 1991).

[519] Tamimi Global Company Limited v. Kellogg Brown & Root, 2011 U.S. Dist. 30822 (S.D. Tex., May 12, 2011)

[520] The United States took legal action against KBR, alleging that there were irregularities in the procurement of the contract. It was alleged that KBR's head of food services and deputy in Iraq had received bribes from Tamimi.

[521] Tamimi v KBR, at 458.

[522] *Id*.

[523] Indocomex Fibres Pte., Ltd. v. Cotton Company International, Inc., 916 F. Supp 721 (1996).

arbitration, the arbitral tribunal decided in favor of the Cotton company. The Cotton company sought the award to be enforced in the U.S. Indocomex counterclaimed that the Cotton company committed fraud because the letter of credit was defective.[524]

The court held that it would not examine the specific allegations of fraud committed by claimant because defendant's allegations involve the merits of the contractual dispute. The court further stated that fraud required "a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of the arbitrator, or willfully destroying evidence, and further required that such evidence of fraud was unavailable to the arbitrator during the course of the proceeding."[525] It must be evidenced that some information was hidden from the arbitrator or that the evidence of fraud was discovered only after the arbitration finalized. The allegations about fraud need to be linked with the arbitration proceedings and not with the merits of the claim being arbitrated.

4.6. Conclusion

The lesson of judicial proceedings in the U.S. is that U.S. courts are quite welcoming to the enforcement of international arbitration awards.[526] It appears that U.S. courts will follow the substantially formed liberal federal policy favoring the enforcement of foreign arbitral awards.[527] It is also apparent from the case law of United States courts that the public policy defense has been rarely applied in relation to the enforcement of foreign arbitral awards.[528]The United States courts tend to draw a line between international public policy and domestic public policy. International public policy has been given a narrower construction compare to domestic public policy. The Courts relying on the international character of the contract between parties, a narrow concept of international public policy must rule in international transactions.

This helps the enforcement process, maintaining the stability of the international commercial system. By supporting arbitration and enforcement of arbitral awards, U.S. courts have increased the attractiveness of arbitration to international business concerns.[529] In this way the courts have taken a role of assurance that parties to a dispute will be able to foresee a possible outcome of a dispute resolution mechanism.

In this respect, international public policy emerges as a type of balancing interest test.[530] This balance requires the national courts considering their own concept of public policy, other

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[524] *Id*. The alleged deficiencies included omission of delivery destination and inadequate repayment guarantees.

[525] *Id*.

[526] Mehren, supra, at 367.

[527] McLaughlin & Genevro, supra, at 272.

[528] Bouzari, supra, 205.

[529] Mehren, supra, at 368.

[530] Kenneth-Michael Curtin, *Redefining Public Policy in International Arbitration of Mandatory National Laws,* 64 DEF. COUNTS. J. 271 (1997).

states' conception on public policy- comity, and finally the needs of the international commerce.[531]

When this test applied to the case law of the U.S. courts, it displays the U.S. courts approach to the public policy in threefold: (i) party autonomy[532]; (ii) notion of comity; (iii) needs of international commence. First, parties are freed to reach an agreement to submit disputes to arbitration. They leave their legal right to judicial remedy for some benefits. Thus, they should bear the risk inherent in arbitration proceedings. Secondly, the court must esteem the notion of comity, respecting the capacity of foreign and transnational tribunals. Finally, the court must recognize the need of the international commercial system for predictability in the resolution of disputes. A narrow reading of public policy will serve the goal to establish a uniform standard to internationally enforce arbitration agreements and arbitral awards.

5. EU LAW, ARBITRATION AND PUBLIC POLICY

5.1. Introduction

The discussion on to what extent European Union Law (EU) corresponds with international arbitration has been attracting scholars of private international law. While some authors favor the parallels between these two domains of law[533], all the blame appears to be put on the EU law practice for such long awaiting link; in other words, the practice of European Court of Justice is in sight.[534]

The most crucial distinction is the wide scope of the law of the EU which covers extensive categories of legal subjects. Constitutional and administrative law have long held the central role. Additionally; specifics of law, such as agriculture, transport law and finally competition law have taken place within the EU law scheme. Throughout the development of the EU Law, treaty amendments have contributed the extension of the domain of the EU law, such as environmental and consumer protection.[535]

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[531] *Id*.

[532] For a detailed discussion, see Brunet *et al*., supra, at 3-7.

[533]Jürgen Basedow, *EU Law in International Arbitration: Referrals to the European Court of Justice,* 32 (4) J.INT'L ARB., 367 (2015); George A. Bermann, *Reconciling European Union Law Demands with the Demands of International Arbitration,* 34 FORDHAM INT'L L. J. 1193,1195 (2011); George A. Bermann, *Navigating EU Law and the Law of International Arbitration,* 28 (3) ARB INT'L, 1193 (2012). "EU law and international arbitration law have long failed to intersect, almost as if the two fields were mutually indifferent. This state of affairs owes more to traditional assumptions made by EU law than to any made by the law of international arbitration."

[534] Basedow, supra, EU law, at 367-368; Born, supra, at 201. It is believed that the ECJ has become increasingly willing to rule against arbitral awards under public policy exception.

[535] Bermann, Reconciling EU Law, supra, at 1194. "…[T]he fundamental Community objective the common market, and later the internal market-brought EU law into virtually any field in which harmonization of Member State law might conduce a more fully integrated market."

Treaties and amendments helped to remove the distance between the EU law and international private law. But how much this helped to international arbitration remains a mystery. Although the European Economic Community treaty included the suggestion of harmonization of rules among the Member States on private international law, it remained distant outside the Community legal system. It has become a part of the EU law only then the Treaty of Amsterdam established. Scholars argue that such development in the EU law system remove the long-lasting gap between the EU law and international arbitration which reflects "a much larger divide."[536]

The practice of the European Court of Justice and subsequent decisions by the European States' courts extended the scope of public policy which has become "a gateway" in annulment and recognition proceedings.[537] Arbitrators have to identify mandatory provisions underlying EU law. There are now many complex issues and goals of the European Union, such as combating discrimination, or the establishment of an economic and monetary union, or establishment of an area of freedom, security and justice, in which may not be difficult to refer any public policy matter in each. The EU law expands rapidly which creates uncertainty to predict whether a wrong interpretation or misapplication of the law of the Union will annul an arbitral award in the enforcement proceedings.

5.2. Arbitration in the EU Law

Although the EU law and the law of international arbitration have been treated separately, this pattern has recently been transformed.[538] Especially the developments both in extension of EU law and foreign direct investment triggered new realities in the field of international arbitration.[539]

The European Convention on International Commercial Arbitration of 1961 is first one which involves European countries aiming to enhance arbitral exercises in the field of international commerce. The European Treaty establishing the European Economic Community of 1957 promoted arbitration as holding member states liable for simplification of formalities governing the reciprocal recognition and enforcement of arbitration awards.[540] In 1958, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted.

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[536] Bermann, Reconciling EU Law, supra, at 1195.

[537] Yves Brulard & Yves Quintin, *European Community Law and Arbitration -National Versus Community Public Policy,* 18 J. INT'L ARB. 533 (2001), at 543; Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law,* 113 PENN. ST. L. REV., 1227 (2009), at 1242.

[538] Bermann, Reconciling EU Law, supra, at 1196.

[539] *Id*.; see also Hew R. Dundas, *E.U. Law Versus New York Convention - Who Wins? Accentuate Ltd. v. Asigra, Inc.*, 76 ARB. J., 159 (2010), at 165.

[540] Article 229, European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, *opened for signature* Dec. 13, 2007, E.T.S. 2007/C 306/01 (entered into force Dec. 1, 2009). Article 220 EEC was later renumbered Article 293 by the Treaty of Amsterdam. And, was finally repealed by the Treaty of Lisbon in 2007.

The convention was successful enough to convince Europeans that a universal regulation can solve the problem better than a regional instrument.[541] But with the establishment of the Treaty of Lisbon, member states required to take measures for 'the development of alternative methods of dispute settlement', which extends its scope relating all aspects of arbitration.[542]

The relationship between international arbitration and international private law needs to be clarified when the EU law concerning. The 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters ("Brussels Convention") was concerning the harmonization of rules among the Member States on matters of private international law. It was, however, a convention outside the Community law system. Later on, with the Maastricht Treaty; while private international law was finally submitted within the scope of EU law, it was remained relegated to the third, non- Community law pillar on justice and home affairs.[543] But it is accepted that the convention excludes the claims on the matters of jurisdiction and the recognition or enforcement of judicial judgments directly related to arbitration.[544]

5.3. The Practice of the European Court of Justice (ECJ)

Amongst the many distinction, arbitration tribunals have not eagerly appealed to the Court of Justice for preliminary decisions on the interpretation of Union law.[545] But in the lieu of the increasing practice of the arbitral settings for investment disputes, parties and arbitrators may try to avoid any mistake on the interpretation of EU Law in their verdict which may be set aside or annulled in later stages of enforcement.

