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Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration : the United States, Europe, Africa, Middle East and Asia

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GOLDEN GATE UNIVERSITY

ARBITRABILITY AND PUBLIC POLICY IN REGARD TO THE
RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARD IN
INTERNATIONAL ARBITRATION: THE UNITED STATES, EUROPE,
AFRICA, MIDDLE EAST AND ASIA

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SUBMITTED TO THE GOLDEN GATE UNIVERSITY SCHOOL OF LAW,
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ABSTRACT

Party autonomy in international arbitration is the most compelling reason for the contracting parties to enter into arbitration agreement, rather than opting for litigation. However, arbitration functionalities may be hindered by several factors, one of which is ‘arbitrability and public policy’. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides arbitrability and public policy as the grounds for refusing the recognition and enforcement of foreign arbitral award for signatory states, thus allowing national courts to use their own discretion when determining the scope of these two issues.

Public policy is a concept that is adapted periodically in order to meet the changing societal needs, including political, social, cultural, moral and economic dimensions. As my study focuses on how each state balances its justice system and determines the finality of arbitration award, this paper will describe how each state applies arbitrability and public policy as a safeguard for their national legal system. It appears that, in the United States, legal matters are referred to arbitration relatively often, while European countries (specifically England, France and Switzerland, which are referred to in this paper) apply arbitrability and public policy only when it is necessary. Moreover, public policy in Africa and Middle East is interpreted in a broader sense and the enforcement of foreign arbitral awards may be more difficult because of the inherent political risks and influence of Islamic law, while most Asian countries have attempted to model their public policy theory on the Western principles.

This dissertation will explore and assess each state's approach of arbitrability and public policy toward international arbitration in order to understand how public policy has changed and developed over time.

TOPIC: ARBITRABILITY AND PUBLIC POLICY IN REGARD TO THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARD IN INTERNATIONAL ARBITRATION: THE UNITED STATES, EUROPE, AFRICA, MIDDLE EAST AND ASIA

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CHAPTER 1 ARBITRABILITY AND PUBLIC POLICY AS A BAR TO ENFORCE THE ARBITRAL AWARD

A. Introduction

Each nation has its own legal, social, and cultural historical development. When business negotiations occur between international parties, they may encounter dissimilarity. Litigation may get involved to help parties resolve the conflict if the parties cannot agree with an accord. Litigation can be an obstacle to parties due to the unique and different rules and procedures of each country, especially the country of which the official language is not English. In this case, litigation may not be a good choice for dispute settlement. Accordingly, arbitration is considered to be a better resolution due to its private and independent nature.

Arbitration has become an important role in the dispute settlement mechanism, as we can see from the expansion of its acceptance in worldwide transactions. In the past, every country set up its own laws unfavorable to foreign trade and investment, because they attached the weight to their own national sovereignties. Now it is different, not only have developed countries become aware of the essential nature of arbitration, but also developing countries. By the 1980s, the economies of many developing countries had become anemic, and one after the other, they began to sheathe their economic nationalism.¹ These countries began to provide a friendlier environment to foreign investment and international trade in the belief that it would support foreign investments, increase the number of international transactions, and promote its

¹ Walde, T., *A Requiem for the New International Economic Order: The Rise and Fall of Paradigms in International Economic Law*, 4 (1998).

economies.² As a result, they limited the power of the national courts and accepted arbitration as a dispute settlement method in international transactions.

Since the arbitration agreement is considered as a contract, parties are free to select their own procedure, rules and laws and forum in arbitration. There are two basic forms of arbitration: 1) ad hoc and 2) institutional. The contract between the parties chooses the type of the arbitration. Ad hoc arbitration is where the arbitral tribunals are appointed by the parties or by an appointing authority chosen by the parties.³ Institutional arbitration is when the parties decide to use the professional arbitral organizations, which have their own procedures and rules; however, some procedures can be customized as per the desire of the parties.⁴ In addition, parties can choose persons to resolve the case and these people called arbitral tribunal. After tribunal rendered the arbitral award, parties are bound with the award and such award is final and the award will be treated as a judgment from the court. The difference is it is not enforceable by itself. If one of the parties does not perform as per the award, the opposing party still needs assistance from the court to make an award enforceable. In practical, some difficulties occur when the enforcement issue of the foreign award arises. Each nation has its own unique arbitration laws and rules which is hard to abide by due to dissimilar procedures. Consequently, conventions or treaties are mutually created in order to establish unity in international arbitration.

² Parra, A.R., *The Scope of New Investment Laws and International Instruments in Economic Development, Foreign Investment and the Law*, 20 (1996).

³ Julain D M Lew, Loukas A Mistelis and Stefan M Kroll, *Comparative International Commercial Arbitration*, Kluwer Law International, 32 (2003).

⁴ *Id.*

The universal international legal mechanisms managing the enforcement of international award are treaties or conventions. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”)⁵ is the most widely acceptable among states. The purpose of this Convention is to facilitate the recognition and enforcement of foreign arbitral awards.⁶ The arbitral award will bind and be enforceable in the countries that recognize the convention in accordance with the rules of procedure of the country where the award is relied upon.⁷ This is because states which are the parties to the New York Convention accept to lower their sovereignty to recognize and enforce arbitral awards based on the arbitration agreement rendered between parties⁸ if the documents submitted by the party have been submitted without delay.⁹

However, the arbitral award has a chance to be challenged by the party. The party may request the competent court to annul the award if there are evidences showing that the award was made on the grounds that the tribunal does not have authority or power to decide such issue resulting in making the award unenforceable, or in addition the court itself may interfere if it

⁵ The New York Convention now is in force in 146 countries. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited November 2011).

⁶ Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 3rd edition, 135 (2010).

⁷ The New York Convention, Article III (1958).

⁸ *Id.*

⁹ *Id.* at Article IV-V.

finds that such award deals with a subject matter of the dispute that is not able to be solved by arbitration under the law.¹⁰ This concept is called “arbitrability.”

The concept of arbitrability, in its most basic sense, means exactly what it suggests. Arbitrability originates the argument about types of issues which can and cannot be solved by arbitration. Each country always imposes specific type of disputes barred from arbitration, because such are reserved for national legislation or judicial authority. Arbitrability is used by every country to exclude some matters from the scope of arbitration. In circumstance where the enforcing court finds that the law governing the enforcing country does not allow arbitration as a way to resolve the dispute, the court will raise ‘arbitrability’ as a defense to refuse the award enforcement. Certain disputes may involve delicate issues that each country wants to protect its own boundary and keep it solved by a national court only.¹¹ There are several examples under which a court accepts the arbitrability defense such as when another law or act prohibits parties from referring to arbitration as a way of dispute solution.

Another defense for the national court to reject the award enforcement is because the award is violation of ‘public policy’ of the enforcing country. In fact, arbitrability and public policy have a connection link between each other. Arbitrability defense relates to the legality of an arbitration agreement or process, while public policy refers to the laws or standards that either the agreement or the award might contravene.¹² Arbitrability and public policy thus overlap in

¹⁰ The New York Convention: Article V (1) contains various grounds authorizing the party to resist enforcement, and Article V(2) provides that a party may invoke or the enforcing court may deny enforcement because the underlying dispute is not arbitrable or because the enforcement of the award would violate the public policy of the enforcing state.

¹¹ Lew, Mistelis and Kroll, *supra* note 3 at 187.

¹² Jay R. Sever, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. And Foreign Arbitration: Arbitration out of Control?*, 65 Tul. L. Rev. 1661, 1664 (1991).

arbitration practice. A violation of public policy, in some countries, may render an agreement inarbitrable.¹³ Courts often refer to “public policy” as the basis of the bar.¹⁴ Thus, if the court feels that such issue falling in the scope of public policy, the court may intervene and assign to the court only, to protect the benefit of the public. An obvious example is criminal law, which is generally the domain of the national courts.¹⁵ The criminal case involves the violation of good morals affecting the public; therefore, the parties’ autonomy is restricted and the judiciary gets involved.

However, the question of whether such subject matter can be referred to arbitration is different from what type of dispute falls within the scope of an arbitration agreement. The latter is the question of arbitration agreement interpretation, which has nothing to do with arbitrability. The question of interpretation is about the parties not agreed to submit the specific dispute to arbitration, while as arbitrability is about dispute cannot be settled by arbitration because there is the involvement of public policy.¹⁶

B. History of Enforcement of Arbitration Award

Arbitration has been established in each country for hundreds year ago.¹⁷ However, the court still did not accept the arbitration agreement as a apart of the business parties’ agreement in

¹³ *Id.*

¹⁴ Laurence Shore, *Defining “Arbitrability”: The United States vs. The Rest of the World*, New York Law Journal, 15 (2009).

¹⁵ Mistelis L. & Brekoulakis S., *Arbitrability: International & Comparative Perspectives*, 4 (2009).

¹⁶ Matthias Lehmann, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 Colum.J.Transnat’l L., 753 (2004).

¹⁷ Alan Redfern, Martin Hunter ET.AL., *Law and Practice of International Commercial Arbitration*, 5 (2004).

international commercial arbitration.¹⁸ There are some difficulties in the recognition and enforcement of arbitral award. In the initial period, ad hoc arbitration was mostly used between the parties and most arbitrations were agreed to on an ad hoc basis, which supports a significant national court to intervene in the arbitration process, including reviewing the substantive decisions of the arbitrators.¹⁹ In doing so, there was no international regulation to limit national court intervention. This obviously makes the arbitral awards difficult to enforce. As a result, the international arbitration during the initial period seemed to fail because the political system in every country interfered in the arbitration proceedings relating to foreign awards.

It was not until the beginning of the twentieth century, as a result of the world's expansion, the demand to originate a mechanism for international recognition and enforcement of both arbitration agreements and awards was established.²⁰ Two Hague Conventions concluded in 1899 and in 1907 are the good examples of this evolution.²¹ Consequently, the Permanent Court of Arbitration was created and still exists and functions today.

In addition, the world's business community established the International Chamber of Commerce (ICC) in 1919. In 1923, the ICC created Court of International Arbitration to provide the framework for an independent and neutral arbitration system for the resolution of commercial disputes between parties from different countries.²² In addition, the ICC was involved in the

¹⁸ *Id.*

¹⁹ Lew, Mistelis and Kroll, *supra* note 3 at 19.

²⁰ *Id.*

²¹ The Convention for the Pacific Settlement of Disputes, adopted 29 July 1899. was one of the most important results of the First International Peace Conference held in Hague in 1899.

²² Lew, Mistelis and Kroll, *supra* note 3 at 19.

promotion and adoption of the Geneva Protocol 1923 on Arbitration Clause, and the Geneva Convention on the Execution of Foreign Awards 1927.²³ These conventions were aimed at the international recognition of arbitration agreements and awards.

Geneva Protocol 1923 and Geneva Convention 1927

The Geneva Protocol 1923 was opened at the Assembly of the League of Nations on September 24, 1923. It provided that contracting states were to recognize the validity of arbitration clauses, whether or not the arbitration was to take place in a country to whose jurisdiction none of the parties in the arbitration was subject.²⁴ The Geneva Protocol 1923 also made provisions for the recognition and enforcement of arbitral awards in the territory of the state in which they were made.²⁵ The Geneva Protocol 1923 ultimately was ratified by the United Kingdom, Germany, France, Japan, India, Brazil, etc. Even though the U.S. did not ratify the protocol, the amount of the contracting states represented a very significant of the international trading community at the time.²⁶

As the Geneva Protocol 1923 was somewhat limited in its scope, the Geneva Convention of 1927 emerged. Many of the Geneva Convention of 1927's provisions have been stipulated and included in the New York Convention. The Geneva protocol 1923 was augmented by the Geneva Convention 1927, which broadened the enforceability of arbitration awards rendered pursuant to arbitration agreements subject to the Geneva Protocol 1923. Article 1(2) provides that in order for the award to be recognized, the submission to arbitration must be valid under the law

²³ *Id.* at 20.

²⁴ The Geneva Protocol, Article 1 (1923).

²⁵ *Id.* at Article 3.

