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BIMBO ATILOLA
Editor - In - Chief

IGHO B. OGHOGHORIE
Managing Editor

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The Jurisprudence of 'Public Policy' Exception in the Enforcement of International Arbitral Awards*

1. Introduction

The concept of public policy is a recurrent decimal in the consideration of arbitrability in international commercial law. The idea of 'public policy' is famous among judges and scholars. But as a concept, it is not susceptible to a generally accepted definition. However, conceptions agree that public policy reflects some moral, social, economic or legal principles 'so sacrosanct as to require [their] maintenance at all costs and without exception'[1]. Although heavily criticized as a vague and ambiguous concept, the role of public policy is nevertheless a fundamental one from the viewpoint of many a legal system. In the "choice-of-law" field, the public policy is a barrier against the application of a foreign law that would otherwise be designated by the choice-of-law rules. The purpose of the public policy impact is to protect the fundamental principles of the society. Thus, according to this function, the public policy rule may be defined as a 'mechanism that corrects the choice-of-law designation for substantive reasons, namely, the defence of the forum's fundamental legal principles and moral values'.

Difficulties arise, however, when an attempt is made to define those principles and values that constitute the public policy of a particular state. The question as to the degree of fundamentality of a given principle inevitably rears its head when the consequences of applying the governing foreign law contradict a principle of another legal system that may be applicable to the legal relationship. Moreover, since the issue of public policy stands within the context of the application of the legal principles of a particular state, the

*Ikenga K.E. Oraegbunam, Dip. Lat., B.Th, M.A.(Rel.), M.A.(Phil.), LL.M, BL, Ph.D., Lecturer, Dept of International Law & Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria.

1. Klaus Peter Berger, International Economic Arbitration, Kluwer Law, Deventer, (1993) at 670.

interpretation of public policy is subject to the values and standards accepted by that state. These standards are determined by the applicable economic, political, religious, social and legal systems, which vary among societies. Therefore, the standards constituting public policy change as these societies develop.[2] This paper therefore deems it pertinent to analyze the concept and trace some contemporary trends in the defence of public policy as an exception to the enforcement of arbitral awards across the globe.

2. Definition and Content of 'Public Policy' Rule in Private International Law

It is quite germane to delineate from the onset the idea of public policy in this discourse, and in particular, to distinguish the layers of the meaning of public policy in international arbitration. It may therefore be apt to define the key terms in relation thereto.

Public Policy

In using the term "public policy", this paper means those moral, social or economic considerations which are applied by courts as grounds for refusing enforcement of an arbitral award (either domestic or foreign).

The English House of Lords in 1853 described public policy as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good".[3]

International Public Policy

The term "International public policy" denotes that which is applied by State courts to foreign awards rather than domestic awards. International public policy is understood to be narrower than domestic public policy: not every rule of law which belongs to the domestic public policy is necessarily part of the international public policy. But "international public policy" is not to be confused with "transnational public policy". The latter is supra-national (see below); the former is specific and subjective to each State.

2 Van den Berg, "Distinction between Domestic-International Public Policy", (1996) XXI Yearbook at p. 502.

3 Egerton v. Brownlow (1853) 4HLC 1.

Transnational or Truly International Public Policy

"Transnational public policy", refers to those principles that represent an international consensus as to universal standards and accepted norms of conduct that must always apply. The concept of "transnational public policy", or "truly international public policy", is said to comprise fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as "civilised nations".

3. Public Policy in the Arbitration Process

The issue of public policy arises at two stages in the arbitration process: first, during the arbitration itself, where the possible conflict between the applicable legal systems is resolved by the arbitration; and, secondly, when the arbitral award is enforced before the national courts, and the judge may be required to protect fundamental policies of the forum. The present analysis will focus on the second stage of application of the public policy exception – the recognition and enforcement procedure. When deciding upon the recognition and enforcement of arbitral awards, national judges have traditionally been concerned with the public policy of the forum. The texts of various international instruments also typically refer to the public policy of the state where recognition and enforcement is sought.

Public Policy and Mandatory Rules

An Arbitral forum has to distinguish public policy from mandatory legal provisions known also as 'normes d'application immediate ou necessaire' or 'lois de police'. Although not always used as synonymous, these terms describe a similar concept in different jurisdictions and are generally referred to as mandatory provisions set out in public interest, which compulsorily apply to all relationships which have a connection with that legal system and which prevail on any contrary conflict of law rules. Two characteristics of mandatory provisions follow from this definition: first, these rules are introduced to protect some policy essential to the state and secondly, their application is demanded irrespective of and even prior to the designation of the substantive law governing the dispute. Necessary, all rules of public policy are of mandatory character because they

reflect the basic notions of morality and justice. But not all mandatory rules rise to the level of public policy because the interests protected may not concern the societies' fundamental values.