EU Law is growing fast. It has become more complicated than ever. There has been an increasing interest on the clarification of EU law beforehand it is too late.[546] Then the question remains whether an arbitration tribunal allowed to appeal a preliminary inquiry to the European Court of Justice. Although there are new developments concerning the practice of the European Court of Justice, it has long avoided a direct referral by arbitral tribunals.

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[541] Basedov, supra, EU Law, at 369.

[542] See Art. 81(2)(g), European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, *opened for signature* Dec. 13, 2007, E.T.S. 2007/C 306/01 (entered into force Dec. 1, 2009). This article enables the Union to take initiatives.

[543] Bermann, Reconciling EU Law, supra, at 1197.

[544] *Id*.; see also Allianz SpA v. West Tankers Inc., [2009] C-185/07, E.C.R. 1-663. The Brussels Regulation is currently the subject of proposed revisions of integrating arbitration into the Brussels Regulation regime.

[545] Basedov, supra, EU Law, at 367, The parties in an arbitration process and the arbitrators will generally be waived from a referral to the Court of Justice. It is because, the parties believe that arbitrators know the applicable law and any referral will cause a delay for a long time. See also, Konstanze von Papp, *Clash of 'Autonomous Legal Orders': Can EU Member State Courts Bridge the Jurisdictional Divide between Investment Tribunals and the ECJ? A Plea for Direct Referral from Investment Tribunals to the ECJ*, 50 CML REV., 1039 (2013).

[546] Basedov, supra, EU Law, at 368. Not just only the risk of annulment of an arbitral award, but also the parties may wish to clarify the applicable law and bypassing the public enforcement proceedings.

According to the Article 267 TFEU, in case there are doubts arise about the interpretation of the European Treaties and of the law of the Union, the courts of Member States are entitled to request preliminary rulings from the Court of Justice.[547] But the wording of the article is clear; the right of referral is only granted to 'any court or tribunal of a Member State.'[548]

In 1982, the European Court of Justice made itself clear that a direct referral to the court by arbitrator was inadmissible. The case, Nordsee[549], was concerning three German companies agreed on a contract to share aid they expected to receive from a European fund. The European Commission accepted only a few applications. Because of the rejection of some, a dispute arose between the three companies as to the allocation of the money received. This dispute was brought to arbitration. The arbitrator referred the matter to the European Court of Justice for a preliminary ruling on the grounds of whether such sharing was permitted under the relevant European law. The European Court of Justice concluded that the Article 267 did not give the arbitrator the status of a "court or tribunal of a Member State."[550] This has been endorsed in the later judgments of the Court.[551] But this case law has given rise to some problems of uncertainty in case of possible annulment or enforcement proceedings. This was apparent in the Eco Swiss decision.[552]

The Eco Swiss judgment believed to open "a gateway for EU law to be used as a yardstick in annulment and recognition proceedings" in the courts of Member States. It has become a burden for arbitrators to identify fundamental provisions underlying EU law, since it is now including more complex issues.[553] The EU law is expanding rapidly which creates uncertainty to predict whether a wrong interpretation or misapplication of the law of the Union will annul an arbitral award in the enforcement proceedings. It is now more difficult for arbitrators and national courts as well to find the criteria required for such a determination. In fact, the European Court of Justice will be able to determine the issue only at the very last stage where the arbitration have already ended, and the enforcement proceedings have already started.

In the lieu of the European Court of Justice practice, the only way to refer a determination from the ECJ in an arbitration proceeding is the indirect referral of the arbitral case through a request

[547] Bermann, Reconciling EU Law, supra, at 1197.

[548] Article 267(2) TFEU, and the same limitation applies to the courts of last instance Article 267(3) TFEU.

[549] Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern and Reederei Friedrich Busse Hochseefischerei Nordstern, [1982] Case 102/81, CJEU, E.C.R. 1095.

[550] Nordsee v Reederei, at para, 10; Bermann, Reconciling EU Law, supra, at 1198.

[551] Belov v. CHEZ Elektro, [2013] C-394/11 (CJEU), at para 38; Ascendi Beiras Litoral v. Autoridade Tributária, [2014] C-377/13 (CJEU), at para 23.

[552] Eco Swiss, supra.

[553]There are now more complicated goals of the European Union, such as combating discrimination, or the establishment of an economic and monetary union, or establishment of an area of freedom, security and justice. These areas are soundly to be considered fundamental as well.

of preliminary ruling by assisting state courts.[554] The European Court of Justice, in the Nordsee, highlighted that:

" ...if questions of Community law are raised in an arbitration . . . the ordinary courts may be called upon to examine them, either in the context of their collaboration with arbitration tribunals, ..."[555]

But in case the seat of arbitration is outside the European Union, arbitration panels will find it difficult to secure the assistance of a Member State court for a referral to the European Court of Justice. It is because only the court of a Member State would be able to provide a referral.[556] Basedov argued that "indirect referrals are a solution in theory, but are not very likely to be made in practice."557 He argued that the European Court of Justice appears to soften some of the requirements it has previously established, and it should be encouraged to take recent developments in national arbitration and in EU law into account.[558] Bermann also argued the necessity of a revision bringing arbitral tribunals within the category of tribunals authorized to make preliminary references to the Court.[559]

5.4. Public Policy Defense in EU Law

A line of cases arising in the European Court of Justice ("ECJ"), The EU has developed "a highly robust concept of European Union public policy." The EU enjoys the similar privilege of nation states in determining what consist of public policy within its legal system. But the European Court of Justice has established a potentially significant public policy exception to New York Convention enforcement in the EU.[560]

The extension of public policy, as which accepted a narrow exception in the New York Convention 1958 system, may well have significant effects on the efficacy of international

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[554] On the contrary, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration limits the intervention of state courts in arbitration proceedings. (UNCITRAL Model Law on International Commercial Arbitration 1985). Article 27 of the Model Arbitration Law regulates the request of the arbitral tribunal seeking assistance from a competent court in taking evidence.

[555] Nordsee v Reederei, supra, paras 14-15.

[556] Basedov, EU Law, supra, at 375

[557] *Id.* According to the author's knowledge only a single case of this kind has been reported. Bulk Oil (Zug) AG v. Sun International Ltd. and Sun Oil Trading Co., Case 174/84, CJEU, 18 Feb. 1986, [1986] ECR 559; see the opinion of Advocate General Slynn at 562.The case was submitted by the High Court for England and Wales after an interim award by an arbitrator, retrieved from Basedov, EU law, at fn 34.

[558] Basedov, EU law, supra, at 385-386

[559] Bermann, Reconciling EU Law, supra, at 1198. "The EU itself has thus been responsible for much of the distance dividing EU law and international arbitration practice."

[560] Allen B. Green & Josh Weiss, *Public Policy and International Arbitration in the European Union*, 22 AM. REV. INT'L ARB. 661, (2011).

commercial arbitration within EU Member States.[561] The European Court of Justice paved the way to the national courts of EU Member States to build a body of case law that weakens "the certainty, finality, and portability of international commercial arbitration agreements" through extensive reference on the public policy exception.[562]

5.4.1. Eco Swiss Case

The European Court of Justice instructed that Member States must take EU law into account in determining what constitutes public policy within their legal orders. In Eco Swiss judgment[563], the Court outlined that a Member State must treat violations to EU public policy as grounds for annulling an arbitral award. According to the Court's ruling, EU competition policy is subject to public policy in the setting of award annulment.[564]

The dispute originated on a licensing agreement between Benetton International NV ("Benetton"), a Dutch corporation, and two other companies: Eco Swiss China Time Ltd ("Eco Swiss") and Bulova Watch Company ("Bulova").[565] The agreement permitted Eco Swiss to manufacture watches of "Benetton by Bulova". It also gave Eco Swiss and Bulova permission to sell the watches. The agreement contained a choice-of-law clause (Dutch law) and an arbitration clause (forum of arbitration: Netherlands).[566]

Benetton, in 1991, terminated the agreement. The parties immediately commenced arbitral proceedings per the terms of their contract. The arbitral tribunal held that Benetton was liable to Eco Swiss and Bulova for early termination damages.[567] Benetton brought the case before a Dutch court requesting to annul the awards. Benetton contended that on the ground that "those arbitration awards were contrary to public policy by virtue of the nullity of the licensing agreement under Article 81 of the European Community Treaty."[568]

When the case reached the Supreme Court of the Netherlands, the Hoge Raad, it referred its interpretive questions regarding Article 81 of the EC Treaty (the Treaty Establishing the European Community) to the European Court of Justice. Article 81 of the EC Treaty identifies a

[561] *Id*., at 662.