²⁶ Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, 20 (2001).

applicable thereto (a), and the subject matter must be capable of settlement by arbitration under the law of the enforcement state.²⁷

The Geneva Convention 1927 also emphasized that an arbitral award rendered under an arbitration agreement covered by the Geneva Protocol 1923 in any contracting state will be recognized as binding and is to be enforced in accordance with the procedure of the territory where the award is relied upon.²⁸ Article 1 also explained that in order to obtain such recognition or enforcement, it is necessary that “the recognition of the award was not to be contrary to the public policy or the principles of law of the country in which it was sought to be enforced”.²⁹

However, even if the conditions in Article 1 are fulfilled, recognition and enforcement shall be refused if “the award has been annulled in the country in which it was made”³⁰, or if the party against whom an award has been made establishes that there are grounds (with certain exceptions) that entitle that party to contest the validity of the award, then a court, if it thought fit, could either refuse recognition or enforcement, or adjourn any consideration thereof, to give the party a reasonable time to apply to have the award annulled.³¹

The procedures under the Geneva Convention 1927 were seen as having certain drawbacks. Later on, the Geneva Protocol 1923 and the Geneva Convention 1927 mostly have been replaced entirely by the New York Convention.

²⁷ The Geneva Convention, Article 1(2) (1927).

²⁸ *Id.* at Article 1.

²⁹ *Id.*

³⁰ *Id.* at Article 2.

³¹ *Id.* at Article 3.

C. Definition and Concept of Public Policy and Arbitrability

Public Policy

Generally, public policy is used to describe the imperative or mandatory rules that parties cannot exploit.³² Public policy is outside and beyond the scope of arbitration and stays within exclusive judicial jurisdiction, and it also can be the obstacle to the arbitration of certain disputes. The concept of public policy often is used to describe the imperative rules of each country.

Public policy serves as the rationale on which a domestic court may refuse the enforcement of an arbitral award, which is contrary to the laws or standards of the court's jurisdiction. If the court feels that enforcement of an award would violate the basic notions of morality and justice, the court may vacate such award.³³ Domestic public policy is expressed by legislative enactments, constitutional constraints, or judicial practice within individual states.³⁴ These rules and laws are the defense of such a state that dominates the power of the parties to arbitrate the dispute. The concept of public policy is influenced by the old concept that "it is against sovereign dignity to submit to any type of dispute resolution system not controlled by the state itself."³⁵

³² Pierre Lalive, *Transnational (or Truly International) Public policy and International Arbitration*, *Comparative Arbitration Practice and Public Policy Arbitration ICCA International Arbitration Congress*, 261(1987).

³³ Bockstiegel, K., *Public Policy and Arbitrability*, *Comparative Arbitration Practice and Public Policy Arbitration: ICCA International Arbitration Congress*, 179(1987).

³⁴ *Parsons & Whitmore Overseas Co. v. Societe Generale de L' Industrie du Papier*, 508 F.2d 969, 974 (2d Cir 1974).

³⁵ Mistelis & Brekoulakis, *supra* note 15 at 6.

Hence, public policy is a legal principle founded on the concept of public good. It can be used to protect the morale of a country or justify a court's intervention where an agreement is considered harmful to the public welfare. Even though such public policy will disturb only one part of community, the states should weigh the whole of the community in applying public policy considerations if the states believe that such actions may impact their own public good and morale.

Public policy has three distinct levels: domestic, international, and transnational.³⁶ Domestic public policy is when only one country is involved in arbitration, the parties come from the same country, and thus the laws and standards of that country's domestic public policy apply.³⁷ Domestic public policy generally is seen as being the fundamental notions of morality and justice determined by a national government to apply to purely domestic disputes within their jurisdiction. These mandatory rules of public policy are found in a State's laws and are designed to protect the public interests of that State, not of any particular private individual or entity.³⁸ International public policy is when an international element gets involved, either from the underlying transaction's nature or from the nationality of the parties. The concept is comprised of the rules of a country's domestic public policy applied in an international context.³⁹ Two or more domestic public policy may include in international public policy. It is likely to be interpreted public policy in domestic context more strictly than the international public policy. In

³⁶ Kenneth Michael Curtin, *Redefining Public Policy in International Arbitration of Mandatory National Laws*, 64 DEF. COUNS. J., 271, 275, 281 (1997).

³⁷ *Id.*

³⁸ James D. Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, Chinese Journal of International Law, 81(2009).

³⁹ Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J., 511, 513, 514 (1988).

other word, we can say that international public policy normally is more liberal than domestic public policy. International public policy is an application of a country's domestic public policy in an international context, but the court tends to consider several factors other than public interest internationally. It is not necessary that a country's international public policy has to be the same as its domestic public policy.⁴⁰ The court will balance the interests of its own domestic public policy with the needs of international commerce.⁴¹ Each state has its own limitation level and occasionally might feel that the need to control and limit the arbitral process may conflict with the importance of international commerce. Public policy of country can change from time to time due to the need of the and situation of each country.

Transnational public policy will occur when the countries step forward and make an effort to make unification or share legal doctrines. This notion "essentially refers to a system of rules and principles, including standard, norms and custom that are accepted and commonly followed by the world community. Violations of these rules and principles, then, are violations of transnational public policy."⁴² Transnational public policy is not a part of a State which can be used by an international arbitrator to avoid enforcement of an arbitration agreement.

A difference between international public policy and transnational public policy is that international public policy relies on the laws and standards of specific countries, while the latter represents the international consensus on accepted norm of conduct.

⁴⁰ May Lu, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England*, 23 *Ariz. J. Int'l & Comp. Law* 747,772 (2006).

⁴¹ Curtin, *supra* note 36 at 281.

⁴² Sever, *supra* note 12, at 1688.

Article V2 (b) of the New York Convention provides the award may be refused or set aside if “it is contrary to public policy.” However, Article V2 (b) does not explicitly state any specific type of public policy. It was accepted widely that the New York Convention intended to challenge only international public policy grounds. Public policy in the international arbitration context is normally considered from the basis of the New York Convention, where it constitutes an acknowledgement of the ultimate right of state courts to determine what constitutes public policy within their jurisdictions.⁴³ Public policy, by nature, “is a dynamic concept that develops continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions.”⁴⁴ When society or the situation of a state changes, public policy adapts.

Arbitrability

Arbitrability separates types of dispute that may be resolved by arbitration and the one which belongs exclusively to the domain of the courts.⁴⁵ One can say that arbitrability prohibits the issue to be submitted to arbitration. Generally, the restriction and limitation will be control in form of national laws. Arbitrability in this paper is arbitrability in an international aspect. This is called “objective arbitrability,” involving the subject matter which is restricted to arbitrate.⁴⁶ Objective arbitrability refers to whether specific classes of disputes are not allowed to be solved by arbitration. Several national laws will get involved, such as the law applicable to arbitration

⁴³ Pierre Mayer & Audley Sheppard, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 *Arb. Int'l* 249, 255 (2003).

⁴⁴ Loukas Mistelis, *Keeping the Unruly Horse in Control' or Public Policy as a Bar to Enforcement of Foreign Arbitral Awards*, 2 *Int'l Law Forum Du Droit Int'l* 248, 252 (2000).

⁴⁵ Redfern, Hunter ET.AL, *supra* note 15 at 163.

⁴⁶ The “subjective arbitrability” is the concept of the capacity to enter into arbitration agreement, for example: A state entity may not permitted to be a party of arbitration agreement, if allowed, it may require a special authorization to do so.

agreement, or to the main contract, or to both, or to the procedure of arbitration, or to the subject-matter in question.⁴⁷

Thus, the issue of arbitrability is connected to important public interest. National laws traditionally defined arbitrability in terms of public policy.⁴⁸ Arbitrability refers to the legality of an arbitration agreement or process, while public policy refers to the laws or standards that an agreement of the award might contravene.⁴⁹ Thus, an issue that contradicts public policy would make it inarbitrable. However, legal rules restricting arbitrability need not necessarily be part of public policy.⁵⁰ Although such rules will be mandatory rules not subject to change by party autonomy, those mandatory rules need not be categorized in public policy. Public Policy requires further additional qualification.⁵¹

A ground to refuse the enforcement of arbitral award in the New York Convention Article V (2) (a) uses the word “the subject matter...is not capable of settlement by arbitration under the law of that country.” When we think about the issues that cannot be arbitrated, it may be that either the parties have not agreed to submit the specific dispute to arbitration (outside the scope of arbitration agreement), or the issue cannot be submitted to arbitration at all. We are taking about the latter here, which are called “non-arbitrable” matters. Non-arbitrable matters have included disputes concerning competition law, intellectual property, securities regulations etc. When the non-arbitrable issue is raised, judicial intervention may be involved. For example,

⁴⁷ Bockstiegel, *supra* note 33 at 184.

⁴⁸ Mistelis & Brekoulakis, *supra* note 15 at 49.

⁴⁹ Sever, *supra* note 12 at 1664.

⁵⁰ Bockstiegel, *supra* note 33 at 183.

⁵¹ *Id.*

Article 2060 of the French Civil Code provides that parties may not agree to arbitrate disputes in a series of particular fields (e.g. family law), and “more generally in all matters that have a public interest.” This limitation has been construed in a very restrictive way by French courts.⁵²

Antitrust is another good example of arbitrability. One country may think that antitrust should not go to arbitration because it is not about defending oneself for interest, but it has yet to affect millions of consumers.⁵³ While another country may decide that it should let arbitrator decide antitrust issues because it will not affect the basic right and freedom of people like criminal law. If the state feels that such issue should be reserved for public interest, the state may apply the law of its own state rather than the rules as agreed between parties.⁵⁴ In some Arab states, for example, contracts between a foreign corporation and its local agent are given special protection by law and, to reinforce this protection, any disputes arising out of such contracts may only be resolved by the local courts.⁵⁵ The public policy exception is “one of the most significant and most controversial, bases for refusing to enforce an international arbitral award.” What is considered to be national public policy in one state may not be concerned as a fundamental rule that will empower the state to interfere in another state. One state might feel that such an issue is essential to the public interest and cannot be decided by party autonomy rule, while such an issue may be arbitrated in another state.

⁵² Redfern, Hunter ET.AL, *supra* note 17 at 164.

⁵³ *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827-28 (C.A.N.Y. 1968). Also see *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 3354 (1985).

⁵⁴ The New York Convention , Article V (2) (a) (1958).

⁵⁵ Redfern, Hunter ET.AL, *supra* note 17 at 164.

D. The UNCITRAL Model Law on International Arbitration 1985

The UNCITRAL Model Law on International Commercial Arbitration 1985 (“the UNCITRAL Model Law”)⁵⁶ states that, “The court shall not intervene the arbitral proceedings except provided in this law.”⁵⁷ Thus, the national court will interfere in the arbitral proceedings only if there are grounds listed in the Model Law. Such grounds concern the appointment and removal of arbitrators,⁵⁸ the ordering of interim measures of protection in aid of arbitration,⁵⁹ and also ordering the parties to take any evidence necessary to the proceedings.⁶⁰

Concerning the arbitrability issue, the UNCITRAL Model Law authorizes the court to refuse the recognition and enforcement of an arbitral award in case the court finds that “(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of that state, and (ii) the recognition or enforcement of the award would be contrary to public policy of the state.”⁶¹

Not only the court can refuse the enforcement of the award under the UNCITRAL Model Law Article 36 (1) (b), the court also has authority to set aside the arbitral award pursuant to the UNCITRAL Model Law Article 34 (2). Article 34 (2) provides “the court may set aside an

⁵⁶ The UNCITRAL Model Law in International Commercial Arbitration 1985 (adopted 2006) is designed to harmonize the law of arbitration of the states by supporting the states to reform and modernize their arbitration laws to be consistent with the UNCITRAL Model Law. It is different from the UNCITRAL Arbitration Rule of 1976 in that it is not the rule that the parties of the contract choose to use, but it is the Model Law helping the states to prepare the new arbitration laws.

⁵⁷ The UNCITRAL Model Law, Article 5 (1985).

⁵⁸ *Id.* at Article 11.

⁵⁹ *Id.* at Article 9.

⁶⁰ *Id.* at Article 27.

⁶¹ *Id.* at Article 36(1) (b).

arbitral award only if (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.”⁶²

The provision in Article 34 (2) (i) (ii), 36 (1) (b) (i) (ii) of the UNCITRAL Model Law and Article V (2) (a) (b) of the New York Convention are almost identical. Thus, countries that are not contracting states⁶³ of the New York Convention may refuse the arbitral award based on the same grounds as countries that have adopted the UNCITRAL Model Law. However, each country has a particularly different standard to apply its own laws and precedents to tackle with the arbitrability issue. UNCITRAL Model Law does not contain any definition or limitation of which disputes are arbitrable, also authorizes the state to freely determine which disputes are arbitrable and which are not.⁶⁴

Thus, the arbitrability and public policy doctrine in the New York Convention and the Model Law basically are given a guide direction to the contracting states. The court still has its own discretion to overrule the defense and to grant the enforcement of the award. One issue that cannot be arbitrated in one country might be able to be settled by arbitration in another country. This might be another consideration that parties should consider before entering into the arbitration agreement as all disputes will not be resolved by arbitration. Some country has shown the support of international arbitration by making an effort to adopt narrower concept of public

⁶² *Id.* at Article 34 (2).