It is worthwhile identifying situations in which the application of mandatory rules is (or should be) so well accepted that it can be categorised as uncontroversial. Potentially, there are four such categories: force majeure, transnational public policy, mandatory rules of the lex contractus, and rules of the seat.

Force Majeure

The principle of force majeure allows arbitrators to take into account mandatory rules which make performance of contractual obligations impossible – provided they were neither foreseeable nor provided for in the parties' contract. It should be noted, however, that the mandatory rule is not applied, but rather considered under the lex contractus as an element of fact. The arbitrator merely needs to identify the applicable rules of force majeure and then decide if the terms and practices of the mandatory rule in issue satisfy that test. Thus, the force majeure category is uncontroversial, as it requires arbitrators to do no more than apply the law chosen by the parties.

For example, if a contract governed by English law for the shipment of goods from the US to South Africa were interrupted by African Union trade sanctions, the sanctions may constitute a force majeure under the lex contractus. They would not, however, be applied directly. This also means that not all cases will deal with force majeure in the same way, as its scope and ramifications will vary according to the national legal history and policy of the country whose law governs the dispute.

Transnational Public Policy

Transnational public policy reflects the fundamental values, the basic ethical standards, and the enduring moral consensus of the international business community. Examples are human rights (such as opposition to racial, sexual and religious discrimination and slavery), bonos mores (including opposition to corruption, terrorism, genocide and paedophilia), fair hearing and due process. It is uniformly accepted that arbitrators must apply any mandatory rule that reflects

transnational public policy in order to maintain minimum standards of conduct and behaviour in international commercial relations. As the Cour d'appel has put it,

'the security of international commercial and financial relations requires the recognition of a public policy that is, if not universal, at least common to the various legal systems'.[4]

And, since transnational public policy represents values that are superior to those of particular national systems, arbitrators owe a paramount duty to the international community; they should refuse to apply any mandatory rules that conflict with transnational public policy. They should also refuse to apply parties' chosen laws that conflict with such policies. The international law institute's Resolution on the Autonomy of Parties supports this view, stating that

'[i]n no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community'.[5]

This statement also makes it clear that the justification for this approach lies not in the mandatory rules doctrine but in that of international public policy, which explains why this category is uncontroversial.

The difficulties with transnational public policy are, first, for parties, the evidentiary difficulty in establishing a given principle's universality; and second, for arbitrators, uncertainty as to the degree of universal acceptance required before the principle becomes 'truly international'. Finally, there is the question of how arbitrators should respond if an express choice by the parties conflicts with an established international public policy. While an arbitrator should not ignore the latter, the arbitrator may find it difficult to maintain jurisdiction when the express choice is to be ignored.

4. Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), Comparative Arbitration Practice and Public Policy in Arbitration (1987) 257, 285-6.
5. Resolution on the Autonomy of Parties, art 2.

Mandatory Rules of the Lex Contractus

It is necessary to distinguish between two situations, one in which the lex contractus has been chosen by the parties, and another, in which the lex contractus has been chosen by the arbitrators.

The Lex Contractus Has Been Chosen by the Parties

It is generally agreed that if the lex contractus has been chosen by the parties, its mandatory rules must be applied – provided, of course, they are not contrary to transnational public policy.

It has been argued however, that if the parties did intend for a mandatory rule of the lex contractus to be excluded, the arbitrator ought to respect their will as they could just as easily have chosen a law that did not contain the relevant mandatory provision. This is true if it is believed that the only limit to the parties' control over the applicable law is transnational public policy. If, on the other hand, it is accepted that mandatory rules may be applied even when not wanted by the parties, such intent will be a relevant but not decisive factor in the arbitrators' decision.