[562] *Id*., at 666.

[563] Eco Swiss v Benetton, supra, para 37.

[564] *Id*. See Robert B. von Mehren, *The Eco-Swiss Case and International Arbitration,* 19 ARB. INT'L, 465 (2003).

[565] Corporations based in Hong Kong and the United States, respectively.

[566] Eco Swiss v Benetton, supra, para 10.

[567] In the amounts of $ 23,750,000 and $ 2,800,000, respectively.

[568] Eco Swiss v Benetton, para 14.

broad variety of agreements that are "prohibited as incompatible with the common market."[569] Article 3(1)(g) of the EC Treaty endorsed the Article 81 as one of "the activities of the Community".[570]

The European Court of Justice finally stated that since Article 81 constitutes "a matter of public policy", a national court reviewing an arbitration award must annul such award which fails to follow Article 81 of the EC Treaty. As the European Court of Justice held:

"where . . . rules of procedure require a national court to grant an . . . annulment of an arbitration award [for] failure to observe national rules of public policy, it must also grant such an application [for] failure to comply with the prohibition laid down in [Article 81] of the Treaty."[571]

The European Court of Justice promoted the importance of a harmonious internal market to the EU as indicating the Articles 3(1)(g) and 81(2) of the EC Treaty mandatory rules, which constitutes one of the public policies of the EU and Member States. As the European Court of Justice pointed out: "It follows 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 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] of the [EC] Treaty."[572] Furthermore, the court referenced the New York Convention 1958 by stating that "the provisions of Article 81 may be regarded as a matter of public policy within the meaning of the New York Convention."[573]

Although the court acknowledged that the Member States enjoy "procedural autonomy" in determining the cases in accordance with EU law and domestic law, it highlighted the limiting principles of "equivalence"574 and "effectiveness."[575] As it is pointed out by the court, the member states must give weight to EU law likewise given to domestic law. Party autonomy is not the same anymore among the EU member states as understood in the rest of the world. But the application of a procedural standard, "principle of equivalence" as set precedent in the

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[569] "The types of anticompetitive agreements that fall within the ambit of Article 81 include agreements that directly or indirectly fix purchase or selling prices, those that limit or control production, markets, technical development, or investment..." Article 81(2) makes it clear that "any agreements or decisions prohibited pursuant to [Article 81] shall be automatically void."

[570] Article 3(1)(g) describes the establishment of "a system of ensuring that competition in the internal market is not distorted."

[571] Eco Swiss v Benetton, para 37.

[572] *Id*.

[573] *Id*.

[574] Member State courts must treat legal claims derived from EU law as similar like they treat the claims derived from domestic law. See Cassis de Dijon, [1979] Case 120/78 (ECR).

[575] Eco Swiss v Benetton, at para 36-39. "The principle of effectiveness" indicates a Member State must make available to individuals relying on EU law procedures and remedies before national courts.

court's case law, brings the question of "how far-reaching is EU public policy?"[576] As pointed out by Bermann, "any exaggerated notions of public policy, which is believed the European Court of Justice induced that of notion, would pose a threat to international arbitration on account of their assumed nonwaivability."[577]

5.4.2. Ingmar Case

After Eco Swiss, the European Court of Justice had the second opportunity to address the EU public policy, in Ingmar case[578], as 'mandatory'[579] which extended its application beyond the parties' agreed contractual clauses. The European Court of Justice invalidated the parties' choice of law and subrogated contract clauses to Community policy.[580]

A British company called Ingmar GB Ltd. entered into a contract with Eaton Leonard Technologies, Inc. ("Eaton"), an American company, to represent as Eaton's commercial agent in the United Kingdom. The parties chose the laws of California to be applied in case a dispute arises. Eaton terminated the contract and soon after Ingmar brought a case before British courts seeking unpaid commission as well as direct compensation under British laws implementing above mentioned Articles 17 and 18 of the EC Directive. The Court of Appeal of England and Wales (Civil Division) referred the case to the European Court of Justice for a ruling on the extent to which "the EC Directive on commercial agents applied in a case where one party was incorporated in a non-EU state and both parties had expressly chosen the law of a non-EU state to govern disputes."[581]

Articles 17 and 18 of Directive 86/653 regulated the laws of the Member States relating to self-employed commercial agents.[582] The Articles guaranteed certain rights to commercial agents after termination of agency contracts.[583] They must be applied where the commercial

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[576] Bermann, Reconciling EU Law, supra, at 1203. "When is an EU law norm merely an EU law norm, and when does it attain the status of EU public policy? Might all of EU law constitute EU public policy?"

[577] *Id*., at 1211.

[578] Ingmar GB Ltd. v. Eaton Leonard Techs., Inc., [2000] Case C-381/98, E.C.R. I-09305.

[579] Johan Erauw, *Observations About Mandatory Rules Imposed on Transatlantic Commercial Relationships*, 26 HOUS. J. INT'L L., 263 (2004), at 274-75.

[580] Green and Weiss, supra, at 670; see also Thalia Kruger, *Ingmar GB Ltd. v. Eaton Leonard Technologies, Inc.*, 8 COLUM. J. EUR. L. 85 (2002), at 86; Ansgar Staudinger, *The Public Policy Proviso in European Civil Procedural Law*, 5 EUR. LEGAL F. 273 (2004), at 275; H.L.E. Verhagen, *Tension between Party Autonomy and European Union Law: Some Observations on Ingmar GB LTD v. Eaton Leonard Technologies, Inc.*, 51 INT'L & COMP. L.Q. 135 (2002), at 137.

[581] Ingmar v Eaton, at para 13.

[582]Council Directive 86/653/EEC, Art. 17, 1986 O.J. (L 382). The Directive implemented to the laws of the Member States governing the relations between commercial agents and their principles. It required rules regarding the rights and obligations of agents, and conclusion and termination of the agency contract.

[583] Ingmar v Eaton, at para 14.

agent carried on his activity. The Agency directive aimed to harmonize different laws in the EC. It required that Member States should take measures to guarantee a commercial agent's rights in case of termination of the agreement. It also necessitated compensation in accordance with the Directive.[584] The Directive was rendered to UK law by the Commercial Agents Regulations 1993.[585]

The European Court of Justice held the EC Directive 'mandatory', arguing that the Directive maintained a compulsory language in which a harmonious internal market desired. The court reasoned that the intention based on the directive is to protect commercial agents and thereby promote competition.[586] Consequently, the parties' choice of law governing the contract is ineffective where the mandatory rules of a supranational instrument – EU law – prevails. The Court stated that;

"The purpose of the regime established in Articles 17 to 19 of the Directive, which is mandatory in nature, is to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market, so that they must be applied where the situation is closely connected with the Community."[587]

Some authors argue that the Ingmar case expanded the scope of the public policy not only by affirming the outcome of Eco Swiss, which confirmed the direct application of the primary Community law, but also by involving a secondary legislation which requires legal implementation of the Member States.[588] Therefore, the threshold for the determinations of what can constitute "public policy" is downgraded. In case of a challenge to a contract, both primary legislation and secondary legislation of the EU law may renounce an arbitral award null on the grounds of EU public policy.

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[584] Green & Weiss, supra, at 669; Kruger, supra, at 86. The Directive was based on continental civil law, and in particular German law. "The Agency Directive, like all directives, is binding upon the Member States of the European Union. The Member States are free with regards to the form and method used to implement a directive in their national laws. Therefore, when a case comes before a court, the legislation upon which the parties base their arguments will not be the directive itself, but rather the national legislation implementing the directive in national law."

[585] Green & Weiss, supra, at 669. See also Kruger, supra, at 87. "The Agency Directive was transcribed to UK law by the Commercial Agents Regulations 1993. They entered into force on 1 January 1994.11 These Regulations changed UK law in the sense that they gave agents a quasi-proprietary interest in the business. Agents obtained a right to be compensated for invasions of this quasi- proprietary interest, even against express terms of the contract."

[586] Ingmar v Eaton, at para 24.

[587] *Id*., at paras 21,24-26.

[588] Green & Weiss, supra, at 670. The United Kingdom had implemented the EC Directive through the Commercial Agents Regulations in 1993.