⁶³ As of 2011, there are 146 parties to the New York Convention. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited November 2011).

⁶⁴ The UNCITRAL Model Law, Article 1(5) (1985) indirectly provides that, “it is not intended to affect other laws of the state which preclude certain disputes being submitted to arbitration.”

policy to apply to foreign award. However, there is no integrated standard of public policy. The concept of public policy has been interpreted and applied differently from country to country. It all depends on the political, religious, social, cultural, and economic systems.

Generally, the public policy exception in accordance with New York Convention Article V has been construed narrowly, as seen in the most reported cases.⁶⁵ However, there are certainly many cases enforcing international arbitration awards despite a claim that doing so would violate the public policy of the enforcing state.⁶⁶ Thus, even some claims that are not arbitrable in domestic arbitration have been found to be arbitrable in a place of international arbitration.

E. The New York Convention

The New York Convention is a well-known and successful international multilateral treaty.⁶⁷ The Convention replaces the Geneva Protocol 1923 and the Geneva Convention 1927 as between states which are parties to both Conventions.⁶⁸ It provides a substantial improvement since it offers a more simple and effective method of obtaining recognition and enforcement of foreign awards and purports to unify the standards by which agreements to arbitrate are observed and arbitrate awards are enforced in the signatory nations.⁶⁹ There are several of provisions in the

⁶⁵ Troy Harris, *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the new York Convention With Particular Reference to Construction Disputes*, *Journal of International Arbitration*, 10 (2007).

⁶⁶ *Id.* at 11.

⁶⁷ Mistelis & Brekoulakis, *supra* note 15 at 85.

⁶⁸ The New York Convention, Article VII.2 (1958).

⁶⁹ Born, *supra* note 26 at 21.

convention that address the issue of arbitrability directly and indirectly.⁷⁰ The relevant provisions dealing with the issue of arbitrability are in Article I, II, and V.

The New York Convention gives right to the signatory state to declare that it will apply the convention only to issues considered as commercial under the national law of the state making such a declaration.⁷¹ This reservation allows signatory state to limit its obligations to differences arising out of legal relationships that are considered as commercial, also known as the “commercial reservation.”⁷² The commercial reservation is a tool straightforwardly connected to arbitrability and to the right of contracting states to benefit from the device adopted by the convention.⁷³

The next relevant provision of the New York Convention is Article II, which describes that (1): each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences that have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration, and... (3) The court of a contracting state, “shall, at the request of one of parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”⁷⁴ This Article forces the contracting states to compel the arbitration if the disputes are arbitrable.⁷⁵ The arbitrability

⁷⁰ Mistelis & Brekoulakis, *supra* note 15 at 87.

⁷¹ The New York Convention, Article I (3) (1958).

⁷² M. Pyles, *Enforcement of Arbitration Agreement and International Arbitral Awards: The New York Convention in Practice*, 245(2008).

⁷³ Mistelis & Brekoulakis, *supra* note 15 at 88.

⁷⁴ The New York Convention, Article II (1) (3).

⁷⁵ Mistelis & Brekoulakis, *supra* note 15 at 91.

issue may be raised and considered to be grounds leading to the incapability of the arbitration being performed.⁷⁶ This Article thus may be established in case the arbitrability issue has been raised. However, Article II does not designate which issue is arbitrable and not arbitrable. Such grounds can be found in Article V.

The ground to refuse the arbitral award is listed in Article V. There are two parts limiting the reasons for which recognition and enforcement of an arbitral award may be refused. The first part lists the ground that must be proven by the party. The second part is the ground for when the court may refuse the enforcement on its own discretion. These grounds are as follows: (a) the subject matter is non-arbitrability matter, or (b) the recognition or enforcement of the award is contrary to public policy.⁷⁷

Article V mentions objective arbitrability separately from public policy. This means that laws restricting arbitrability may not be part of public policy necessarily.⁷⁸ Laws limiting arbitrability might be a mandatory law, which is not needed to be identical as a public policy rule.⁷⁹ In Article V, the law of the enforcing country gets involved. The court may refuse the recognition and enforcement by its own motion without any application by the parties.

⁷⁶ Stefan Kroll, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, 246 (2008).

⁷⁷ The New York Convention, Article V (1958).

⁷⁸ Bockstiegel, *supra* note 33 at 183.

⁷⁹ *Id.*

CHAPTER 2

THE UNITED STATES' PERSPECTIVE ON ARBITRABILITY AND PUBLIC POLICY

A. Historical Background

The U.S. law of arbitration bears a resemblance to the French arbitration law during the beginning of the 1980s before the French decrees on arbitration was promulgated.⁸⁰ In 1925, Congress passed the U.S. Arbitration Act, commonly known as the Federal Arbitration Act 1925 ("FAA").⁸¹ The purpose of the FAA is to preserve legal procedure safeguards, restrict the scope of arbitration to specific circumstances,⁸² and enforce the parties to arbitrate.

This act also aims to decrease the hostility to arbitration agreements in the U.S. The FAA helped position arbitration agreements on an equal status with other contracts. It also originated as a special interest bill, offering safeguards for legal procedures of that country and restricting the scope of arbitration to specific circumstances.⁸³ The controversy in arbitration in federal court has decreased; as a result, the judiciary now determines arbitration. The FAA assists in encouraging the dispute resolution method. As the Supreme Court stated: "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."⁸⁴ Thus, according to the FAA, the federal

⁸⁰ Loukas A. Mistelis & Stavros L. Brekoulakis, *Arbitrability International & Comparative Perspectives*, 144 (Kluwer Law International 2009).

⁸¹ 9 U.S.C., Section 1 (1925).

⁸² Thomas Carbonneau, *The Law and Practice of Arbitration*, 23-26 (2nd ed., 2007).

⁸³ *Id.*

⁸⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 3354 (1985).

courts were given power to enforce arbitration agreements by compelling arbitration,⁸⁵ staying proceedings pending arbitration,⁸⁶ and affirming arbitral awards.⁸⁷

However, uncertainty of arbitration still occurs even after the promulgation of the FAA. In 1970, the U.S. acceded to the New York Convention followed by Congress's enactment of Chapter 2 to the FAA. Chapter 2 codified and implemented the New York Convention. The accession to the New York Convention and the amendment of the FAA had a significant impact on the arbitrability doctrine in the U.S., as depicted by the evolution of the U.S. Supreme Court's attitudes toward the arbitrability claims.⁸⁸

Even when there are revolutions of the accession to the New York Convention and the amendment of the FAA, public policy seems to be an obstacle to arbitration. In the mid-1970s, public policy continued to be an important factor in restricting arbitrability in the U.S.⁸⁹ If disputes conflict with other important federal policies, the domestic courts might hinder the enforcement of the award. With the development of arbitral practice over the decades, public policy has gradually been construed narrowly. The role of public policy in the arbitrability definition has started to dwindle in the American and European courts.⁹⁰ The courts are likely to accept more arbitration agreements as a contractual concept regardless of considering public policy.

⁸⁵ 9 U.S.C., Section 2 (1925).

⁸⁶ *Id.* at Section 3.

⁸⁷ *Id.* at Section 9.

⁸⁸ Abby Cohen Smutny & Hansel T. Pham, *Enforcing Foreign Arbitral Awards in the United States: The Non-Arbitrable Subject Matter Defense*, J. International Arbitration 25(6), 658 (2008).

⁸⁹ Mistelis & Brekoulakis, *supra* note 15 at 50.

⁹⁰ Antoine Kirry, *Arbitrability: Current Trends in Europe*, Arb.Int'l. 12(4), 373-389 (1996).

B. Definition and Concept of Arbitrability and Public Policy in the U.S.

The concept of arbitrability in the U.S. is broader than other countries.⁹¹ Internationally, arbitrability refers to the concept in which disputes are obstructed from arbitration due to the public policy of that country or the disputes go beyond the scope of the arbitration agreement.⁹² The U.S. Supreme Court has included the jurisdictional question as “Who should decide?” by doubting if an arbitral tribunal or a court has the authority to decide whether a dispute should be submitted to arbitration.⁹³ U.S. courts cases have shown that the U.S. courts have been giving themselves the power to determine the question of arbitrability.⁹⁴ However, recent Supreme Court cases have permitted arbitrators to take initial decisions on the arbitrability issue.⁹⁵ Although the U.S. courts empower arbitrators to rule on their own jurisdiction, the parties can call upon a court to decide whether a particular matter can be submitted to arbitration at any stage of the arbitral process.⁹⁶

The topic of this paper concerns international arbitration; therefore, I will focus on the international side concerning which dispute is arbitrable or not and will not go into detail in the jurisdictional contention between an arbitrator and the court regarding who should be the initial decision-maker.

⁹¹ Mistelis & Brekoulakis, *supra* note 15 at 69.

⁹² *Id.* at 70.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 72.

C. Relevant Arbitration Laws

The FAA is the most fundamental law regarding arbitrability in the U.S. Section 2 states that “any written provision to settle disputes arising out of a contract by arbitration, or an agreement to submit and existing controversy to arbitration shall be valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.”⁹⁷ Section 3 also states, “if a lawsuit or proceeding is pending upon an issue referable to arbitration, the court upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall stay the trial of action.”⁹⁸ If there is an arbitration agreement between parties and such an agreement is valid, irrevocable, and enforceable, the court is required to stay the legal proceedings and resort to arbitration. Even if an arbitration agreement complies with the conditions as mentioned, its arbitrability might stand as an obstacle to compel arbitration under these Sections.

The FAA does not mention the arbitrability issue, but it requires the court to stay its legal proceedings pending in the court if it found matching components according to Sections 2 and 3. Initially, the FAA did not provide the annulment of arbitral award in cases where such awards violated the public policy. The FAA only said that the court should stay the proceedings. However, as the U.S. became the signatory of the New York Convention, the court adopted the provision in the Convention automatically and then had power to refuse the enforcement of the arbitral award, which contradicts the nation’s public policy according to the Convention.

⁹⁷ 9 U.S.C., Section 2 (1925).

⁹⁸ *Id.* at Section 3.

The next question is what is considered a non-arbitrable matter due to a public policy challenge. Both the FAA and the New York Convention do not provide details on this issue. As some scholars said “in order to determine whether such dispute is arbitrable, the court must determine whether Congress intended to except the dispute from arbitration in order to know whether or not the court should stay its legal proceedings and refer to arbitration.”⁹⁹ So, how do we know Congress’s intention? Past cases would be a good explanation of how U.S. courts deal with the arbitrability doctrine, and recent cases could be another indicator of how U.S. courts are likely to deal with this issue in the future.

D. Arbitrability and Public Policy in the U.S.

Prior to accession of the New York Convention in 1970, the U.S. courts had a narrow view of Article V (2) (b) by interpreting the public policy in the wider perspective to protect the country’s interests. In *Wiko v. Swan*,¹⁰⁰ the U.S. Supreme Court delineated that the claim under the U.S. securities law was non-arbitrable.

Wiko, the petitioner, brought a suit to court to claim compensations from a brokerage firm’s false representations in the sale of securities. The respondent, Swan, filed the stay of litigation and claimed the agreement between parties, resorting to arbitration as a dispute settlement method. The U.S. Supreme Court cited that Section 12 of the Security Act 1933 created a private right of action for purchasers of securities to bring a suit “either at law or in equity in any court of competent jurisdiction”¹⁰¹ for fraud or misrepresentation. In addition,

⁹⁹ Brian E. Greer, *When the Federal Arbitration Act and the Bankruptcy Code Collide*, Business Restructuring Review, 20 (2002).

¹⁰⁰ *Wiko v. Swan*, 346 U.S. 427 (1953).

¹⁰¹ The U.S. Security Act 1933, Section 12.

Section 14 of the act provided that “any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this act shall be void.”¹⁰² Considering both provisions, the Supreme Court ruled that an agreement to arbitrate future securities disputes constituted an impermissible waiver under Section 14 of the petitioner’s right to judicial forum selection under Section 12. The arbitration compel thus would be declined in the securities case due to conflict with a federal statute.

The *Wiko* case occurred prior to the ratification of the New York Convention. In *Wiko*, the Supreme Court believed that the enforcement of arbitration would reduce the strength of securities law protection. The Court further explained 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.”¹⁰³

Another case showing the American narrow view of public policy is *M/S Breman v. Zapata Off-Shore Co.*,¹⁰⁴ where the two parties signed a towage contract and chose arbitration as a resolution of any disputes. In contract, there was an exculpatory clause,¹⁰⁵ and the parties selected the foreign forum to dissolve the dispute. The opponent party claimed that the exculpatory clause (which was enforceable in the elected forum) conflicted public policy.