According to Darains,[6] these all need to be considered in the broader context whereby an arbitrator cannot ever do anything contrary to an express agreement of the parties without some other source for such a mandate. For example, if an arbitrator thinks a mandatory rule must apply but the parties say not to apply it as between them, an arbitrator might distinguish between situations where there are negative externalities which the mandatory rule addresses and those where there are not. In the latter situation, there seems little reason to interfere with party autonomy where the parties are both fully knowledgeable as to their rights. In the former case, where third party rights are involved and the mandatory rules are for their benefit, an arbitrator faced with an express demand to ignore such laws could have chosen not to have accepted the appointment in the first place but cannot inherently do something outside the limited mandate in the arbitration agreement. Similarly, if an arbitrator decides to apply a mandatory rule based on

6. Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in Pieter Sanders (ed), Comparative Arbitration Practice and Public Policy in Arbitration (1987) 227, 228.

implied consent and the parties then expressly revoke that consent, the arbitrator would be entitled to stand down as opposed to ignoring the law if he or she felt so compelled, but would not be entitled to ignore the parties' directions.

A second view, espoused by Voser is that parties do not choose a law according to its public policy provisions, but according to how it balances competing private interests.[7] Therefore, automatically applying mandatory rules of the lex contractus does not give effect to party expectations and so gives undue advantage to the public policy goals of the state that provides the lex contractus. Consequently, mandatory rules of the lex contractus should be in no better position than those of other countries. While there is certainly some appeal to this argument, the contrary position is equally tenable. For example, the fact that many mandatory rules protect private party interest could, by itself, be sufficient to influence choice of law. There are a range of permutations of implied consent in such circumstances. For example, the mandatory rule might protect buyers against sellers, in which case the buyer could have impliedly consented, but not the seller. It is also at least possible that both consented freely, which means that Voser's presumption is going too far. And, in an age where there is increasing pressure on corporations to consider community welfare, it is not inconceivable that a law's public policy provisions may also have some relevance to choice of law. Further, such a narrow construction of the parties' intentions seems contrary to current interpretive trends. Craig, Park and Paulsson suggest that

[w]hen parties now use the Model clause, it is understood that they intended to make a comprehensive reference to the ICC (International Chamber of Commerce) mechanism (bracket mine).[8]

Thus, the reason for Voser's criticism is logical, but her subsequent suggestion, namely, denying this category entirely, seems disproportionate. It would be safer to presume that the parties intended for the law to be applied in toto, and allow them to alter their arbitration

7. Nathalie Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration (1996) 7 American Review of International Arbitration 319, 347.
8. William Craig, William Park and Jan Paulsson, International Chamber of Commerce Arbitration (3rd ed, 2000) 88-9.

agreement and the arbitrators' mandate in the event they change their minds.

Third, it has been argued that only the mandatory rules of the lex contractus that have been invoked by one of the parties are applicable, as arbitrators' jurisdiction only extends to issues raised by the parties.

Again, however, contrary arguments are imaginable. For example, arbitrators' duty to meet the parties' legitimate expectations could be a source of obligation, because, it is arguable that the parties' original expectations were more likely than not, for the law they chose to be applied in toto. Alternatively, jurisdiction could be invoked through arbitrators' duty to render an enforceable award. Here, however, there are a range of scenarios. If the duty is seen as being owed to the winner, and if the winner was warned of the issue but still did not want the mandatory rule raised, should an arbitrator be paternalistic and do it anyway, and, if so, on what grounds? Or could it be argued that the duty to render an enforceable award is also owed to 'arbitration as an institution' (The more unenforceable awards that go around, the worse arbitration's reputation will be ...)? Both parties could promise that they would not challenge the award on that basis, but enforceability concerns will always be greatest when the loser's assets are located in the state that promulgates the law, and such a state would be reluctant to respect an agreement not to apply its mandatory rules.

It is readily conceded, however, that there are germs of truth in these dissenting voices. One solution that would placate their concerns, though radical, is to change this category from the lex contractus to the 'parties' expectations, assessed objectively. If the parties have expressly agreed on the proper law, there would be a presumption in favour of applying its mandatory provisions. The parties would then have to adduce evidence to overcome this prima facie position. This would be simple if alongside the choice of lex contractus sits an express exclusion of its mandatory provisions. Generally, however, overcoming the presumption is likely to be difficult. Even if the parties were unaware of a particular mandatory rule or any other substantive law of a country, if they choose a body of law to govern their contract they should be taken to submit to all its provisions. To establish that the

law should not apply, relevant evidence might include, for example, a documented mutual pre-contractual desire to avoid the rule in question. Alternatively, one party may have made reference to the importance of not breaching a particular law, where the other party did not object. Some laws expressly excluded might even demonstrate an intention to exclude others.