5.4.3. Mostaza Case

In the following cases, the court had the chance to address what constitutes EU public policy. In the *Mostaza Claro v. Centro Móvil Milenium* case[589], the Court examined a case concerning a Spanish court hearing of setting aside an award. The main question was whether the case was unfair and unenforceable under unfair clauses in consumer contracts derived from EU law.[590]

In the Mostaza case, a Spanish telecom company brought an arbitration case against Mostaza Claro who didn't comply with the minimum contractual period of its subscription. The award was against him. Mostaza initiated annulment proceedings and brought the case before Spanish courts. He claimed that the arbitration agreement was invalid under EU law because it was an unfair contract term within the meaning of Directive 93/13.591 The national court referred the case to the European Court of Justice.

The European Court of Justice held that the "principle of equivalence" necessitated any member state's legal order to give as full effect to EU public policy as it gives to domestic public policy.[592] The court pointed out that fundamental rights treated as public policy under domestic law are equally fundamental rights under EU law, which must also be treated as a matter of public policy.

But the court didn't propose any direct "public policy" norm for purposes of the annulment of arbitral awards. The Court indicated the mandatory nature of the norms derived from EU law which had a particular "nature and importance of the public interest" underlying the protection on consumers.[593]

Although the grounds for annulling or denying recognition and enforcement of arbitral awards are to be barely applied, in regard with the impact of EU public policy on the law and practice of international arbitration, it finds a possible broader application in the arbitration proceedings. It needs a further definition in order to identify to what extent the EU public policy reaches.

In fact, EU public policy has its place under the New York Convention 1958 public policy protection. But the role of courts in arbitration is not to correct errors of fact or of law. The grounds for annulling or denying recognition or enforcement of awards must be interpreted

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[589] Mostaza Claro v. Centro Móvil Milenium, [2006] Case C-168/05, E.C.R. I10,421.

[590] EU Directive 93/13. See also Bernd U. Graf & Arthur E. Appleton, *Elisa Maria Mostaza Claro v. Centro Civil Milenium: EU Consumer Law as a Defense against Arbitral Awards, ECJ Case C-168/05*, 25(3) ASA BULL. 48 (2007).

[591] Mostaza v Centro, at para 20.

[592] *Id*., at para 35. "[W]here 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 failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with Community rules of this type."

[593] *Id*., at para 38.

narrowly and application of the exceptions for that of grounds are to be understood as voluntary not mandatory.[594]

Another distinguishing case is the *Asturcom Telecomunicaciones SL v. Rodriguez Nogueira*[595] before the European Court of Justice. The case was concerning a preliminary referral to the court where the consumer did not participate in the whole process, but the claimant company was seeking the enforcement of the award before Spanish court. The European Court of Justice highlighted that a national court had the privilege to decide on whether a violation of domestic rule triggers the public policy defense, it could be same for the determination of EU public policy. The Court indicated that due to "the nature and importance of the public interest underlying the protection" derived from Directive 93/13 (Article 6(1)); it had to be studied as "the equivalent of national rules of public policy."[596] What makes this decision special is the fact that the national courts are remained to confront the question of the reach of EU public policy and the obligation to raise sua sponte the unfairness of a consumer contract under " the principle of equivalence" where an EU law rule is considered as a matter of public policy.[597]

As appeared in both cases examined above, consumer protection law, like competition law, has reached an EU public policy status. What is next; EU environmental protection law, labor law, or occupational health and safety law? Are those fundamental rules inherited in that of laws reach any EU public policy status?

The question of EU public policy has been arguably conceived in the field of Bilateral Investment Treaties (BITs). The Lisbon Treaty entitled the EU as the sole competent institution for the regulation of foreign direct investment in the EU zone. The main concern for the international law practitioner is whether "EU law imperatives may operate to alter the international arbitration landscape, relating to the rapidly growing field of investor-state arbitration."[598]

Although, at the early stages of the Union, the foreign investment law and policy were not a matter of EU's commercial policy, and although the arbitration process stemming from BITs activities were not fall within the EU interest, the member state's conduct did so. Member states' conduct may infringe the EU law and policy in regard with the foreign investment field.[599] Accordingly, the Commission brought cases against Austria[600], Finland[601], and Sweden[602] on

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[594] Bermann, Reconciling EU Law, supra, at 1207-1208.

[595] Asturcom Telecomunicaciones SL v. Rodriguez Nogueira, [2009] C40/08, 1-9579 (E.C.R).

[596] *Id*., para 52.

[597] Bermann, Reconciling EU Law, supra, at 1210.

[598] *Id*., at 1200.

[599] Costa v. ENEL, [1964] Case 6/64, E.C.R. 585.

[600] Commission v. Austria, [2009] E.C.R. 1-1301, 45.

[601] Commission v. Finland, [2009] E.C.R. 1-10,889, 50.

[602] Commission v. Sweden, [2009] E.C.R. 1-1335, 45.

account of provisions in their BITs. The Commission argued that those provisions were incompatible with EU law. The European Court of Justice embraced the Commission's argument in each case. According to the Court, "the guarantees of the free and immediate transfer of freely convertible currencies of all payments due in connection with investments were incompatible with the EU law."[603] The court stated that the defendant states have failed to take actions to eliminate the incompatibility.[604]

Now, after the Lisbon treaty, the EU adhered a central role in foreign investment law, which falls within the scope of the EU commercial policy. But it is clear from the case law of ECJ and the Commission's previous stand, EU law will prevail over any nonconforming BIT norm. It is now subject to practice of national courts and the ECJ whether EU foreign investment policy will enjoy the similar status that the competition and consumer protection benefitted within the hierarchy of EU legal norms.[605]

5.4.4. Accentuate Case

In *Accentuate Ltd. v. Asigra, Inc.*[606], the subject of issue was the licensing agreement between Asigra Inc. (a Canadian Company) and Accentuate Ltd. (a British Company). The agreement was concerning the resell of Asigra's software in the United Kingdom. In any case of dispute, according to the agreement, the disagreement shall be governed by Canadian Law and arbitrated in Toronto. In 2006, Asigra terminated the contract. Accentuate claimed compensation on the grounds of violation of EC Directive 86/653, Articles 17 and 18.[607] Then, Asigra initiated arbitration in Canada.[608] It based on the argument that the EC Directive on commercial agents did not apply in this case. It is because the agreement between the parties governed that in any dispute the law of a non-EU state law namely, Canada law applies. Both procedures continued simultaneously, in British court and the Canadian arbitral trial respectively. The Arbitral tribunal concluded that the EC Directive did not apply in the case.

On the other hand, the British court (Quen's Bench Division) held the reasoning of Eco Swiss, Ingmar, and Mostaza. The court did not allow the arbitral and choice-of-law provisions to prevent the Community law to be applied. The court, applying the case law of European Court of Justice, extended the scope of the application of mandatory Community law since it is now exceptional that an arbitration clause and a choice-of-law clause in an agreement considered void

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[603] TFEU Treaty, Articles 64, 66, and 75. "The Council of the European Union ("Council") under stated circumstances to restrict the free movement of capital and payments between Member States and third countries."

[604] Commission v Austria, para 45; Commission v Sweden, para 45; Commission v Finland, para 50.

[605] Bermann, Reconciling EU Law, at 1215.

[606] Dundas, supra, at 165.

[607] Articles 17 and 18 of Directive 86/653 regulated the laws of the Member States relating to self-employed commercial agents. This issue was also discussed in Ingmar case. Accentuate sought compensation of that Asigra owed it £1.75 million.

[608] Accentuate Ltd. v. Asigra, Inc., [2009] EWHC 2655 (QB).

in which the EU law prevails.[609] This is an apparent extension of EU law against valid contractual clauses.[610]

5.5. Conclusion

The EU public policy practice in regard with the international arbitration creates uncertainty where parties cannot rely on their agreements if one of the parties is from EU. This was interpreted by international commercial community as "protectionism" in which the parties' reasoned choices were disregarded, and the entire arbitral proceedings are now in endangered. This will inevitably affect the effectiveness and value of the international arbitration.[611] This apparently effects the credibility of the arbitral agreements. Community law could become an excuse for the party who is not happy with the outcome of the arbitral proceedings. The apparent protectionism in EU sends signals of danger for international arbitration.[612]

6. TURKEY, ARBITRATION AND PUBLIC POLICY

6.1. Introduction

The objective of this chapter is to review how the concept of public policy as defined by Turkish courts and applied in the context of the enforcement of arbitral awards. In particular, this chapter discusses the concept of public policy generally as a ground for refusal of the enforcement of awards in Turkey.