¹⁰² *Id.* at Section 14.

¹⁰³ *Wiko*, *supra* note 100 at 427, 436.

¹⁰⁴ *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

¹⁰⁵ An exculpatory clause is a provision in a contract relieving one party of any liability arising from the other party’s wrongdoing.

The U.S. Supreme Court upheld a clause in the towage contract selecting the foreign forum but marked that such exculpatory clause was contrary to U.S. public policy, even though such a clause is enforceable in the selected forum. The Supreme Court noted, “We cannot trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”¹⁰⁶

The U.S. court began to develop a more favorable view of arbitration and arbitrability in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*¹⁰⁷ by emphasizing that the arbitration agreement was irrevocable and enforceable under the FAA. In 1970, the U.S. acceded to the New York Convention and amended the FAA. Four years later, in *Scherk v. Alberto-Culver Co.*,¹⁰⁸ the Supreme Court confirmed the securities dispute was arbitrable.

The American corporation, *Alberto-Culver*, had sued German citizen, Fritz Scherk, under the Securities Act of 1934 for alleged fraudulent representations. The sale agreement between two parties concerned transferring the ownership of Scherk’s enterprises to Alberto-Culver, expressing the warranty of unencumbered trademarks. Later on, Alberto-Culver found out that the trademarks were not free from substantial encumbrances and intended to discontinue the agreement, but Scherk refused. Subsequently, Alberto-Culver claimed a law suit for damage with the District Court, alleging that Scherk’s entered into agreement with the intention of fraudulent representations, and such action violated Section 10 (b) of the Securities Exchange Act of 1934. Scherk later counterclaimed that the court should refer the case to arbitration as agreed between parties. The District Court rejected Scherk’s petition, relying on *Wiko v. Swan*.

¹⁰⁶ *M/S Breman*, *supra* note 104 at 9.

¹⁰⁷ *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967).

¹⁰⁸ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

The Supreme Court reversed the District Court's decision and enforced the agreement to arbitrate securities claims, giving the reason 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."¹⁰⁹

The Court acknowledged that parties to international contracts (the contract between Alberto-Culver and Scherk was truly an international agreement)¹¹⁰ had independent rights to select the entire structure of the dispute resolution procedure. In addition, the courts could undermine the international expansion of U.S. commerce by insisting on a "parochial concept that all disputes must be resolved under our laws and in our courts."¹¹¹ In reaching its decision, the Court determined that the express provisions of the FAA compelled enforcement of the agreement to arbitrate. Moreover, the Court concluded that the U.S. accession to the New York Convention supported its decision.¹¹²

In Scherk, the Supreme Court overturned the decision of the Seventh Circuit Court by allowing parties to arbitrate. I believed that the Supreme Court had balanced the conflict between the importance of international commercial arbitration and the investors' safeguards under the

¹⁰⁹ *Id.*, at 506, 516.

¹¹⁰ *Id.* Unlike the *Wiko* case, this case involved an American Corporation and a German Party, and an international contract that had been signed in Austria, executed in Switzerland, and negotiated in the United States, England, and Germany.

¹¹¹ *Id.*, at 506, 519 (quoting *M/S Bremen v. Zapata Off-Shore Co.* 9). The Court in *Scherk* noted that the expansion of American businesses would be hindered if courts required all disputes regarding trade and commerce in world markets to be resolved "exclusively on our terms, governed by our laws, and determined in our courts."

¹¹² *Id.*, at 506, 515. The U.S. Supreme Court stated that "the United States' recent adoption and ratification of the New York Convention 1958 and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today."

Securities Exchange Act of 1934, then analyzed that an agreement between the parties is “truly international” by considering the subject matter of the contract and the character of the parties.

Scherk had expressed that national’s interests could be deprived of strength in an international aspect.¹¹³ This did not mean that the Court’s decision in Scherk weakened the importance of the securities laws, but the Court opened its arms and welcomed the international arbitration. However, the Court failed to determine in which circumstances an international interest would supersede domestic policy considerations.¹¹⁴

In the same year in *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*,¹¹⁵ the Second Circuit adopted a narrow construction of the public policy defense to enforcement of arbitration. The American corporation, Parson & Whittemore entered into an agreement with Egyptian operation, RAKTA, to construct and manage a paperboard mill in Egypt. The construction of the mill was nearly complete when a large part Parson & Whittemore’s crew pulled out of Egypt because of the Arab–Israeli Six Day War of 1967. After that, the Egyptian government expelled all Americans from Egypt apart from those that applied and qualified for a special visa. The parties argued that a change in U.S. foreign policy toward Egypt as a result of the Arab–Israeli Six Day War of 1967 required

¹¹³ *Id.* at 519.

¹¹⁴ In *S.A. Mineracao da Trindade–Samitri v. Utah Int’l, Inc.*, 576 F. Supp.566, 574 (S.D.N.Y. 1983), 745 F.2d 190 (2d Cir.1984), the party raised the *Scherk* doctrine toward RICO (Racketeer Influenced Corrupt Organizations Act) claims to the court. The court indicated that the public interest involved in enforcement of the RICO claims was more significant than the public interest in enforcing securities fraud claims and decided that such RICO claims are non arbitrable.

¹¹⁵ *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969 (1974).

Parsons & Whittemore, “as a loyal American citizen”¹¹⁶ to abandon a project to construct a paperboard mill in Egypt.

RAKTA finally brought the dispute to arbitration pursuant to the parties’ contract and the award was later granted in favor of RAKTA. Parsons & Whittemore raised defenses to enforcement based on Article V 2 (b) of the New York Convention. The Second Circuit Court rejected Parsons & Whittemore’s claim, reasoning that, “the mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable.”¹¹⁷ In addition, “Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”¹¹⁸

The *Parsons* case is the landmark of the U.S. public policy case, showing that public policy should be construed narrowly. Even *Parsons* did not present any explicit guideline regarding what considered the most basic notions of morality and justice, and U.S. courts now use *Parsons* as the standard to practice in later cases.

The revolution attitude of the U.S. courts toward arbitrability of federal securities law claims was mirrored in cases involving the arbitrability of antitrust disputes.¹¹⁹ Any skepticism was removed by the Supreme Court’s decision in *Mitsubishi Motors Corp. v. Soler Chrysler-*

¹¹⁶ *Id.*, at 969, 974.

¹¹⁷ *Id.*, at 969, 975.

¹¹⁸ *Id.* at 973-974.

¹¹⁹ Smutny and Hansel T. Pham, *supra* note 88 at 661.

*Plymouth, Inc.*¹²⁰ The case concerned the question of the arbitrability of antitrust claims arising from an international commercial transaction.

An agreement between Mitsubishi, a Japanese automobile manufacturer, and Soler, a Puerto Rican distributor, allowed Soler to distribute Mitsubishi's vehicles within a limited area. Parties further concluded the arbitration clause in the agreement to refer the dispute to arbitration in Japan. The dispute occurred when Soler could not perform the contractual minimum volume sale as agreed. As a result, several shipments of Mitsubishi's vehicles were delayed or cancelled. To resolve the problem, Soler attempted to arrange for the transshipment of a quantity of its vehicles for sale in the U.S. and Latin America, but *Mitsubishi* refused to do so. *Mitsubishi* eventually filed a request for arbitration and commenced an action against Soler in the U.S. District Court for the District of Puerto Rico. Soler counterclaimed, alleging that Mitsubishi had conspired with its joint venture to divide markets in restraint of trade in order to effectuate the plan violating the causes of action under the Sherman Act and other statutes. Soler further claimed that its counterclaim was irrelevant with the arbitration clause since the Sherman Act claims are non-arbitrable as a matter of law and Soler never agreed to arbitrate the antitrust issue under the Sherman Act.

The District Court relied upon the Supreme Court's decision in *Scherk* to compel arbitration. The First Circuit Court of Appeals overruled the District Court's judgment, citing the precedent *American Safety Equip. Corp. v. J.P. Maguire & Co.*¹²¹

¹²⁰ *Mitsubishi*, *supra* note 84 at 3354.

¹²¹ In *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968), the Supreme Court noted that there were four essential factors to consider: (1) the antitrust law was so important to the public interest and could cause the extensive effect to the losing party by trebling damages; (2) the possibility that an arbitration clause was the result of a contract of adhesion; (3) the complex legal and economic analysis required for the

The U.S. Supreme Court reversed the Court of Appeals' decision with respect to the arbitrability of antitrust claims. The court reasoned the "strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions" and noted, "that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution."¹²² The Court found that it is necessary for the domestic courts to support the notions of arbitrability to the international policy favoring commercial arbitration.¹²³

It seems that in *Mitsubishi*, the court places greater weight on the international comity and the relationship between the parties than a strict enforcement of the U.S.'s laws. "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."¹²⁴ Although the decision is contrary to a domestic prevention, this case expresses the good intention of the Court to support the international dispute resolution system.

Now we look at the intention of Congress as mentioned before. The language in the Federal Arbitration Act of 1925 did not indicate a presumption against the arbitrability of statutory claims. If Congress intended the substantive protection of the Sherman Act to be available exclusively through judicial recourse, that intention would have been expressed in the

resolution of antitrust claims; and (4) arbitral panel chosen from business community may have no experience to the U.S. laws. Within this framework, the court indicated that antitrust violations could affect "hundreds of thousands -- perhaps millions -- of people and inflict staggering economic damage." Weighing these factors against the language of the Act, the court held that the antitrust claims were inappropriate for arbitration." However, *American Safety* is considered in an account of domestic context, different from the *Mitsubishi* case, which was based on international commercial relationships.

¹²² *Mitsubishi*, *supra* note 84 at 631.

¹²³ *Id.* at 639.

¹²⁴ *Id.* at 695.

act or its legislative history.¹²⁵ However, such intent was not obvious. In addition, the arbitration agreement itself or any other legal constraints did not bar the antitrust claims from arbitration, which would make the arbitration clause invalid. Thus, there was no restriction to cause a matter inarbitrable.

The enforcement of the international arbitration agreement by the Court is essential to create harmony of international transactions, even if the issues covered by the agreement would not be arbitrable in a purely domestic transaction. According to the Court, *Bremen* and *Scherk* established a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions.

Scherk and *Mitsubishi* represent an overall trend of U.S. courts expanding the scope of arbitrability since 1970.¹²⁶ For example, the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*¹²⁷ rendered most employment disputes arbitrable. While arbitrators still cannot dissolve a marriage, most courts in the U.S. now allow binding arbitrations of family law matters, such as disputes over alimony, property division, and spousal support, as long as the matters do not involve children.¹²⁸ Also, U.S. courts have found certain criminal and fraud claims to be arbitrable.¹²⁹

¹²⁵ *Id.* at 645.

¹²⁶ Rufus and Rhoades ET AL., *Practitioner's Handbook on International Arbitration and Mediation*, 223-224 (2007).

¹²⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹²⁸ Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 Albany L. Rev., 905 (1996).

¹²⁹ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (finding RICO claims arbitrable); *Meadows Indemnity Co. v. Baccala & Shop Ins. Services*, 760 F.Supp. 1036 (E.D.N.Y. 1991) (finding fraud claims arbitrable).

In *Northrop Corp. v. Triad International Marketing S.A.*,¹³⁰ the U.S. court showed that even if the award was contrary to Saudi law, such an award was still enforceable in the U.S. In this case, Northrop, a U.S. arms supplier entered into the marketing agreement with Triad. Triad agreed to attempt to get contracts for the sale of military equipment to the Saudi Arabian Air Force in return for commissions on the sales.¹³¹ The parties agreed to use the laws of the State of California to govern the contract, and any dispute was to be solved by arbitration under the rules of the American Arbitration Association. After Triad rendered the action and got the sale on the contract, Saudi Arabia promulgated a decree that prohibited the payment of commissions for arm contracts.¹³² As a result, Northrop stopped paying Triad, and Triad then submitted the dispute to arbitration pursuant to marketing agreement. The tribunal issued the award in favor of Triad by ordering Northrop to make a payment. Northrop argued that the marketing agreement was invalid under Section 1511 of the California Civil Code.¹³³ Thus, the award was contrary to the public policy. Triad sought to confirm the award in the U.S. court. The U.S. Court of Appeals agreed with Triad and decided that the award was not contrary to public policy even though Saudi law prohibited the payment of such commissions, as the relevant law was that of

¹³⁰ *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 811 F. 2d 1265 (9th Cir. 1987).