In addition to the parties' conduct, other relevant factors are likely to include their experience, the amount and quality of their advice, the foreseeability of the particular law and arbitral trends. For example, in construction disputes it may be relevant that the UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works encourages parties to take mandatory rules into account when negotiating contracts. Generally, it will be relevant that there has been a proliferation of mandatory rules in recent arbitral practice, and the potential relevance of mandatory rules in international arbitration has been made widely know through cases such as Mitsubishi.

This suggests that often, parties should be aware of the potential for mandatory rules issues to apply to any dispute resolution proceeding, and should take active steps to avoid them if that is their wish. Naon,[9] argues:

[I]t would be relevant that there has been a proliferation of the mandatory rules in recent arbitral practice. It can hardly be maintained that sophisticated and experienced parties – as most subjects of international economic relations are – can be deemed to ignore the eventual application of international mandatory rules of national origin having some connection with the transaction, especially if they currently use or have easy access to the advice of international law firms with branches or correspondents all over the world.

So if highly experienced parties with expert legal advice choose the widest possible words in drafting their arbitration agreements and choice of law clauses, they should be taken to expect a wide range of mandatory rules to apply.

9. Horacio Grigera Naon, Choice-of-law Problems in International Commercial Arbitration (1992).

Certainly, the category is thus broadened, allowing laws not even mentioned in the lex contractus to be applied; however it better accords with party autonomy than the alternative, and thus ensures the arbitrators' jurisdiction even when a law is not raised by either party. It also increases fairness between the parties, and placates states. In cases where the evidence is ambiguous it might prove more controversial, however no more controversial, than any other determination of fact an arbitrator is required to make. For the purposes of this paper, it will be assumed that this approach is an accepted category.

The Lex Contractus Has Been chosen by the Arbitrators

Parties often fail to select a law to apply to their relations, either because they cannot agree on a law, they had incompetent lawyers who omitted a choice of law clause, or because they are more concerned with making a deal than planning for its undoing. When this occurs, arbitrators can generally either select the conflicts rules, or directly choose the substantive law they consider appropriate. Either way, however, commentators agree that arbitrators should, and do, choose the law that best accords with the parties' legitimate expectations (although there may be a difference between expectations as to ultimate substantive law and expectations as to applicable conflicts principles). Once the substantive law has been determined, the orthodox approach is for arbitrators to then automatically apply all of this law's mandatory rules. In addition, foreign mandatory rules are applied more readily than where there is an express choice of law.[10]

The merits of this can be debated. By indirectly consenting to the arbitrators choosing the applicable law, the parties may have intended no more than for the arbitrators' choice to be treated as if it were the parties' own. This would make it difficult to justify applying foreign mandatory rules more readily than situations where a choice of law clause is present. On the other hand, by leaving it up to the arbitrators to choose the applicable law, it may be that the parties do not care as much

10. Okezie Chukwumerije, Choice of Law in International Commercial Arbitration (1994) 11. See also Rules of Arbitration of the International Chamber of Commerce 17.1 ('ICC Rules'); Australian Chamber for International Commercial Arbitration, Arbitration Rules. Art 34.1. A number of commentators criticise this approach, arguing that 'an arbitrator exercising such discretion must have some cogent reason for the choice made, which in turn will be identical to some conflicts principle.

about which law applies. This would mean that in balancing all relevant considerations, arbitrators may consider these to be less party hostility to the relevant mandatory rule. It may even have been that the mandatory rule in question could have been part of the lex contractus had the arbitrator chosen a different conflicts system. This approach fits logically with and even supports the 'parties' expectations' category as argued for above. If such a category were adopted, the distinction between party and arbitrator's choice of the lex contractus would become superfluous.

Rules of the Seat

Jurisdictional purists believe that arbitrators' powers derive from the law of the seat, and so will automatically apply its mandatory rules. Conversely, contractualist purists deny the relevance of the seat, and so would in theory be reluctant to apply its mandatory rules – at least where they relate to substantive, as opposed to procedural, issues. Where procedural issues are concerned, selecting the seat should at least imply acceptance of the lex arbiteri. In regard to the substantive rules, the analysis may be affected by the procedural rules that are selected. For example, the ICC Rules indicate that when the ICC International Court of Arbitration scrutinises arbitrations under its control, 'it considers, to the extent practicable, the requirements of mandatory rules at the place of arbitration'. While this does not require mandatory rules to be applied and while the Court is generally reluctant to interfere in the substantive parts of awards,[11] this would be some evidence of consent in an ICC arbitration.