Turkey has enacted many substantial and procedural rules that apply to commercial arbitration that track international instruments such as the New York Convention and European Convention on International Commercial Arbitration. Private International Law No. 2675 (Now, PIL No. 5718) is the first legal text in which the "*foreign element*" of arbitral awards was introduced. This was an important step for the Turkish legal system because before that, reciprocity was the main condition to enforce any foreign arbitral award. The integration of Turkish legal system to the international order came along with the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by Turkish Act No. 3731 in 1991. Further, the constitutional amendment in 1999 was another considerable development in the practice of the international arbitration.

Turkey has been considered unfriendly to arbitration since the Keban judgment in 1976. In the judgment, the enforcement of the arbitral award delivered by the ICC was refused on the ground of public policy. But since then many things have changed and recently the courts have

[609] Weiss & Green, supra, at 674.

[610] Compared with Ingmar, Accentuate decision additionally held that the parties could not elude EU Law through arbitration clauses, while Ingmar was only concerning choice-of-law provisions.

[611] Weiss & Green, supra, at 675.

[612] Dundas, supra, at 165. "While Europe has prioritized some private protection rules regarding commercial agents, unfortunately it has harmonized the field and drawn the line that may become self-righteous and inward-looking in protecting its own policies, no longer accepting deviations for 'international' cases that contain a non-European element. If this happens, Europe risks making a simplistic legal deduction…"

changed its approach on the public policy concept. Although the notion of public policy in the Turkish legal system is not definitive, Turkish courts have been more progressive in the light of the developments of last two decades.

This section first starts with providing general legal framework of Turkish domestic law and then attempts to analyze some of the cases decided by the Turkish courts to display how the rationale of these cases relate to their facts and relate to the construction of the public policy defense. It looks for an answer as to how far Turkish courts have gone to provide a formula in enforcing foreign arbitral awards in situations where such enforcement would be in substantial conflict with fundamental domestic legal or moral concepts.

6.2. Sources of International Arbitration in Turkey

Procedural rules applicable to commercial arbitration are provided under various codes in the Turkish regulations. The Turkish Code of Civil Procedure ("CCP") dating back to 1927 has provisions without any distinction between domestic and foreign arbitral awards. Since then, international arbitration has been gradually established into the Turkish legal system. In 1982, Private International Law No. 2675 (Now, PIL No. 5718) entered into force in which "foreign element" of arbitral awards introduced. At first reciprocity was the main condition to enforce such arbitral awards. Another important stage was the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by Turkish Act No. 3731 in 1991. Furthermore, the constitutional amendment in 1999 was another considerable development in the practice of the international arbitration. Turkey adopted the International Arbitration Act (IAL, no 4686) in 2001, in the advantage of application of international arbitration. In this section, more details will be provided about these regulations.

6.2.1. Constitutional Setting

One of the essential amendments in the constitution in relation to arbitration came as a result of the increase of foreign investment related to the build-operate-transfer investment model. The increase in foreign investment necessitated a better functioning arbitration mechanism with respect to recognition and enforcement. Thus, parliament took action and amended Article 125 of the Constitution in 1999.[613] Article 125 states under the heading of Judicial Review:

> Recourse to judicial review shall be available against all actions and acts of administration. In concession, conditions and contracts concerning public services and national or international arbitration may be suggested to settle the disputes arising from them. Only those disputes involving an element of foreignness may be submitted to international arbitration.[614]

[613] Law no. 4446, August 13th, 1999.

[614] The translated text is available at *Constitution of Republic of Turkey*, THE GRAND NATIONAL ASSEMBLY OF TURKEY (August 12th, 2018, 11:40 a.m.) https://global.tbmm.gov.tr/docs/constitution_en.pdf.

This was a breakthrough legal achievement in which the Turkish government secured the path for foreign investors who had previously been discouraged from investing because of the risks of legal disputes during the investment or after the investment process. The provision constitutionally guaranteed that in concession agreements relating to public services where the Turkish sate is one of the parties and an "element of foreignness" exists, involves, disputes would be settled by international arbitration. If there was no "element of foreignness," disputes would be settled through domestic arbitration.

The enactment of this provision limited the role of the Council of State, which is the highest court to review for rules delivered by administrative courts. The constitutional amendment allowed the parties enjoying the concession to avoid domestic judicial review.

On the other hand, it is worth to note that as amended with 16/4/2017-6771/16 md., in 2017, the Council of State would also give its opinion within two months on the conditions and the contracts under which concessions are granted concerning public services.[615]

6.2.2. Code of Civil Procedure (CCP)

The Code of Civil Procedure Law no. 6100 (CCP) is one of the earliest legal documents in which the term "arbitration" appeared.[616] But the CCP applies to arbitration taking place in Turkey. In other words, the CCP does not include cases with a foreign element involving but rather regulates domestic arbitration and recognition and enforcement of those awards.

6.2.3. Code of Private International Law and Procedural Law

The Private International Law and Procedural Law Act (PILA)[617] is the law applicable to international arbitration. It includes various provisions related to arbitration and the recognition and enforcement of foreign arbitral awards.

According to the statute, the enforcement procedure must be conducted in accordance with Turkish law. As to venue, Article 60/2 of PILA states that if the parties made a choice of venue in writing, the claimant must file the legal action in the court mutually chosen by the parties. In the absence of such agreement, the venue is chosen by examining the location of the defendant's domicile, habitual residence and assets that may be subject to execution. Furthermore, according to the Article 5 of the Law No.5235, the commercial courts are competent to recognize and enforce foreign arbitral awards in Turkey.[618]

According to Article 48 of PILA, "foreign real and legal persons who file a lawsuit before a Turkish court are required to provide a security to be determined by the court to cover the expenses of the legal procedures and proceedings as well as losses or damages of the

[615] Article 155, Turkish Constitution 1982.

[616] Official Gazette, Vol. 622, July 1927.

[617] Law no. 5718, entered into force in November 27, 2007.

[618] Law on the Establishment, Duties and Jurisdiction of First Instance Courts and Regional Courts of Appeal. Date of enactment September 26th, 2004.

defendant." But in cases where there is a multilateral or bilateral agreement which grants an exemption from providing a security the court may exempt the claimant from it pursuant to the reciprocity principle.

According to Articles 61/2 and 57/2 of PILA, court decisions regarding dismissal or acceptance of an enforcement claim may be appealed in accordance with the general provisions of the CCP. The appeal suspends the execution of the decision.

And under Articles 61/2 and 55/1 of PILA, court proceedings are administered pursuant to the "simplified procedure" governed between Articles 316 and 322 of the CCP.

6.2.4. International Arbitration Act (No. 4686)

Turkey passed the International Arbitration Act (IAA), no 4686 for the purpose of advancing the legal regime on international arbitration. The lawmakers made use of both the UNCITRAL Model Law on International Commercial Arbitration and the Chapter 12 of the Swiss Federal Statute on Private International Law during the drafting process. But the notion of "terms of reference" in the IAA derived from the Rules of Arbitration of the International Chamber of Commerce.[619]

The act entered into force on July 5th, 2001. The Article 1 indicates the purpose sought by this act:

> The purpose of this Law is to set forth the procedures and principles concerning international [commercial] arbitration. This Law shall be applicable where a dispute has a foreign element and the place of arbitration is determined to be in Turkey or where the Law is chosen as the governing law [of arbitration] by arbitrating parties or their sole arbitrator or arbitral tribunal.[620]

The IAA is applicable to disputes if it is selected as the applicable law either by the parties or by the arbitral tribunal. Regardless of the nationality of the parties or the law applied to the arbitration procedure, the awards made in another country other than Turkey are considered to be foreign awards. Arbitral proceedings with foreign elements supervised in Turkey fall within the scope of Turkish IAA (no.4686) unless the parties have to explicitly agree that the arbitral procedure will not be conducted pursuant to the Law no. 4686. Such arbitral award with a foreign element rendered in Turkey is deemed as foreign.

Article 1 of the IAA states that the "Law shall not be applicable to disputes related to real rights concerning immovable and to disputes that are not within the parties' disposal."

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[619] Bennar Balkaya, *Turkey Country Report, IBA Sub-Committee on Recognition and Enforcement of Awards, IBA Public Policy Project 2015*, IBA (August 5th, 2018, 2:30 p.m.) https://www.ibanet.org/Document/Default.aspx?DocumentUid=C1AB4FF4-DA96-49D0-9AD0-AE20773AE07E.

[620] Article 1, IAA. Non-official translated text is available at http://www.camera-arbitrale.it/Documenti/tial_turkey.pdf (August 7th, 2018, 2:50 p.m.)