¹³¹ *Id.* at 1266.

¹³² *Id.* at 1266-68, the decree provided “*First*: No company under contract with the Saudi Arabian government for the supply of arms or related equipment shall pay any amount as commission to any middleman, sales agent, representative or broker irrespective of their nationality, and whether the contract was concluded directly between the Saudi Arabian government and the company or through another state. Any commission arrangement already concluded by any of these companies with any other party shall be considered void and not binding for the Saudi Arabian government; *Second*: If any of the foreign companies described above were found to have been under obligation for the payment of commission, payment of such commission shall be suspended after notifying the concerned companies of this decision.”

¹³³ The California Civil Code, Section 1511 provides that “when operation of law prevents performance of an obligation, that performance is excused.” *Northrop* at 1267.

California since the parties chose that law to govern arbitration.¹³⁴ California public policy did not apply in this context because the U.S. Department of Defense's policy toward Saudi Arabia was not "well defined and dominant."¹³⁵

In *Northrop*, even when the contract was illegal at the place of performance, the U.S. Court of Appeals chose to enforce the award. The court gave the reason that enforcing an arbitral award, whether or not the underlying contract was illegal under a certain country's laws, would not be contrary to public policy.

In 2007, the U.S. federal court highlighted the narrow view of public policy. In *Telenor Mobile Communications v. Storm L.L.C.*,¹³⁶ two companies, Telenor and Storm, jointly owned a Ukrainian company called Kyivstar.¹³⁷ The agreement between the parties contained an arbitration clause.¹³⁸ Telenor initiated arbitration after the dispute occurred. While participating in the arbitral proceedings, Storm brought the parallel case against Telenor to the Ukrainian court. The Ukrainian court ruled that the arbitration agreement between Telenor and Storm was invalid, which was favorable to Storm.¹³⁹ Telenor was unaware of such legal proceedings and never participated. In other proceedings, the arbitrator ruled in Telenor's favor and ordered Storm to divest its Kyivstar shares.

¹³⁴ *Id.* at 1267, 1269.

¹³⁵ *Id.* at 1271.

¹³⁶ *Telenor Mobile Communications v. Storm L.L.C.*, 524 F.Supp.2d 332 (S.D.N.Y. 2007).

¹³⁷ *Id.* at 335.

¹³⁸ *Id.* at 336-37.

¹³⁹ *Id.* at 338.

Telenor then sought to enforce the award in the New York courts. Storm argued that the arbitral tribunal's award conflicted directly with the Ukrainian court's ruling and with Ukrainian law, specifically that the divestiture award violated Ukrainian antimonopoly laws.¹⁴⁰ By enforcing the award, the New York court would be compelling Storm to violate the law, which was against New York public policy.

The court noted that even if the arbitral award conflicted with Ukrainian law, the decision of the arbitral panel and the decision of the U.S. court would have to be "directly contrary to the foreign law in such a way to make compliance with one necessarily a violation of the other."¹⁴¹ The court doubted that "public policy restricted the court from enforcing an award that compelled violation of foreign law", but reasoned that, "even if it did, the public policy in favor of encouraging arbitration and enforcing arbitration awards outweighed the policy suggested by Storm."¹⁴² The court thus denied Storm's argument.

As we have seen in above cases, the U.S.'s view on the arbitrability doctrine tends to be narrow. The U.S. has tried to limit its own national policy by opening wider in arbitration. The arbitrability in the U.S. is possibly decreasing the scope of the "public policy" term in the future. There is likely to be a chance that some matter affecting public interest may be found arbitrable.

In a recent case, *Rent-A-Center, West, Inc. v. Jackson*,¹⁴³ the U.S. Supreme Court held that the delegation clause (which expressly authorized arbitrators to decide the case) in arbitration agreement between parties can prove enough that the parties had intention to refer the

¹⁴⁰ *Id.* at 357.

¹⁴¹ *Id.* at 357.

¹⁴² *Id.* at 357-58.

¹⁴³ *Rent-A-Center, West, Inc. v. Jackson*, 581 F. 3d 912 (2010).

dispute to arbitration. The arbitrator thus has the authority to decide the issue of agreement enforceability.

In the arbitration agreement, Jackson agreed to arbitrate claims that may arise from his employment contract. When the dispute took place, Jackson sought his claim through the U.S. District Court for the District of Nevada, alleging on the employment discrimination accusation. Based on the arbitration agreement, Rent-A-Center (“RAC”) referred the dispute to arbitration. Jackson contended that the agreement was unenforceable because provisions contained in the agreement were unconscionable. RAC argued that the unconscionable issue was for the arbitrators to decide, while Jackson disagreed and indicated that such an issue should be in the arm of courts, even if there was an agreement to arbitrate.

The District Court agreed and judged in favor of RAC, stating the arbitration agreement between RAC and Jackson was not unconscionable. Jackson appealed to the Appeals Court. The Appeal Court stated that the unconscionability issue is in the scope of the court to decide, not arbitrator. However, the Supreme Court reversed the verdict of the Appeals court and held that an arbitrator appointed by the parties, not a judge since the parties were unanimously delegated arbitrator to arbitrate the dispute, should decide Jackson’s challenge. The Court additionally explained that it would intervene and refuse the enforcement of the delegation clause if it was unreasonably difficult for the arbitrator to rule on the unconscionability question. However, there is no such complication to be found yet in this case.

In this case, Jackson challenged the whole arbitration agreement, alleging that the agreement was unconscionable, not specifically to the delegation sentence. The arbitrator then has right to determine the case.

However, the verdict of *Jackson* case demonstrates that the unconscionability issue is arbitrable. In addition, since the underlying dispute is about employment discrimination, we may conclude that such a matter is also arbitrable. Prior U.S. Court of Appeals' decision¹⁴⁴ confirmed that the dispute regarding employment could be arbitrable. Employment discrimination is one area in employment; it is thus arbitrable.

In another recent case regarding arbitrability issue, *Granite Rock v. International Brotherhood of Teamsters ("IBT")*,¹⁴⁵ the Supreme Court resolved two important issues in federal labor law. The first one was regarding whether there was an agreement between parties or not, and if there was an arbitration clause. The other one was about tortious interference claimed by the employer, Granite Rock.

In 2004, the employer, Granite Rock and IBT, Local 287, as the employee's side, began negotiating a new collective bargaining agreement ("CBA") prior to the expiration of their existing CBA. A disagreement of the contract occurred. IBT and Local 287 forced Granite Rock to accept its new demands in labor contract. In June 2004, a strike was initiated. While the strike was continuing, the parties agreed on the terms of a new CBA on July 2, 2004, which included no-strike and arbitration clauses. The strike ended. Local 287's members agreed to return to work immediately and voted to ratify the CBA on that date.

IBT disagreed and opposed Local 287's decision to return to work, according to a back-to-work agreement, and instructed Local 287 and its members not accept the back-to-work agreement and to continue the strike to pressure Granite Rock to accept the immunity agreement.

¹⁴⁴ *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20 (1991).

¹⁴⁵ *Granite Rock v. International Brotherhood of Teamsters ("IBT")*, 546 F.3d 1169 (9th Cir. 2008).

When Granite Rock refused, IBT and Local 287 announced the wide strike, which impacted hundreds of employees.

Granite Rock filed a claim toward Local 287 as a signatory to the CBA, and IBT, as Local 287's agent, to the Northern District of California to recover the damages under the no-strike clause of the CBA dated July 2, 2004. It also sought an injunction to end the strike under Section 301 (a) of the Labor Management Relations Act.¹⁴⁶ IBT and Local 287 argued that Local 287 had never ratified the CBA, thus the no-strike clause was invalid.

While the case was still pending in the court, Local 287 again voted to ratify the CBA and stopped the strike on September 13. Granite Rock amended its claim and added a federal law claim against IBT for tortious interference with the CBA. Granite Rock explained that the new CBA was formed in July 2, which was the date the first ratification vote happened. Local 287 argued that it was not formed until the vote on August 22. The second strike thus did not violate the no-strike clause because there was no contract at that time.

Local 287 chose to refer the ratification issue to arbitration. The District Court decided that the ratification dispute was for the court to decide. Regarding Granite Rock's claim, the District Court then ordered the parties to arbitrate Granite Rock's claims under Section 301(a). However, the court granted IBT's motion to dismiss Granite Rock's tortious interference claim, reasoning that Section 301 (a) does not confer federal jurisdiction over tort claims.

¹⁴⁶ The Labor Management Relation Act, Section 301 (a) provides "Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The Ninth Circuit affirmed the District Court's dismissal of the tortious interference claim, but reversed the arbitrability issue. The court confirmed that this issue should be decided by arbitration and was not in its jurisdiction. The Supreme Court agreed with Granite Rock and overturned the Ninth Circuit's verdict, holding that "in the absence of clear and convincing evidence, contract formation and the date on which it occurs is properly decided by a court, not an arbitrator."¹⁴⁷ The Supreme Court thus rejected Local 287's effort to compel arbitration of the parties' dispute over the CBA's formation date. Additionally, the Court affirmed the dismissal of Granite Rock's claim against IBT for tortious interference with CBA.

The Supreme Court sent the issue to an arbitrator in *Rent-A Center*, which is different from this case. In *Granite Rock*, the arbitrability issue is about the formation of the contract, not the validity of the contract (it had to step back to consider before the contract was formed), which is different from *Rent-A Center*, in that the parties acknowledged there was a contract, but wondered if they expressly agreed on arbitration clause. A doubt between the parties whether the contract has been formed or not in *Granite Rock* would result in the existence of Section 301 (a) for tortious interference. The issue is concerning the date of contract formation to determine if the parties agreed to arbitrate the dispute. Thus, this time, the arbitrability dispute went to the court and not the arbitrator.

Another case that demonstrates the refusal of the court to enforce arbitral award is *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*¹⁴⁸ *Laminoirs*, a French company, agreed to manufacture and sell steel wire as per the world market price to Southwire, a Georgia company. Dispute occurred over the price appraisal. Laminoirs submitted the disputes to

¹⁴⁷ Granite Rock , supra note 145 at 19.

¹⁴⁸ *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1069 (N.D. Ga. 1980).

arbitration according to the arbitration agreement. The tribunal ordered Southwire to compensate Laminoirs for the higher world market price plus interest at French rate and an additional 5% interest per year.

Laminoirs filed the award to be enforced in Georgia. Southwire argued that the French interest rate violated public policy because it was usurious.¹⁴⁹ The court concluded that it was not too high, as the French interest rate is higher than in Georgia. The exceeding interest rate higher than the rate in Georgia could not constitute a violation of the “forum country’s most basic notions of morality and justice.”¹⁵⁰ However, the additional 5% interest was contrary to public policy because it was not reasonably related to the damage Laminoirs suffered due to the delay in receiving the awarded sums. The court further explained that the purpose of interest is to make whole the person deprived of the use of his money rather than to penalize the wrongdoer.¹⁵¹ While the court enforced the award in the French interest rate part, it refused to enforce the additional 5% interest. The U.S. court accepted the public policy defense with some limitations.

Laminoirs showed the delicate decision of the court. The court thoroughly considered the original purpose of the interest, which was to compensate the owner of the money from not having the money for a period of time. However, such compensation had to be reasonable. Even though the French interest rate is higher than the Georgia rate, the court still enforced the award, but rather enforced the whole part of an award. The court chose not to do so because it took consideration that some part of the award was not reasonable. After becoming a signatory state of the New York Convention in 1970, U.S. courts have set two standards of the basic notions of

¹⁴⁹ *Id.* at 1066.

¹⁵⁰ *Id.* at 1068-69.

¹⁵¹ *Id.* at 1069.

morality and justice: domestic and international. The courts were likely to be loose more in the international context. The precedent cases appeared after ratifying the Convention were mostly on a pro enforcement basis and were rarely refused the enforcement. The court believed that parties should be able to rely on the finality of awards. However, U.S. courts did not follow the pro enforcement basis excessively. If the courts found that it was not appropriate to enforce the award, they refused the award, such as in *Laminoirs*.

Arbitrability of Intellectual Property in the U.S.

Regarding Intellectual Property (IP), the U.S. is likely to accept the arbitrability of almost all IP disputes.¹⁵²

Since IP gives exclusive rights between contractual parties, it is usually considered arbitrable. However, IP is sometimes granted an exclusive right of exploitation to one or more persons, which affects the public as limited the right to use. IP thus is under public policy concern.