Another relevant factor is that most national arbitration statutes provide some grounds for setting aside awards made within their territory, and the New York Convention allows non-enforcement if an award has been set aside or suspended by a competent authority of the country in which it was made.[12] Enforceability concerns should therefore give mandatory rules of the seat a strong claim to be applied,

11. See ICC Rules, above n 75, art 27, which states: Before signing any award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.

12. New York Convention, art V (1) (e).

at least insofar as they reflect the relevant public policy. Some argue that because the New York Convention is only discretionary, party autonomy should be preferred where the two conflict. Insofar as procedural mandatory rules are concerned, this makes little sense. Given the widespread adoption of the Model Law, many countries would have the same mandatory procedural rules for arbitrations. If an award violates such a provision at the seat, jurisdictions that have enacted the Model Law are unlikely to then grant enforcement.

Where substantive mandatory rules are concerned the issue is less clear. Given that there are some, although not many, jurisdictions known to enforce awards that have been set aside at the seat,[13] situations are imaginable in which enforceability concerns would not be great. One example is where there is no relevant substantive mandatory rule issued from either party's home country or the enforcement country but one arises from the seat, the seat does not provide the proper law of the contract, and the probable place of enforcement is a particularly pro-enforcement country.

In any event, contractualist arguments in this context are difficult to accept. If a sovereign state directs an arbitrator to apply a law, he or she must obviously do so. Where the direction is aimed at the parties and the arbitrator is entrusted with giving effect to it via a mandatory rule, the same would be true. Otherwise, the arbitrator would be facilitating evasion of the state's direction. As a matter of law, this is not permissible. One exception may be substantive rules that are expressed as mandatory, and that were not really intended to apply to the specific fact situation of the dispute. For example, if mandatory competition or antitrust rules, designed to protect a state's domestic market, are worded broadly enough to prohibit a relationship which has only a tenuous connection to that market, and the parties are foreign and have chosen the seat purely for convenience, then it is arguable that the law need not be applied.

In the light of this exception and the prominent voices that advocate against the automatic application of all relevant mandatory rules of the seat, it would be going too far to consider their application entirely uncontroversial.

4. Court Interpretation of Public Policy[14]

Notwithstanding the different terminologies used in national legislation, case law and commentaries indicate that courts of many countries apply a narrow concept of public policy.

The legislations of France and Portugal prescribe the application of international public policy. The courts of several other European civil law countries like Germany; Italy; and Switzerland expressly apply international public policy. Commentators from other countries like Denmark, the Netherlands, Norway, Spain and Sweden state that their courts apply public policy restrictively. But the "international public policy" being applied is generally the public policy of the country in question which is applicable to international awards, and not "transnational public policy". When commenting on the French approach, Gaillard and Goldman note:[15]

The international public policy to which Article 1502.5 refers can only mean the French conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the French legal order, even in international cases.

Some courts have approved the application of transnational public policy but this has not received widespread acceptance. The Milan Court of Appeal may have had in mind a more transnational concept when it described international public policy as a "body of universal principles shared by nations of similar civilisation, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions".[16]

The Swiss Federal Tribunal in **W.v. F. and V**[17] was in favour of taking into account a "universal conception of public policy, under which an award will be incompatible with public policy if it is contrary to the

13. Austria, Belgium, France and the US have recognised and enforced awards set aside at the seat of arbitration, although this has often been done under local law, not the New York convention: see generally, Alan Redfern and Martin Hunter with Nigel Blackaby and convention Partasides, Law and Practice of International Commercial Arbitration (4" ed. 2004) 91.
14. See generally: Audley Sheppard, Clifford Chance, Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?http://www.gasandoil.com/ogle/.htm.
15. Fouchard, Gaillard and Goldman on International Commercial Arbitration (ed. Gaillard and Savage) Kluwer, London, (1999), paras. 1645-1662.
16. Decision dated 4 December 1992, reported in (1997) XXII Yearbook 725.
17. Decision dated 30 Dec. 1994, (1995) Bull. ASA 217.

fundamental moral or legal principle recognised in all civilised countries". However, in Les Emirats Arabes Unis –v- Westland Helicopters,[18] the same court, after a long discussion of academic authority, refused to take a position on the point, preferring instead a "pragmatic approach". In France, the Paris Court of Appeal has expressed a degree of skepticism in relation to applying such a concept, in Fougerolle –v- Procofrance,[19] although it has noted that certain activities, such as corruption, violate both French public policy and international business ethics.