Article 2 explains the "foreign element" criteria. Article 2 provides the necessary conditions for the existence of a "foreign element" in a dispute where arbitration is considered international. The first element is that the parties to the arbitration agreement have their domiciles or habitual residences or places of business be in different States. The other elements also relate to the habitual places where the arbitration agreement takes place or where a substantial part of the obligations arising from the underlying contract is performed. Another important "foreign element" in Article 2 is when a shareholder has brought foreign capital into Turkey. A final element for the consideration of foreignness is the movement of capital or of goods from one country to another.

Articles 4 to 6 explain the definition and formation and related procedures of the arbitration agreement. Article 4 defines the arbitration agreement as the legal relationship based on contractual or non-contractual grounds that requires the parties to agree to refer any disputes that may arise to arbitration proceedings. The arbitration agreement, whether concluded separately, or placed as an arbitration clause in the main agreement, must be in writing (Art. 4/I).[621] The validity of the arbitration agreement is based on either the law chosen by the parties or the Turkish law (Art. 4/III). This is basically a recognition of the principle of the autonomy of the arbitration agreement from the main contract.[622]

Article 7 covers the appointment procedures and duties of arbitrators. It provides details about the hearings, seat of the arbitration, and the language of the arbitration proceedings.

Article 8 concerns the determination of the rules of procedure, equal treatment of parties and their representation.

Article 9 emphasizes the free choice of parties to determine the place of arbitration. If the parties fail to agree on a place of arbitration, the arbitral tribunal is entitled to decide where to arbitrate the case.

Article 10 governs issues such as commencement, term and language of arbitration, statement of claim and defenses, and terms of reference.

Finally, the Article 12/C acknowledges the very principle that the parties may decide the relevant law to be applied to resolve the dispute: "[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." Articles 12 to 15 govern matters such as participation in the arbitration process, expert appointments, taking evidence, rules applicable to substance of dispute and settlement, termination of proceedings, and the formation of arbitral award.

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[621] The written form requirement is complied with if the arbitration agreement is included in a written document signed by the parties, or in an exchange of a communications such as letters, telegrams, telex, fax or electronic mail, or if it has not been objected in the respondent's reply to the request of arbitration. An arbitration agreement will also be deemed validly concluded in the case of reference to a document containing an arbitration clause so as to make it a part of the main contract (Art. 4/II IAA).

[622] Art. 4/IV, "No objection could be made against the arbitration agreement by arguing that the underlying contract is invalid or that the arbitration agreement is related to a dispute, which has not yet arisen."

The IAA also governs the remedies against arbitral awards. This part will be examined under the recognition and enforcement subheading.

6.2.5. The Law Concerning Concession Contracts.

The Turkish Law concerning the concession contracts is entitled "Principles That Shall Be Complied with When There Is Access to Arbitration for Disputes Arising from Concession Contract" (Law No. 4501, enacted on January 21, 2000).[623] The IAA is applicable to concession contracts related to public services and contain a foreign element that are subject to international arbitration.

6.2.6. International Instruments

Turkey has ratified all the essential international conventions with regard to international commercial arbitration. Moreover, Turkey has endorsed many bilateral and multilateral treaties.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention 1958) entered into force in Turkey in 1992.[624] Turkey ratified the New York Convention with reservations on two grounds.[625]First, the Convention applies for arbitral awards which are delivered in another state in which the Convention is also ratified; in other words, Turkey applies the Convention on the basis of reciprocity. Second, the dispute must, regardless of whether contractual or not, be related to commercial transactions and the dispute must be commercial in nature.

In summary, the recognition and enforcement of foreign arbitral awards arises in the following: (1) the arbitral awards with foreign elements based on a commercial dispute; and (2) arbitral award is rendered in another contracting state.

Turkey is also a party to the European Convention on International Commercial Arbitration (Geneva Convention) (1991),[626] the UNCITRAL Model Law on International Commercial Arbitration Convention on Settlement of Investment Disputes between States and Nationals of Other States (1988), the Convention on Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (1988),[627] and the

Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) (2000).[628]

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[623] Turkish text is available (August 7th, 2018, 3:40 p.m.) http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4501.pdf.

[624] Official Gazette, Vol. 21002, September 25th, 1991 – ratification; entered into force in September 30, 1992.

[625] Turkey signed the Convention with two declarations stated in Article I/3 of the Convention.

[626] Official Gazette, Vol. 21000, September 23rd, 1991.

[627] Official Gazette, Vol. 19830, December 6th, 1988.

[628] Official Gazette, Vol. 24107, July 12th, 2000.

6.3. Recognition and Enforcement of Foreign Arbitral Awards in Turkey

6.3.1. Governing Law

The Private International Law and Procedural Law Act (PILA) articles 60-62 are the main regulations on the enforcement of foreign arbitral awards in Turkey. The Articles apply if the arbitral awards sought to be enforced have been rendered in countries that are not parties to the New York Convention of 1958. But because the New York Convention has been ratified by so many countries, these articles have been rarely applied in practice.[629]

Indeed, the Article 1 of the PILA states that:

> (1) This Act regulates the law applicable to private law transactions and relations that contain a foreign element, the international jurisdiction of the Turkish courts, and the recognition and enforcement of foreign judgments.
>
> (2) Provisions of international conventions to which the Republic of Turkey is a signatory are reserved."[630]

As one can see from the second paragraph that the law specifies the importance of the international conventions, to which Turkey is a signatory, as a reservation in which the conventions prevail the domestic law.

Article 15 of IAA also governs defenses to an arbitral award. A claim or defense against an arbitral award may only consist of an application for setting aside the arbitral award in question. Such an application must be made before the Turkish regional court of second instance (based on an amendment entered into force in February 28, 2018; Law no. 7101/ Article 53). The law requires the court to give priority to the case and to handle it efficiently.

In the following section, the conditions for setting aside the arbitral awards will be examined in detail.

6.3.2. The Grounds for Refusal

As discussed above, the New York Convention of 1958 has strongly influenced international arbitration law in Turkey. A party can only resist the enforcement of an arbitral award if he proves the grounds set forth in Article 62 of PILA and Article V/1 of New York Convention. Second, the claimant can only request annulment of the arbitral award if he proves the grounds in Article 15 of IAA and Article V/1 of the New York Convention. In addition, a Turkish court can refuse the enforcement of an arbitral award on its own motion on the grounds established in Article 15/2 of IAA and Article V/2 of the New York Convention.

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[629] Bennar, supra, at 3.

[630] The non-official translated text is available (August 7th, 2018, 4:50 p.m.) at http://jafbase.fr/docAsie/Turquie/Private%20international%20law%20Turkey.pdf

In the following headings, particular provisions in the Turkish law will be examined and some issues will be highlighted to reveal the correlation between the Turkish law and the New York Convention.

6.3.2.1. Turkish Private International Law and Procedural Law No.5718

Article 62 of the PILA (Turkish Private International Law and Procedural Law No.5718) governs the grounds for refusal of enforcement of the arbitral awards. The Article consists of a similar structure to the New York Convention, except that the language of the article has a mandatory element by using "shall" instead of using "may" as in Article 5 of the New York Convention:[631]

> (1) The court shall dismiss the enforcement request of a foreign arbitral award, if,
>
> a) An arbitration agreement is not executed, or arbitration clause does not exist in the main agreement,
>
> b) The arbitral award is contrary to public morality or public policy,
>
> c) It is not possible to settle the dispute subject to the arbitral award by way of arbitration under Turkish law,
>
> ç) One of the parties has not been duly represented before the arbitrators and has not expressly accepted the acts concluded thereafter,
>
> d) The party against whom the enforcement of the arbitral award is requested has not been duly notified of the appointment of arbitrators or has been deprived of his/her right to make claim and defense,
>
> e) The arbitration agreement or clause is invalid pursuant to the governing law designated by the parties, or in the absence thereof, pursuant to the law of the place where the arbitral award is rendered,
>
> f) The appointment of the arbitrators or the procedure applied by the arbitrators violates the agreement of the parties, or in the absence thereof, the law of state where the arbitral award is rendered,
>
> g) The arbitral award has been rendered on an issue that is not included in the arbitration agreement or arbitration clause or exceeds the limits of the agreement or the clause (only the exceeding part),
>
> h) The arbitral award is not final, enforceable, or binding under the governing law or the governing procedure or the law of state where it was rendered, or it is annulled by the competent authority in the place where the award is rendered.

[631] Article 62 of PILA.