Generally, most countries do not give the right to arbitrators to decide an IP issue in light of registration.¹⁵³ However, most related issues, such as ownership, infringement, transfer, or violation of patent can be freely arbitrated in all major transactions.¹⁵⁴ In the U.S., the enactment of statutory provision in 1983¹⁵⁵ makes all matters in U.S. patents arbitrable.¹⁵⁶ Pursuant to 35

¹⁵² Lew, Mistelis and Kroll, *supra* note 3 at 209.

¹⁵³ Registration with the public record is needed for patents and trademarks, but not for copyright. Thus, arbitrability in copyright seems to be arbitrable internationally.

¹⁵⁴ Lew, Mistelis and Kroll, *supra* note 3 at 209.

¹⁵⁵ 35 U.S.C., Section 294 (a). The sections of Title 35 govern all aspects of patent law in the United States. There are currently 37 chapters, which include 376 sections (149 of which are used), in Title 35.

U.S.C. 294 (a), parties may agree to refer the patent validity or infringement disputes to arbitration. However, other patent issues not covered under 294 are also likely to be arbitrable.¹⁵⁷

Trademark and copyright do not have explicit statutory provisions regarding arbitration. As long as the arbitrability of trademark issues arising from a federal trademark statute is considered, such a trademark issue will be arbitrable.¹⁵⁸ In addition, copyright tends to be arbitrable since there was an appellate court decision in 1987 ruling in favor of the arbitrability of copyright validity.¹⁵⁹ After this court's decision, it is now likely that all issues regarding copyright will be arbitrable in the U.S.¹⁶⁰

E. Conclusion

Since the arbitration agreement is one type of contract, the same basic of contractual freedom should apply to it. The FAA does not explicitly restrict what type of disputes should be non-arbitrable. The Supreme Court has concluded an approach to the arbitrability claims by looking at the arbitration clause between parties. If the arbitration clause is broad enough, it means that such a claim, even it arises under mandatory law and designed for social policies, will

¹⁵⁶ David W. Plant, *Arbitrability of Intellectual Property Issues in the United States*, Am. Rev. Int'l Arb., 12-15 (1994).

¹⁵⁷ *Id.* at 34-35.

¹⁵⁸ *Id.* at 12-19.

¹⁵⁹ *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987). The court ruled based on Mitsubishi case and reasoned that a copyright monopoly is less extensive and more easily avoidable than the monopolies discouraged by antitrust law, thus copyright should be arbitrable.

¹⁶⁰ Plant, *supra* note 156 at 36-38.

be arbitrable. However, if there is clear evidence to the contrary, such as a reduced ability to arbitrate the claim in particular, the dispute might not be arbitrable.¹⁶¹

The U.S. courts seem likely to narrow the arbitrability of public law claims in international arbitration in the future. With the expansion of the scope of arbitrable matters, the state's public law could be challenged in international commercial arbitration. The U.S. tends to be reluctant to use the public policy as grounds for refusing the enforcement of the arbitral award. As we can see, U.S. courts rarely refuse to enforce the award under the public policy defense by narrowly construing the public policy exception. Even though U.S. courts usually restrict the public policy, the courts themselves did not provide much guidance on which arguments have a greater chance of success. Thus, the opposing party can still challenge the award if it thinks that such award has grounds to be set aside. However, some critics did not agree with the U.S. narrow view. Justice Steven (from the *Mitsubishi* case) reasoned, "an arbitration clause should not be construed to cover any statutory claim unless expressly provided." Furthermore, he did not believe Congress intended the FAA to apply to antitrust claims or that the Convention was intended to apply to disputes not covered by the Act.¹⁶² I believe that U.S. courts will consider several factors to apply unequally to foreign and domestic arbitration, such as efficiency, notion of international comity, and freedom of contract. Taking

¹⁶¹ Edward Brunet, Richard E. Speidel, Jean R. Sternlight and Stephen J. Ware. *Arbitration in America A critical Assessment*, 43 (2006). Also see *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 80 (2000).

¹⁶² Monroe Leigh, *Federal Arbitration Act—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—Arbitrability of Antitrust Claims Arising from an International Transaction*, Am.J. Int'l L., 46(1986).

these factors into account, U.S. courts tend to decide upcoming cases as per the *Stare Decisis*¹⁶³ doctrine.

¹⁶³ *Stare Decisis* doctrine is the doctrine in which judges are obliged to respect the precedents established by prior decisions.

CHAPTER 3 THE ARBITRABILITY AND PUBLIC POLICY IN EUROPE

In the past, public policy in Europe took time before the courts in European countries in order to accept that arbitral tribunals could apply rules putting important public policies into effect.¹⁶⁴ Practically, the arbitrator did not have jurisdiction to judge the case if the claimant raised the issue to nullify the contract based on an alleged infringement of competition law. The arbitral tribunal had to stay the proceeding and wait until a court had decided whether the contract was valid or invalid. Some defendants used this method as a delay-proceedings tactic.

Between the mid 1980s and the end of 1990s, the situation was reversed in Europe. It is now well accepted that the public policy character of a rule did not prevent an arbitral tribunal from applying it. For instance, in France, the court clarified that an arbitrator has the power to apply principles and rules of a public policy character and to sanction their possible violation, subject to the review that the courts of the state must perform.¹⁶⁵

All member states of the EU are parties to the New York Convention. In a matter of public policy in arbitration, all European legislations contain the same provision as described in Article V (2) (b) of the New York Convention. However, public policy and arbitrability mean different things in different nations. Broader provisions in the New York Convention still allow each nation to put in its own preference proceedings. Thus, we should look at this issue from the past cases of each nation and then we will understand more.

¹⁶⁴ Pierre Mayer, *Arbitration and National Courts: Conflict and Cooperation: The Second Look Doctrine: The European Perspective*, 21 AM.REV.INT'L.ARB.201, 1 (2010).

¹⁶⁵ *Labinal v. Mors*, REV. ARB. 645 (1993)

3.1 England

A. Historical Background

England expressed an interest in international arbitration long ago. It is regarded as a place where its current practice of arbitration is extensive.¹⁶⁶ Historically, the English court was free to intervene at any point in the arbitral process. After the Geneva Protocol 1923, England enacted the Arbitration Clause Act 1924, and after executing the Geneva Convention 1927, it enacted the Arbitration Act 1930. The Arbitration Act 1930 combined both the Geneva Protocol 1923 and the Geneva Convention 1927.

In 1950, England integrated the Arbitration Act 1924 and the Arbitration Act 1930 into the Arbitration Act 1950. After the 1950 Act, foreign arbitral awards will be enforceable in England and will be treated as a same manner as a judgment or order to the same effect.¹⁶⁷ In order to enforce a foreign arbitral award, the award must be in respect of a matter which is capable being referred to arbitration in England.¹⁶⁸

England became a signatory state of the New York Convention in 1975, five years after the U.S. In 1975, England promulgated the Arbitration Act 1975 by adopting the provision from the New York Convention. Section 3 of the Arbitration Act 1975 places the arbitral award on the same level as the Arbitration Act 1950. Thus, arbitral awards in the 1975 Act will be considered as the judgment as well. In addition, the 1975 Act set out the grounds to refuse the arbitral award by imitating Article V (1) and (2) of the New York Convention. The arbitral award referred to an

¹⁶⁶ Bruce Harris, Rowan Planterose, and Jonathan Tecks, *The Arbitration Act of 1996: A Commentary*, 20 (2d ed 1999).

¹⁶⁷ The English Arbitration Act 1950, Sections 26 and 36.

¹⁶⁸ *Id.* at Section 37(1).

award made in the territory of a state (other than the United Kingdom), which was a party to the New York Convention.

In 1979, England enacted the Arbitration Act 1979, which amended the provisions of the 1950 Act concerning the award appeal part. The most updated and current arbitration act in England now is the Arbitration Act 1996. The 1996 Act invalidated the 1975 Act, the 1979 Act, and Part 1 of the 1950 Act. The Arbitration Act 1996 takes party autonomy to a new level. It gives the parties freedom to agree on how their dispute should be solved, as long as this agreement is not contrary to public policy.¹⁶⁹ It also emphasizes that the tribunal has the right, subject to the rights of the parties to agree to any matter, to decide all procedure and evidential matters.¹⁷⁰

B. Relevant Arbitration Laws

The English Arbitration Act of 1996

The UNCITRAL Model Law influenced the English Arbitration Act of 1996 in several aspects, but the 1996 Act did not follow its text directly. The 1996 Act does not provide separately between domestic and international arbitration. Section 99 of the 1996 Act allows the 1950 Act continue to apply to foreign awards (within the meaning of that Part II of the 1950 Act) that are not made under the New York Convention. Thus, for an award made in the territory of a state other than England, which is the party to the New York Convention, the 1950 Act shall not apply.

¹⁶⁹ The English Arbitration Act 1996, Section 1 (b).

¹⁷⁰ *Id.* at Section 34 (1).

In the 1996 Act, the arbitral award may be enforced in the same manner as a court judgment.¹⁷¹ The parties may challenge the arbitral award if any serious irregularity under Section 68 occurs. Serious irregularity is defined as a substantial injustice that will impact the parties.¹⁷² If the court finds that a serious irregularity occurred to the award, the award may be set aside in whole or in part, the court may send the award back to the tribunal for reconsideration, or the court may declare that the award is not binding between the parties.¹⁷³

In Section 68 (2) (g), the public policy ground is listed as a serious irregularity, and the award can be challenged accordingly. In addition, Section 68 (2) (g) also mentions “the award being obtained by fraud.” Thus, it is not necessary for the court to verify whether the fraud is contrary to the public policy because fraud is one component listed explicitly in Section 68 as a ground to set aside the award.

In addition, even though the award made from the signatory state of the New York Convention will not be refused according to the English Arbitration Act 1996,¹⁷⁴ Section 103(1) and (3) authorize the court to refuse the recognition of such arbitral award if the award is not capable of settlement by arbitration (arbitrability exception) or if it would be contrary to public policy to recognize or enforce the award.

¹⁷¹ *Id.* at Section 66 (1).

¹⁷² *Id.* at Section 68 (2).

¹⁷³ *Id.* at Section 68 (3).

¹⁷⁴ *Id.* at Section 103 (1).

C. Cases Study

The main case regarding public policy in England is *Deutsche Schachtbau-und Tiefbohrergesellschaft M.B.H. (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)*.¹⁷⁵ In this case, there is an oil exploration agreement dispute between D.S.T. and Rakoil. The parties choose to solve the dispute through arbitration by putting in an International Chamber of Commerce (I.C.C.) arbitration clause. When the dispute arose, D.S.T. submitted its claims to the I.C.C. arbitration panel. However, Rakoil sought to void the agreement in the Court of Ras Al Khaimah, contending that D.S.T. acquired the agreement by misrepresentation at the time of entry into the arbitration agreement. The I.C.C. arbitration tribunal referred the dispute to arbitrators in Switzerland, as is common practice in international arbitrations in the field of oil drilling concessions. In the proceedings before the English court for the recognition and enforcement of the Swiss arbitral award, Rakoil argued that the arbitrator applied unclear and non-precisely defined international rules based on general usage in license rights, instead of applying substantive law of particular state.¹⁷⁶ It was accordingly contrary to English public policy.

The court disagreed and reasoned that in order for an English court to set aside the award on the public policy defense, the claiming party must prove 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

¹⁷⁵ *Deutsche Schachtbau-und Tiefbohrergesellschaft M.B.H. (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)*, 2 Lloyd's Rep. 246, 254 (K.B.)(1987).

¹⁷⁶ *Id.* at 246.

informed member of the public on whose behalf the powers of the State are exercised.”¹⁷⁷ In addition, it was not contrary to public policy of England if the arbitrator used common principles underlying the laws of the various nations to govern contractual relations, especially when the parties failed to specify which system of law would apply.¹⁷⁸

In this case, the English court confirmed that it had to violate a particular existing justified interest of the English public to be a public policy exception.¹⁷⁹ The court must see that such recognition and enforcement of award may endanger the interest of the state’s citizens by executing its public authority. Thus, any public policy exception that cannot show clearly how the recognition and enforcement could damage the interest of state’s public will not be considered as a bar to recognize or enforce the award.

Similar to the important American case of *Parson & Whittemore*, the *D.S.T.* case is the crucial landmark English case of public policy in relation to the recognition and enforcement of foreign arbitral award. We could say that the *D.S.T.* case defined the definition of public policy in arbitration. Even though this standard is less ambiguous than the U.S., it does not define specifically what situation would fall in the meaning of “clearly injurious” or “wholly offensive.” Importantly, the *D.S.T.* case clarified that the English courts do distinguish between English international public policy and English domestic public policy.¹⁸⁰

¹⁷⁷ *Id.* at 257.