Common Law countries have also restricted the scope of public policy but have not embraced transnational public policy. The United States applies a restrictive concept of public policy. For example, the definition of public policy most often quoted in the context of international arbitration is that of Judge Joseph Smith in Parsons & Whittemore[20] in which he held that enforcement of a foreign arbitral award may be denied on public policy grounds "only where enforcement would violate the forum state's most basic notions of morality and justice".

The same year (1974), the Supreme Court, in Scherk v.Alberto-Culver Co.,[21] recognised the difference between international and domestic public policy. It enforced an agreement to arbitrate a claim arising in international trade, although arbitration of a similar claim would have been barred had it arisen from a domestic transaction. Although the English courts have not yet expressly applied the concept of international public policy, they have affirmed the importance of finality of awards when considering an objection to enforcement on grounds of illegality, and have endorsed a restrictive concept of public policy. For example, the English Court of Appeal (Sir John Donaldson MR), in D.S.T. v. Rakoil[22] (1987), stated:
Considerations of public policy can never be exhaustively defined, but

18. Decision dated 19 April 1994, (1994) Bull. ASA 404.
19. Decision dated 25 May 1990, (1990) Rev. Arb. 892. See also Republique de Cote d'Ivoire –v- Norbert Beyrard, 12 Jan. 1993, (1993) Rev. Arb. 685.
20. Parsons & Whittemore Overseas Co., Inc. –v- Societe Generale de l'Industrie du Papier RAKTA and Bank of America 508 F. 2d 969 (2nd Cir., 1974).
21. 417 U.S. 506 (1974).
22. Deutsche Schachtbau-und Tiefbohrgesellscaft mbh-v-Ras Al Khaimah National Oil Company (1987) 2 Lloyd's Rep. 246 at 254.

they should be approached with extreme caution.... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised".

In India, the Supreme Court, in Renusagar Power Co. Ltd v.General Electric Co.,[23] interpreted public policy more restrictively than it had done previously. The Court held that in order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of the law of India. It held that the phrase "public policy" must be construed in the sense in which the doctrine of public policy is applied in the field of private international law; and that enforcement of a foreign award would be contrary to public policy if it was contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice and morality. A Singaporean judge has said[24] that:
The principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist.

A recent decision of the Hong Kong Court of Final Appeal[25] highlights the issues faced by many courts the world-over, and in respect of which the ILA sought to give guidance. The Court addressed whether the applicable public policy was that of Hong Kong or some shared public policy, and to what extent a national court could or should look at the practice of other courts. The Court rejected the suggestion that public policy under the New York Convention meant some "standard common to all civilized nations". Nevertheless, it construed public policy narrowly. It stated that in order to refuse enforcement of a New York Convention award on public policy grounds, "the award must be so fundamentally offensive to that jurisdiction's notion of justice that, despite it being a party to the Convention, it cannot reasonably be expected to overlook the objection". The Court accepted that, in many instances, the relevant public policy of the forum would coincide with

23. AIR 1994 SC 860; also reported in (1995) XX Yearbook 681.
24. Re an arbitration between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte. Ltd (1996) 1 SLR 34 at 46, per Judith Prakash J.
25. Hebei Import and Export Corporation –v- Polytek Engineering Co. Ltd (1999) 2 HKC 205, also reported in (1999) XXIV Yearbook 652, per Bokhary PJ.

the public policy of other countries, and that it would be appropriate to examine how far the courts of other jurisdictions had been prepared to go on enforcing Convention awards made in circumstances that did not meet their domestic standards.

5. International Law Association (ILA) Recommendations

The International Law Association comprises 18 Committees, ranging from International Monetary Law, to Refugee Procedures, to Space Law. The Arbitration committee comprises 51 members (including alternates) from 35 countries. The International Commercial Arbitration Committee of the International Law Association conducted a six year study into the application of public policy by enforcement courts. The Committee concluded its work in 2002. Notwithstanding the very different legal and cultural traditions of State courts, public policy is rarely successful in preventing enforcement of international awards. Nevertheless, the Committee concluded that greater harmonisation of approach would lead to greater consistency and predictability, which would dissuade unmeritorious challenges to awards. The ILA recommended the application of "international public policy" as defined above, namely, that part of a public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award. The ILA did, however, identify various categories of international public policy. The ILA noted that the international public policy of any State includes:

(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;
(ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules"; and
(iii) the duty of the State to respect its obligations towards other States or international organisations.