(2) The burden of proof regarding issues addressed in the paragraphs (ç), (d), (e), (f), (g), and (h) above, lies on the party against whom enforcement is requested.[632]

6.3.2.2. International Arbitration Act No.4686 (IAA) Article 15

Article 15 of the IAA governs the conditions for an arbitral award to be set aside:

1. Where the party making the application furnishes proof that:

a) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Turkish law;

b) the composition of arbitral tribunal is not in accordance with the parties' agreement, or, [failing such agreement] with this Law;

c) the arbitral award is not rendered within the term of arbitration;

d) the arbitral tribunal unlawfully found itself competent or incompetent;

e) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;

f) the arbitral proceedings are not in compliance with the parties' agreement [as to the procedure], or, failing such agreement, with this Law provided that such non-compliance affected the substance of the award;

g) the parties are not treated with equality;

or

2. where the court finds that:

a) the subject matter of the dispute is not capable of settlement by arbitration under Turkish law;

b) the award is in conflict with the public policy."[633]

By means of the IAA, the conditions for setting aside an arbitral award is considered as a special remedy. First of all, the party who relies on the aforementioned circumstances needs to bring the claim to the regional court of

[632] Full translated text (non-official translation) is available (August, 7th, 2018, 5:10 p.m.) at http://jafbase.fr/docAsie/Turquie/Private%20international%20law%20Turkey.pdf.

[633] The non-official translated text is available at (August 7th, 2018, 5:30 p.m.) http://www.camera-arbitrale.it/Documenti/tial_turkey.pdf.

second instance. The law requires the hearings and the verdict to happen as soon as possible.

Article 15 further indicates that in cases where the award contains certain matters beyond the scope of submission to arbitration, it partially may be set aside.[634]

No matter which provisional grounds the applicant relies on, any claim against the arbitral award brought to court suspends the execution of the arbitral award *per se*. Parties are allowed to disclaim their right, in part or in full, to initiate an action for setting aside an arbitral award.[635] The parties may appeal the final judgment regarding the enforceability of an arbitral award to the Court of Cassation in accordance with the provisions of the Code of Civil Procedure.

6.3.3. Correlation between the Turkish Law and New York Convention

Article 62/1-e of the PILA, Article 15/A/1-a of the IAA and Article V/1-a of the New York Convention necessitate a valid arbitration agreement between the parties.[636] Therefore, the

[634] Article 15, IAA; "The application for setting aside an award may be made within thirty days from the date of notification of an award or a decision on correction or interpretation or an additional award."

[635] Article 15, IAA; "A party whose domicile or habitual residence is not in Turkey may renounce that right completely in an express clause in the arbitration agreement or in writing, following the signature of the arbitration agreement. Alternatively, in the same manner, the parties may renounce the above right for one or more of the reasons as set forth above for setting aside the award."

[636] PILA Article 62/1-ç, d, Article V/1-b of the New York Convention and IAA Article 15/1-b: The arbitration procedure should not violate the defendant's right to fair hearing the defendant has the right to be properly noticed from the all necessary arbitral procedures such as the appointment of the arbitrator. In institutional arbitration, the notification procedure must be carried out pursuant to the institution's proceedings. In ad hoc arbitration, it must be systematically conducted in accordance with the arbitration agreement and the rules designated by the arbitral tribunal. Moreover, according to the PILA 62/1-ç, the defendant should be able to present his case during the arbitral proceedings.

IAA Article 15/1-e, PILA Article 62/1-g and The New York Convention Article V/1-c: The arbitral award should be issued within the scope of the arbitration agreement. The tribunal cannot decide beyond the parties' submissions. In this respect, the arbitral tribunal's jurisdiction is limited. But in cases the award can be separated, the court may recognize and enforce the part of the award which has been presented within the scope of the parties' submission to arbitration.

IAA Article 15/1-b, PILA 62/1-f , and New York Convention Article V/1-d: The composition of the arbitral tribunal and the arbitration procedure must be in accordance with the arbitration agreement. Otherwise, the enforcement of the award may be refused. Furthermore, in the absence of such agreement it must be in accordance with the law of the country where the arbitration took place.

PILA Article 62/1-h, and New York Convention Article V/1-e: In order to enforce an arbitral award, it must become binding. Otherwise, the enforcement of the award may be refused. On the other hand, it should have not been set aside or suspended by a competent authority. This authority may be the country in which, or under the law of which, that award was made.

Turkish law, like the New York Convention, allows parties to argue incapacity or invalidity of the arbitration agreement as a defense to the recognition and enforcement of an arbitral award. Mental incompetence and lack of authority to act are examples for the incapacity defenses. Article 9 of PILA requires incapacity to be determined in accordance with the national law of the person in question pursuant.

The invalidity argument, on the other hand, must be examined in accordance with the law chosen by the parties in the agreement. In cases where the parties have not chosen any applicable law, then the law of the country where the award was rendered will be applied (PILA 62/1-e). A common invalidity argument is that the arbitration agreement is not valid because it is not in writing as required in Article II. Other grounds for arguing invalidity include illegality, duress or fraud. In some instances, poor drafting can cause inaccuracy which makes the arbitration agreement unenforceable.[637]

6.4. The Concept of Public Policy in Turkey

Since the well-known Keban-judgment was delivered by the Court of Cassation in 1976, Turkey has been considered unfriendly to recognition and enforcement of arbitral awards.[638] In the judgment, the enforcement of the arbitral award delivered by the ICC was refused on the ground of public policy. Before the finalization of the arbitral award, it was reviewed and approved by the ICC board. The Court of Cassation considered this sort of approval apart from the arbitral tribunal itself as against the public policy notion.

But things have changed in Turkey in a way favoring arbitration. In fact, the high court has changed its approach to appeals within the ICC arbitration system, and now accepts that that the appeal procedure does not violate public policy.

In the following headings, post-Keban changes in Turkey will be explained.

6.4.1. Definitions in the Doctrine and Practice

The notion of public policy in the Turkish legal system is not definitive. In the last two decades, courts have not interpreted public policy narrowly in every case. The concept is still a vague and

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PILA 62/1-c, IAA 15/2-a, CCP Article 408, and New York Convention Article V/2-a: The dispute subject to the arbitration proceedings must be arbitrable. In cases where the subject matter of the dispute is not capable of settlement by arbitration under Turkish law, the court can refuse enforcement of that award. For example, Article 408 of the CCP governs that disputes arising from property rights on immovable property are non-arbitrable.

PILA 62/1-b, IAA Article 15/2-a, and New York Convention Article V/2/b: The court can also, by its own motion, consider whether the arbitral award is against to the public policy in the country where recognition and enforcement is sought. This issue will be discussed in detail in the following sections.

[637] This is called "Pathological Arbitration Clauses" in the academia. Nevertheless, courts may overcome a pathological clause by using the principle of effective interpretation. See Duarte G. Henriques, *Pathological Arbitration Clauses, Good Faith and the Protection of Legitimate Expectations*, 31(2) ARB INT'L, 349 (2015).

[638] Turkey, Court of Cassation, 15th Civil Chamber, E.1617, K.1052 (March 10th, 1976).

subjective under Turkish Law. Judges have a considerable discretion on how to interpret public policy.[639]

Public policy has a high place in Turkish law. For instance, the Constitutional Court has said that "legislator[s] can under no circumstances . . . undermine or exclude the public policy."[640]

The Court of Cassation has issued numerous opinions describing public policy. In one of the judgments related to tax law, the high court stated:

public policy is the entire set of rules and institutions, which determines the foundation structure and protects the fundamental interests of the society from the political, social, economic, ethical and legal perspectives within a specific period of time."[641]The high court held that arbitral awards can be refused on public policy grounds when they conflict with tax and customs laws.[642]

In another case concerning the enforcement of a foreign judgment, the high court stated that "public policy is the set of rules, which protects the foundation structure and fundamental interests of the society."[643]Although this case was about the enforcement of a foreign court judgment—not an arbitral award—it gives a considerable insight of how the high court views public policy. In that case, the foreign court judgment sought to be enforced in Turkey was delivered without any reasoning. Although this is against the Turkish law, the high court—after discussion—found that this did not amount to a public policy violation *per se*.

6.4.2. The Grounds for Refusal Based on Public Policy

The principles derived from the doctrinal discussions and the practice have two important aspects: Substantive, procedural.

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[639] Balkaya, supra, at 4.

[640] Turkey, Constitutional Court, E.1985/1, K. 1986/4 (1986), retrieved from Balkaya, supra, at 4.