¹⁷⁸ *Id.* at 252-254.

¹⁷⁹ Alexander J. Belohlavek, *Arbitration, Order Public and Criminal Law: Interaction of Private and Public International and Domestic Law*, 1347 (2009).

¹⁸⁰ *Omnium de Traitement et de Valorisation S.A. (OTV) v. Hilmarton Ltd.*, (1999) 2 Lloyd’s Rep. 222, 225 (K.B.) (“There is nothing which offends English international public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might taken a different view.”).

In *Soleimany v. Soleimany* (C.A.),¹⁸¹ the English court set aside the arbitral award due to its breach of Iranian law. The case concerned the business partnership contract between father, Sion Soleimany, and son, Aber Soleimany. Son and father entered into an arrangement to split the profits from supplying valuable Persian and other Oriental carpets from Iran to England. By doing so, Aber, who was an Iranian resident, would export merchandises to his father, Sion, in England by smuggling them, thus breaking Iranian revenue and export control rules. Later on, Aber claimed for non-payment in arbitration proceedings. The dispute was brought to arbitrator (the Beth Din, a Judaism court) with Jewish law governing the arbitration. The arbitrator consequently gave the award insisting that the business was executed illegally, but that Sion, the father was still responsible for the profit because in Jewish law, the illegality was irrelevant in determining the rights between the parties. Aber made an effort to enforce the award in England, but Sion claimed that the enforcement of award would be contrary to English public policy due to the illegality of the contract. The English Court of Appeal considered “the award could not be enforced because it is based on English contract which was illegal when made.”¹⁸² Thus, the court refused to enforce the award as contrary to public policy.

The Court of Appeal of England reviewed *Westacre Investments, Inc. v. Jugoisimport-SPDR Holding Co. Ltd.*¹⁸³ A Yugoslavian state enterprise hired Westacre, a Panamanian company, as per advised by senior Kuwaiti Minister, to use its personal influence to procure contracts for the sale of military equipment to the Kuwaiti government. After the business between the Yugoslavian state enterprise and Kuwaiti government went ahead, a Yugoslavian

¹⁸¹ *Soleimany v. Soleimany*, (1999) Q.B. 785, 804 (K.B.).

¹⁸² *Id.* at 799.

¹⁸³ *Westacre Invs. Inc. v. Jugoisimport-SPDR Holding Co. Ltd.*, (1999) Q.B. 740, 757 (K.B.), *aff'd*, (2000) 1 Q.B. 288 (K.B.).

state enterprise terminated the contract and declined to compensate Westacre. As agreed in the arbitration agreement, Westacre filed the dispute to I.C.C. arbitration in Paris, and the arbitration tribunal issued the award in favor of Westacre, using Swiss law as the law governing the arbitration.

Westacre sought the enforcement of award in England, but the Yugoslavian state contended that doing so was contrary to public policy because the underlying contract was about using bribery to provoke the sale agreement. Thus, the sale contract was illegal in Kuwait, the country of performance. If the English court enforced the award, it would be contrary to the doctrine of international comity and be harmful to the public policy of England.

By considering between the public policy reservation and the principle of the recognition of foreign arbitral awards according to the New York Convention, the English lower court and the Court of Appeal unanimously disagreed with the Yugoslavian state. They reasoned that English law allowed an English court to enforce an agreement even when such agreement is contrary to public policy of the place of performance (Kuwait), if such enforcement is not contrary to the public policy of the governing law (Switzerland) or of England.¹⁸⁴ In this case, an agreement to purchase personal influence was neither illegal under Swiss nor English law. The court further concluded that “only serious universally condemned activities such as terrorism, drug trafficking, prostitution and pedophilia and in any event nothing less than outright corruption and fraud would offend against English public policy.”¹⁸⁵ To use personal influence to procure the contract did not fall in these categories. It was also essential for the court to advance

¹⁸⁴ Shai Wade, *Westacre v. Soleimany: What Policy? Which Public?*, INT'L.ARB.L.REV.2(3), 100 (1999).

¹⁸⁵ D. Rhidian Thomas, *International Commercial Arbitration Agreements and the Enforcement of Foreign Arbitral Awards - A Commentary on the Arbitration Act 1975*, 1 L.M.C.L.Q. 17, 775 (1981).

the public policy to “sustain international arbitration agreements.”¹⁸⁶ The court considered this an important factor and decided that the public policy of sustaining international arbitration agreements outweighed the public policy of corruption.¹⁸⁷ The court thus enforced the award.

The *Soleimany* case is different from the *Westacre* one, as the arbitral tribunal in *Westacre* found that the underlying contract was not illegal,¹⁸⁸ while the contract in *Soleimany* was found strictly illegal. However, the court’s decision in *Westacre* seems to be inappropriate. Using personal influence to procure a contract may be regarded as corruption. Without such powerful control involvement, the contract may not have occurred. Corruption has become the serious global problem. In today’s materialized world today, the power of money can distort public moral and goods. Since arbitration proceedings appear to be more flexible and less transparent than a court’s procedure, especially taking evidence and determining facts, arbitration might not be the best solution to solve a corruption dispute. In addition, court proceedings are usually matters of public record and thus stricter than arbitration. The public policy narrow view of the court in *Westacre* could diminish the trust of the justice system and make the corruption problem in the world worse. In addition, one might question that corruption is regarded as fraud with the same consequence. Both corruption and fraud could affect the world economy in the long run. Section 68 (2) (g) in the 1996 Arbitration Act specifies the award being obtained by fraud as a serious irregularity. In my view, the court’s decision here might not be proper.

¹⁸⁶ Wade, *supra* note 184. 769.

¹⁸⁷ *Westacre*, *supra* note 183 at 773.

¹⁸⁸ *Soleimany*, *supra* note 181 at 802.

In *R v. V*,¹⁸⁹ this case is about a consultant contract between R and V. V promised to obtain the approvals from the national oil company of a North African country for development plans for R, with R paying the fee in return. Although R has made two payments in the past to V, R's new management team refused to pay a third fee that was due. The contract referred the dispute to I.C.C. arbitration and chose English law as the applicable law.

V brought a claim to I.C.C. arbitration in London in 2006. The tribunal ruled in favor of V by ordering R to pay the third success fee to V. R argued that the consultant contract was contrary to the English public policy and to the *lex loci solutionis*¹⁹⁰ because V was merely influencing the peddling. Subsequently, R challenged the tribunal award and brought the claim to the court, contending that the award was contrary to English public policy pursuant to Section 68 (2) (g) of the English Arbitration Act 1996. Based on the *Westacre* case, the court rejected R's argument. The court found that the tribunal's conclusion was that "the consultant contract was not illegal as a matter of the *lex loci solutionis* was unimpeachable,"¹⁹¹ and that the agreement was not contrary to English public policy.¹⁹²

D. Conclusion

Like the U.S., the English approach in public policy exceptions tends to construe narrowly and support the pro-arbitration basis. Even though the English court accepts the public policy defense in *Soleimany*, later cases are likely to follow the theory in *D.S.T. v. Rakoil* by following the theory that public policy offense must be "some element of illegality which is

¹⁸⁹ *R. v V*, 1 Lloyd's Rep 97, (2008) EWHC 1531 (Comm), 119 Con LR 73 (K.B.).

¹⁹⁰ Law of the place where performance occurs.

¹⁹¹ *R v V*, *supra* note 189 at 43.

¹⁹² *Id.* at 49.

clearly injurious to the public good or, wholly offensive to the ordinary reasonable...”¹⁹³. However, *Soleimany* is a sign showing that the English court still accepts the public policy defense, but that parties might have to work harder to get such a defense because England puts weight on international comity rather than the defense. English courts will restrict themselves to reviewing the reasoning of the arbitral tribunal, instead of seeking to review the underlying facts. Unless it is clear from the award itself that there has been a breach of public policy, the award will not be overturned on that basis.

3.2 France

A. Historical Background

France adopted the New York Convention on June 26, 1959. The French international approach on recognition and enforcing foreign arbitral awards is based on the New York Convention and its local standard enforcement.¹⁹⁴ In France, the New French Code of Civil Procedure (NCCP) is the most important local standard enforcement in arbitration.¹⁹⁵ Although France is signatory state of the New York Convention, the French court seems to put more weight on local rule when it comes to recognizing and enforcing foreign arbitral awards rather than on the New York Convention. Perhaps French courts consider it more advantageous to the enforcement of awards than the New York Convention. In addition, it should be noted that France has not adopted the UNCITRAL Model Law.

¹⁹³ D.S.T., *supra* note 175 at 254.

¹⁹⁴ Christopher Koch, *The Enforcement of Awards Annulled in their Place of Origin: the French and U.S. Experience*, J. INT’L.ARB. 26(2), 267-292 (2009).

¹⁹⁵ Nouveau code de procedure civile (NCPC) (May 11, 2007), www.legifrance.gouv.fr. (last visited May 2010).

In 1980 and 1981, the French government carried out a series of reforms to clarify, codify, and modernize French arbitration law by way of Decrees¹⁹⁶ by amending the NCCP, which had remained relatively unchanged since its enactment in 1806. The new law separated arbitration law into two parts: domestic and international. Articles 1442 to 1491 of the NCCP deal with domestic arbitration while Articles 1492 to 1507 are found to cope with international arbitration.

Generally, an application for setting aside an international arbitration award in France may only be made under very strict conditions, such as timeliness, choice of venue, or the unavailability of arbitral recourse.¹⁹⁷ In addition, an application for setting aside an international award may only be granted on very narrow grounds, which in board terms concern irregularities affecting the tribunal, the proceedings, or the award.¹⁹⁸ Article 1502 of NCCP lists the arguments that the French court will accept as grounds to set aside. Article 1502 contains five grounds that the court will refuse the enforcement of award. Public policy is listed as one of the grounds in (5).

In the past, the French Civil Code did not allow dispute matters relating to public policy to be referred to arbitration. However, this norm tended to weaken as a result of the French courts' decisions. In 1950, there was a decision from the Cour de Cassation holding that the fact that the subject matter of a dispute was subject to public policy rules of itself did not prevent the

¹⁹⁶ Decree No.81-500 (May 12,1981); Decree No. 80-354 (May 14,1980).

¹⁹⁷ Alain N. Farhad, *Provisional Enforcement of International Arbitral Awards Made in France: The Dilatory Effect of the French Set Aside Application*, J.INT'L.ARB. 23(2), 115 (2006).

¹⁹⁸ *Id.*

dispute being referred to arbitration.¹⁹⁹ In addition, the *Hilmarton*²⁰⁰ decision in the late 1990s has awoken the awareness of arbitration in France. In *Hilmarton*, the French court enforced the award despite an annulment by Swiss court because the French court considered the award as an international award rather than integrated in the legal system of Switzerland, so that its existence remained established even if set aside, and its recognition in France was not contrary to international public policy.

B. Relevant Arbitration Law

Article 1498 and Article 1502 (5) of NCCP describe the public policy concept. According to Article 1498, the French court will recognize or enforce the foreign arbitral award if such recognition or enforcement is not contrary to international public policy.²⁰¹ Article 1502 also provides that “an appeal against a decision which grants recognition or enforcement is available only in the following cases...(5) where the recognition or enforcement is contrary to international public policy.” An arbitration award made abroad may be appealed only if French courts find circumstances matching Article 1502.

Article 1504 of NCCP also emphasizes that an arbitral award made in France may be subject to be set aside if it is contrary to international public policy.²⁰²

¹⁹⁹ Kirry, *supra* note 90, 733.

²⁰⁰ Cour de Cassation, 23 March 1994, *Société Hilmarton Ltd v Société OTV*, REVUE DE L'ARBITRAGE [REV. ARB. (1994)].

²⁰¹ NCCP, Article 1498 provides that “Arbitral awards shall be recognized in France if their existence is proven by the party relying on the award and if such recognition is not manifestly contrary to international public policy. Such awards shall be declared enforceable in France by the enforcement judge under the same conditions.”

²⁰² NCCP, Article 1504.