6. Substantive and Procedural International Public Policy

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

principle is the principle of good faith and prohibition of abuse of rights (especially in civil law countries). Other examples that are cited by courts and commentators include: pacta sunt servanda; prohibition against uncompensated expropriation; and prohibition against discrimination.

There is an ongoing debate whether and to what extent the award of unlawful relief (e.g. punitive or exemplary damages) constitutes a violation of international public policy. The category of fundamental principles also includes the proscription against activities that are contra bonos mores, such as piracy, terrorism, genocide, slavery, smuggling, drug trafficking, and paedophilia. Some fundamental principles, such as prohibition against corruption, may also fall into one or more of the other categories. For example, permitting corruption may also be contrary to the 1997 OECD Convention on Combating the Bribery of Foreign Officials in International Transactions.

An example of a procedural fundamental principle is the requirement that tribunals be impartial. Other examples that are given are: the making of the award as induced or affected by fraud or corruption, breach of the rules of natural justice, and the parties were on an unequal footing in the appointment of the tribunal. It is widely accepted that procedural public policy should not include mistake as to the law or the facts by the tribunal (unaccompanied by some serious procedural irregularity). Contrast the decision of the Supreme Court of Zimbabwe in Zimbabwe Electricity Supply Authority v. Maposa. The arbitrator used the wrong start date for calculating the claimant's entitlement for lost salary, which resulted in a windfall to the claimant of approximately 13 months' salary. After reviewing the public policy bar to enforcement in the New York Convention and the Model Law, the Court held.

Under Article 34 or 36 [of the Model Law] the court does not exercise an appeal power either [to] uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a

sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above.

Other examples that are often cited are currency controls; price fixing rules; environmental protection laws; measures on embargo, blockade or boycott; tax laws; and laws to protect parties presumed to be in an inferior bargaining position (i.e. consumer protection laws). An example of an international obligation is a United Nations Security Council resolution imposing sanctions. Such resolutions are immediately binding on Member States of the UN pursuant to Chapter V, Article 25 of the UN Charter.

A State is also bound to comply with the treaties it has ratified. In Parsons & Whittemore,[26] the United States Court of Appeals held that public policy did not equate with "national policy" (in the diplomatic or foreign policy sense), and it would not refuse to enforce an award in favour of the Egyptian party simply because of tensions at that time between the United States and Egypt. But one wonders whether the outcome in National Oil Corp. v. Libyan Sun Oil Corp[27] might be different today. In that case, the Delaware court rejected a challenge to an award at the enforcement stage on the ground that it was in favour of Libya – "a state known to sponsor international terrorism". The Delaware court noted that the United States still recognised the government of Libya had not declared war on it and had specifically given it permission to bring an action to confirm the award. The Court said:

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

26. Parsons & Whittemore Overseas Co., Inc. –v- Societe Generale de l'industrie du Papier RAKTA and Bank of America 508 F. 2d 969 (2nd Cir., 1974).
27. National Oil Corp. –v- Libyan Sun Oil Corp. 733 F. Supp. 800 at 819 (Del., 1990).

In Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd.,[28] Baker Marine sought enforcement of two arbitral awards by a Nigerian court while the losing party petitioned the same court to vacate the awards. After the Nigerian court set aside both awards, Baker Marine attempted to enforce the arbitral award in the United States pursuant to the New York Convention, arguing that the Nigerian court's reasons for setting aside the awards were not valid under FAA standards. The District Court rejected the argument because Baker Marine agreed that disputes were to be arbitrated under Nigerian law, and there was no claim that the Nigerian High Court was an incompetent authority in that country. Relying on principles of comity within the Convention, the 2nd U.S. Circuit Court of Appeals affirmed.

7. Arbitrability and Public Policy

The issue of arbitrability of the dispute is another aspect of public policy. The rules on arbitrability may restrict the freedom of parties to substitute arbitration for the jurisdiction of the national courts by excluding certain subject matter from arbitration (so-called 'objective arbitrability') or by limiting the ability of certain parties to participate in arbitral proceedings ('subjective arbitrability').