[641] Turkey, General Assembly of the Court of Appeals, E. 2011/13 K. 2012/47 (February 8th, 2012). This definition has been, one way or the other, acknowledged by the academia. See Z. AKINCI, MILLETLERARASI TICARI HAKEM KARARLARI VE TENFIZI, (1994), at 160; PELIN GUVEN, TANIMA VE TENFIZ, YABANCI MAHKEME KARARLARININ TANINMASI VE TENFIZI (2013), at 131; KEMAL DAYINLARLI, MILLI-MILLETLERARASI KAMU DUZENI, TAHKIME ETKILERI VE SONUCLARI (2011), at 8; AYSEL CELIKEL & BAHADIR ERDEM, MILLETLERARASI OZEL HUKUK, (15th ed. 2017), at 164; TURGUT KALPSUZ, TURKIYE'DE MILLETLERARASI TAHKIM, (2nd ed. 2010), at 146; CEMILE DEMIR GOKYAYLA, YABANCI MAHKEME KARARLARININ TANINMASI VE TENFIZINDE KAMU DUZENI (2001); Aydanur Gurzumar, *Turk Devletler Ozel Hukuku Acisindan Bosanma Davalarinda Kamu Duzeninin Etkileri,* MILLETLERARARSI HUKUK VE MILLETLERARASI OZEL HUKUK BULTENI 14, 21 (1994), at 21-54; HIFZI TIMUR, DEVLETLER HUSUSI HUKUKUNDA KAMU DÜZENI (1942).

[642] Turkey, General Assembly of the Court of Appeals, E. 2011/13 K. 2012/47 (February 8th, 2012).

[643] Turkey, General Assembly of the Court of Appeals, E. 2010/1 K. 2012/1 (February 10th, 2012).

6.4.2.1. Substantive Issues

It is widely accepted in Turkey that if a foreign arbitral award violates the principles of equality and fairness and right to be heard, it can be rejected on public policy grounds.[644]

Turkish law also adopts the notion that the very essence of justice is that arbitrators must be independent and impartial. If this is not the case, an arbitral award may be refused based on public policy.[645]

Turkish law has also recognized that arbitral awards ignoring a payment that the state requires violates public policy. In one case, in a concession agreement under Turkish law[646] between a state agency and a mobile phone operator, an arbitral award was rendered under the Rules of the International Chamber of Commerce seated in Istanbul.[647] The arbitral tribunal held that the claimant, the mobile phone operator, was not obliged to pay a contribution of 0.35% of its gross sales to the treasury as claimed by the state agency. The state agency brought the arbitral award to a local court for setting aside it for the violation of public policy and the arbitral tribunal exceeded its authority in pursuant to Article 15 of the IAA.[648] The first instance court dismissed the annulment request and found no violation of Turkish public policy, and that the arbitral tribunal did not exceed its authority. Upon appeal by the state agency the Court of Cassation overruled the first instance court's verdict, reached the decision that the arbitral award was against the public policy.[649]

The Court of Cassation, in the decision, discussed both the domestic and international characteristics of public policy\. The high court argued that public policy stands in two different grounds: public policy in domestic law and public policy in private international law. In the words of the high court, public policy in domestic law "is the entire set of rules protecting the fundamental structure and fundamental interests of the Turkish society." On the other hand, "the notion of international public policy is more limited compared to that of domestic law… . A situation considered as a violation of public policy in domestic law may not be considered as violation of public policy in international law." The high court recalled that "in the present case, the arbitration agreement between the parties provides that the dispute shall be resolved by Turkish law." Therefore, public policy should be considered pursuant to the Turkish law. The

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[644] Balkaya, supra, at 6; Okan Demirkan & Burak Eryigit, *Developing Court Practice in Turkey Regarding Applications to Set Aside Arbitral Awards*, 26 AM. REV, INT'L ARB. 591 (2015), at 591.

[645] *Id*.

[646] "According to the agreement, the operator should pay a treasury share and contribute to the authority's expenses pro rata to the realized gross sales."

[647] "Although the operator paid these shares for some time, it claimed that the discounts on wholesale prices given to distributors should not have been included in the gross sales based on which these shares were calculated. The operator initiated arbitration under the agreement. The arbitral tribunal ruled in favor of the operator."

[648] The state agency claimed that claiming that: "[T]he arbitral tribunal had exceeded its authority (Article 15(A)(1)(e)); and the award was contrary to Turkish public policy (Article 15(A)(2)(b))."

[649] Turkey, Court of Cassation, 13th Civil Chamber, E. 2012/8426, K. 2012/10349 (April 17th, 2012).

high court referred the already established criteria by the General Assembly that public policy is "the entire set of rules and institutions, which determines the foundation structure and protects the fundamental interests of the society from the political, social, economic, ethical and legal perspectives within a specific period of time."[650]

The court highlighted the purpose of the transfer as part of the State's public service and the expected income of the treasury which was agreed upon the concession agreement. The court distinguished tax debts from such fees and decided that the latter has emerged as the treasury's share. Consequently, the high court held that the arbitral award absolving the telecommunication company from paying such fees violates the function of "the State's income generation," which is one of the mandatory principles of Turkish law and thus public policy.[651] This basically shows that the Court of Cassation adopted a broad understanding of public policy in refusal proceedings of arbitral awards.

In case the foreign arbitral award includes terms of payment of claims related to gambling, bribery or performing of obligations arising out of contracts of drugs or human-trafficking, the foreign award will be refused on grounds of violation of public policy.[652]

Similarly, in cases in which a foreign arbitral award stipulates the delivery of goods whose imports and exports are prohibited by law, the enforcement of that foreign arbitral award will not be possible due to the violation of public policy.[653]

6.4.2.2. Procedural Issues

Concerning an arbitral award delivered under the rules of the Zurich Chamber of Commerce and Industry, which obliged the prevailing party to bear the arbitration cost, the Turkish first instance court declined the enforcement request. According to the Turkish law the losing party is required to bear the costs and expenses in court proceedings. But the Court of Cassation decided against the first instance court by announcing that even though the allocation of the costs and expenses of the arbitral proceedings is against the Turkish law, it would not violate the public policy.[654]

Article 15 of the IAA provides for the possibility of waiving the right to challenge an award or resort to the legal remedies in part or in full. But parties are not allowed to waive such right before the right to resort to those remedies originates. If a foreign arbitral award refers to such agreement, it shall be refused due to the violation of public policy.[655]

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[650] Turkey, General Assembly of the Court of Appeals, E. 2011/13 K. 2012/47 (February 8th, 2012).

[651] Turkey, General Assembly of the Court of Appeals, E. 2011/13 K. 2012/47 (February 8th, 2012).

[652] Balkaya, supra, at 6.

[653] *Id.*

[654] Turkey, Court of Cassation, 11th Civil Chamber of Court of Appeal, E. 2012/16024, K. 2013/24728 (July 16th, 2013).

[655] Balkaya, supra, at 6.

In cases which a foreign arbitral award and a final court judgment include contradictory provisions, their enforcement at the same time would harm the justice system. Thus, the enforcement of the foreign arbitral award may be refused on the grounds of violation of public policy. It is because the public policy is based on legal security, social peace and stability.[656]

7. CONCLUSION

Historically, courts did not favor alternative dispute resolution mechanisms, including arbitration. But with the advent of globalization and expansion of international commerce, parties started to look more and more to arbitration as. Arbitration's appeal was clear. Not only did it give the contracting parties great procedural autonomy, including with respect to the choice-of-law, the seat of arbitration, the language of the proceedings, and the applicable institutional rules but it also gave the parties assurance that they would avoid being "hometowned" in the other party's jurisdiction. To promote international commerce, countries began ratifying international instruments aimed at legitimizing international arbitration and enabling parties to enforce arbitral awards the member-states' jurisdictions.

But despite these advances, there are still certain concepts that cast a shadow over the enforceability of arbitral awards. One of these concepts is the public policy exception—which is codified in numerous instruments, including the most important one of them all: the New York Convention. The public policy exception allows the forum state to refuse recognition and enforcement of an arbitral award on the grounds that it violates the state's public policy.

Given that public policy is somewhat amorphous concept escaping any clear definition, the public policy exception has the potential to create great unpredictability and the loss of confidence in the arbitral process depending on how it is interpreted. For instance, if it is interpreted broadly to include statutory violations, then the enforcement of arbitral awards become less predictable and more tied to the forum state's domestic laws. If, on the other hand, public policy is interpreted as violating some more universal moral standard, then the enforcement of arbitral awards will become more predictable.

International arbitration is critical in supporting international commerce and direct foreign investment, and its role will only become more important as globalization continues. For this reason, a narrower approach to public policy is necessary, so that arbitral awards do not become subject to the many unique laws of different forums. The point of international arbitration is, after all, to move away from domestication to a more standard international set of norms in the dispute resolution process. Thus, this author favors the U.S. rather than the E.U. approach to a narrow construction of the public policy exception.

[656] *Id*.

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