Being a prerequisite for determining the competence of the arbitrators, the issue of arbitrability may arise as soon as the dispute has been submitted to arbitration. At this initial stage, one of the parties may assert lack of arbitrability either before the arbitral tribunal or directly before a national court. The question may be raised as well, in proceedings before national courts at the time of recognition and enforcement of arbitral awards. Pursuant to Article V (2) (a) of the New York Convention, arbitrability constitutes a separate ground for the refusal of the enforcement of arbitral awards. According to some opinions, this text may be considered superfluous because arbitrability is part of public policy and is thus included in Article V (2) (b). Others argue that rules regarding arbitrability of disputes do not always rise to the level of public policy. Although legal provisions determining arbitration are always of mandatory character, some commentators argue that restrictions on the arbitrability of certain disputes may not

28. Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd 191 F. 3d 194, 197 n.2 (2d Cir. 1999) (affirming the District Court's decision not to enforce the arbitral award).

reflect national policies of such a fundamental character so as to qualify them as issues of public policy. In the area of objective arbitrability, issues regarding consumer protection, anti-trust and competition, industrial and intellectual property rights, restrictions on foreign trade, foreign exchange restrictions and securities transactions are among the subject matters most commonly proposed for exclusion from the jurisdiction of arbitrators.

It goes without saying that the concept of subjective arbitrability refers to the capacity of certain entities, such as state and state institutions, to conclude arbitral agreements. The limitations are usually related to the particular relationship of one of the parties to the state, such as state-controlled enterprises. Two questions arise in this respect. The first one is whether the responsible government official or other authority had lawfully bound the respective entity to arbitrate. This issue is to be solved by the applicable law as determined by the choice-of-law rules. The second question relates to the principle of sovereign immunity. It is a generally accepted principle of international public policy that a state party to an arbitral agreement may not claim immunity from arbitral proceedings to which it has acceded by a previous agreement. However, if the contractual obligations of the state party conflict with what would be considered a major national interest by the national forum, the public policy defence might prevent the enforcement of the award against that party in its home state.

8. Conclusion: Towards a Truly International / Transnational Judicial System

Transnational law has been defined by Jessup as "the law which regulates actions or events that transcend National frontiers.....includ[ing] both....public/private law distinction". In recent times, the term "transnational law" has been used to describe another phenomenon, namely, the creation of law in the international context by governments, international organizations, and non-sate actors (e.g., business organization). While this theory has been developed for public international law, it has long since been advocated in the field of commercial law, where the global business community has created its own law, the so-called lex mercatoria.

This paper however adopts a different definition of the term "transnational law". Transnational law describes general principles of law that are recognized by a significant number of national laws. Such general principles of law are different from the legal rules created by private actors because they draw their binding force from national laws. However, they also are not identical to state-made laws, because they are more general principles underlying these laws. The theory of general principles of law is that there are fundamental ideas of justice that can be found in a wide spectrum of national laws and directly applied to legal disputes. It is the somewhat platonic view that we can see the pure ideas of justice through the shadows of national laws.

The question of arbitrability is a most basic one in arbitration. Arbitrability separates those issues that may be submitted to arbitration from those that may not. Arbitrability thus goes to the jurisdiction of the arbitral tribunal over a dispute. Since arbitration is based on the contractual agreement of the parties, there are two reasons why the arbitral tribunal may lack jurisdiction--either the parties have not agreed to submit the specific dispute to arbitration, or the dispute cannot be submitted to arbitration at all. The former is basically a question of contract interpretation, while the latter pertains to complex considerations of public policy. It is the latter question that has created most problems in arbitral practice.

While the New York Convention has been acclaimed by many, it is considered by some that the public policy exception would undermine the objectives of the Convention. There was concern that it was affording an unsuccessful defendant and/or the State a "second bite" at frustrating enforcement. Others saw it as a necessary "safety-valve". The draftsmen of the New York Convention sought to limit the scope of the public policy clause as far as possible. The cases reviewed in this work show that Article V. 2 (b) has not created any serious mischief. Attempts to resist enforcement on grounds of arbitrability and/or public policy have rarely been successful. More workable way forward towards the achievement of greater predictability would be for the international arbitration community to reach a broad consensus as to which "exceptional circumstances" would justify a national court denying enforcement of a foreign arbitral award, and for the courts to

have regard to any such consensus.

The time has come for there to be a global standard of "arbitrability", and it is hoped that the ILA Recommendations represent a broad consensus, and if applied will lead to greater consistency in the interpretation and application of public policy as a bar to enforcement of international arbitral awards.