The scope of public policy must be restricted further in the international sphere than in domestic policy, meaning that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations.²⁰³ We may find that disputes concerning public collectivities and public establishment in France cannot be referred to arbitration.²⁰⁴ This approach, however, has not been accepted as applicable in international arbitration.²⁰⁵ The ‘international public policy’ to which Article 1502 (5) and 1504 refer has been interpreted to mean the French conception of international public policy and not a “truly international public policy.”²⁰⁶ The Court d’appel of Paris has stated that “international public policy in the context of Article 1502 (5) means our conception of international public policy, that is to say, the entirety of the rules and matters of fundamental importance which the French legal system requires to be respected even in situations of an international characters.”²⁰⁷ This standard empowers French courts to determine whether it would be appropriate, based on a set of French legal values, to allow the enforceability of an award in the French legal order. Actually, the French courts have, for the past decade, held that a violation of public policy must be “flagrant, effective and concrete” in order to give rise to annulment.²⁰⁸ The term “flagrant” has been

²⁰³ Bernard Hanotiau & Olivier Caprasse, *Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention: Belgian and French Perspectives*, J.INT’L.ARB. 25(6), 730 (2008).

²⁰⁴ NCCP, Article 2060.

²⁰⁵ Hanotiau & Caprasse, *supra* 203, at 724.

²⁰⁶ Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 954 (1999).

²⁰⁷ CA Paris, 27 October 1994, *Lebanese Traders Distributors v. Reynolds*, REV.ARB.709 (1994).

²⁰⁸ The Cour d’appel de Paris has used the term “Flagrant, effective and concrete” in a number of cases where public policy defenses have been raised, see *Thales Air Defence v. Euromissile et al.*, (judgment of November 18, 2004, REV.ARB., 751 (2005).

defined as meaning that the award must “contain the ingredients of the breach” of public policy.²⁰⁹

C. Cases

In the later period, the French court seems to soften more and more on referring the public policy to arbitration. On the matter of setting aside the award, the French court has rarely annulled an arbitral award based on public policy exception. Between 1981 and 1990, there were only 2 out of 40 cases where the Court of Appeal of Paris annulled the award on the ground of being contrary to public policy.²¹⁰ The first one is concerning bankruptcy. The arbitral tribunal was unaware of the international public policy and directed that no claims can be brought against a bankrupt individual or legal entity person.²¹¹ In the latter case, the arbitral award was set aside on the grounds that it had ignored the rules relating to control of investments.²¹²

In 1993, *European Gas Turbine-Westman*,²¹³ the Court of Appeal of Paris decided to become involved, reasoning that public policy exception under Article 1502 (5) of NCCP concerns all legal and factual elements justifying the application of the international public policy rule, including the evaluation of the validity and legality of the contract. In this case, the court annulled the award on the grounds that the agreement between the parties was made on the purpose of bribery. In the same year, *Republique de Cote D'Ivoire v. Beyrard* emphasized this

²⁰⁹ Yves Derains, *Chronique de jurisprudence française*, REV.ARB. 816, 817 (2001).

²¹⁰ Teresa Giovannini, *What are the Grounds on Which Awards are Most Often Set Aside? The Institute for Transnational Arbitration's Eleventh Annual Workshop/ Dallas 15 June 2000*, *The Making and Enforcement of The Arbitral Award*, at 12 (2000).

²¹¹ Cour de cassation, 8 March 1988, *Société Thinet v. Labrely* Rev. Arb., REV.ARB. 473 (1989).

²¹² Cour d'Appel de Paris, 5 April 1990, *Soc. Courrges Design v. Andre Courreges*, REV.CRIT.DIP., 580 (1991).

²¹³ CA Paris, Sept 30. 1993, *European Gas Turbines SA v. Westman International Ltd.*, REV.ARB. 359 (1994).

court decision and the Court of Appeal of Paris held that “there is a general principle of international public policy of implementation of the agreements in good faith.”²¹⁴

However, these decisions appeared to be isolated today. French case law has developed a very restrictive approach to public policy control.

In 1991, the Court Appeal of Paris in the *Ganz*²¹⁵ cases held that “the allegation of fraud or expropriation was not itself such as to exclude the jurisdiction of the arbitral tribunal.”²¹⁶ The Hungarian company, Ganz Mavaz, had been divided into seven separate companies, and a dispute arose as to which of those seven companies succeeded to the rights of the former Ganz Mavaz with respect to its contracts with the Tunisian company, SNCFT. The arbitral tribunal had determined that the seven companies were jointly bound by the contracts entered into by their predecessor. The award has been raised to be set aside on the grounds that the arbitral tribunal had wrongly agreed to decide the party’s allegation of fraud, which it was claimed, rendered the case non-arbitrable. The court accepted that arbitrators were entitled to rule on both the non-performance and the validity of contracts contravening public policy. The Court Appeal of Paris confirmed in *Ganz* that fraud is arbitrable.

However, in later days, French case law has developed a narrow way of interpreting public policy. In 1996 *Gallay v. Fabricated Metals*,²¹⁷ the Court Appeal of Paris rejected the annulment of the award, regarding the unfair competition under European competition law.

²¹⁴ Cour d’Appeal de Paris, 12 January 1993, *Republique de Cote D’Ivoire et autre v. Beyrard*, REV.ARB. 685 (1994).

²¹⁵ Cour d’Appeal de Paris, 29 March 1991, *Ganz and Others v. Soc. Nationale des Chemins de fer Tunisiens*. REV.ARB. 478 (1991).

²¹⁶ *Id.*, at 480.

²¹⁷ CA Paris, 16 April 1996, *Gallay v. Fabricated Metals*, Cass. REV.ARB. 805 (2001).

Another decision of the Court Appeal of Paris has affirmed the restricted view of public policy that “the control of the court of appeal with respect to public policy must concern the solution given to the dispute, the setting aside being only possible if this solution violates public policy.”²¹⁸ The decision rendered by the Court Appeal of Paris in 2004 on *Thales v. Euromissile*²¹⁹ supports the limitation of public policy theory. The arbitrators ordered Thales to pay damage to Euromissile based on the dispute from a license agreement. Thales filed a request to set aside the award on the grounds that the agreement violated European competition law. The award was made from the illegal contract and violated the international public policy. The court refused to set aside an award and ruled that only violations of French public policy, which were “obvious, actual and concrete” (*flagrante, effective et concrete*), would be sanctioned.

From these two cases, the court has restricted the public policy drastically. We can conclude that the claim about violation of European competition law will not be able to be used as grounds to set aside the arbitral award as stipulated in NCCP Article 1502 (5). One more thing we have learned from *Thales* case is even though the parties did not raise the issue of contrary to European competition law during the arbitral process, the parties could still file a request to annul the award by alleging that the agreement is in breach of public policy. The fact that the parties did not invoke the violation of public policy before the arbitrator did not prevent them from raising the issue before the court, since “the scope of the judicial control relating to the respect of mandatory European rules should not be conditioned by the attitude of the parties.”²²⁰

²¹⁸ CA Paris, 23 February 1996, Leroy. REV.ARB. 471 (2000).

²¹⁹ CA Paris, 18 November 2004, *Thales Air Defense v. GIE Euromissile*, REV.ARB. 751 (2005).

²²⁰ Hanotiau Caprasse, *supra* note 203, at 736.

Another recent case has asserted this notion: *SNF v. CYTEC*²²¹ in 2008. CYTEC a Dutch chemical company was buying chemical products from SNF, a French company. SNF had to order material, which was the only product used to produce such chemical product, from CYTEC. The contract was referred to I.C.C. arbitration in Brussels, Belgium for future dispute. In 2000, SNF decided to discontinue the purchase from CYTEC, alleging that the contract violated European antitrust laws (Art 81 and 82 of the European Treaty). CYTEC subsequently initiated and submitted the claim to arbitration in May 2000 on the grounds of breaching a sale agreement. SNF counterclaimed that the contract was contrary to European antitrust laws and that such an award should be set aside.

The tribunal gave an award by ordering SNF to compensate CYTEC and found that the contract violated the antitrust law due to forcing SNF to purchase exclusively from CYTEC. The tribunal annulled the contract accordingly due to violation of Art 81 of the European Treaty.

SNF argued that by compensating CYTEC only, the tribunal had managed to have the contract indirectly produce the effect, and had thus violated antitrust laws anyway. SNF challenged the validity of the award before the Belgian court. On 8 March 2007, the Brussels court set aside the arbitral awards on the ground that the award had been made in a violation of the antitrust law.

However, at the same time, CYTEC had sought enforcement of the awards in France. The Cour de Cassation of France found that the awards were not contrary to French public policy, as there was no evidence of an “obvious, actual and concrete” violation of public policy

²²¹ Cour d' Appeal Paris, 23 March 2006, *Societe SNF v. Societe Cytec Industries BV*, Cass. Civ.1. REV.ARB. 100 (2007).

had been provided. The fact that the award was set aside by the Belgian courts was irrelevant for the French court to set it aside.

Like the U.S., the French court nowadays lessens the role of the court to set aside the award based on public policy and increases the role of arbitrators to decide disputes relating to public policy. Even though the French courts accepted that violation of the provision of European competition law could bring the award to the annulment (this idea came from the decision of the European Court of Justice in *Echo Swiss China Ltd. v. Benetton International NV.*),²²² the Paris Court of Appeals, added that it was for French procedural law to determine the extent of the control of the award. Thus, the public policy exception of Article 1502 (5) of NCCP will be used as grounds to set aside the award if the enforcement of the award runs against a legal order in unacceptable manner, and such violation has to be an obvious breach of a rule of law considered essential or of a fundamental principle. French court will consider “public policy matter” if a matter offends to the ‘fundamental notion’ of French legal systems. Even though there is evidence showing the conflict of fundamental law, the French court still may not annul the award if such confliction is not “obvious, actual and concrete.” One might consider this factor as important before using public policy exception, as the French courts may consider the *Thales* and *SNF* cases as *Stare Decisis*.

Arbitrability of Intellectual Property in France

IP rights were developed in France in 1791, and the French Civil Code (FCC), comprising provisions related to arbitration, was enacted in 1804. Thus, in the past, arbitration

²²² *Echo Swiss China Ltd v. Benetton International NV*, Judgment of 1 June 1999 in case c-126/97, ECR I-3055 (1999). This case the Dutch court annulled the arbitral award ordering *Benetton* to pay damage in an amount of USD 23 750 000 to *Echo Swiss*. The court reasoned that the granting of damages would conflict Article 81 of EC Treaty by calculating a loss of sales based on an agreement that was dividing the common market.

and IP law seemed to be far away from each other but they have long been a controversial issue for French lawyers. The rationale under this theory is because the laws governing the validity of an IP right are public policy rules and a state monopoly.²²³ However, this issue in France now appears to be more flexible and the arbitrability of IP disputes is well established. The FCC provides general rules that arbitration must refer to the rights of which persons have the free disposal.²²⁴

In a matter of patents, article L.615-617 of the French Intellectual Property Code (FIPC) states “The above provisions shall not prevent recourse to arbitration in accordance with Article 2059 and 2060 of FCC.” Arbitrability in the patent issue in France is a good example of how French court IP develops the arbitrability concept. Disputes arising from patent contracts and questions concerning the ownership or entitlement of patents are generally considered to be arbitrable.²²⁵

With regard to trademark, article L.716-4 of FIPC provides that “this article shall not prevent recourse to arbitration as provided for in article 2059 and 2060 of the Civil Code.” Similar to patents, contract disputes of trademark and trademark ownership issues can likely be arbitrated.²²⁶

²²³ Edouard Fortunet. *Arbitrability of Intellectual Property Disputes in France*, ARB.INT’L. 26(2), 281 (2010).

²²⁴ The French Civil Code. Article 2059. Additionally, Article 2060 provides that “arbitration must not deal with matters of status and capacity of the persons, ...divorce and judicial separation, ...controversies concerning public bodies and institution, and more generally in all matters in which public policy is concerned.”

²²⁵ Georges Bonet & Charles Jarrosson, *L’arbitrabilite des litiges de propriete industrielle, Arbitrage et propriete intellectuelle*, 66-67 (1994).

²²⁶ *Id.* at 68. With regard to trademarks, Article L.716-4 provides that “Article 716-3 shall not prevent recourse to arbitration as provided for in Article 2059 and 2060 of the Civil Code.”

Concerning the infringement of IP rights, the French court precluded arbitration for this type of disputes. In addition, disputes relating to the validity of registered IP rights are a non-arbitrable matter (i.e., trademarks and patents). However, the Paris Court of Appeal recently reversed this concept, enabling an arbitral tribunal to rule on a question relating to the validity of an intellectual property right.²²⁷

Arbitration in IP in France now has been developed. In most cases, the exploitation of an IP right can now be arbitrated.²²⁸ However, some claims still cannot be settled by arbitration, such as infringement proceedings. This is because French law includes criminal sanctions, which a private judge cannot impose. Another claim that is still a contentious issue is the question of whether an arbitrator can rule on the existence of an IP right. A patent case reversed the tradition position by the Paris Court of Appeal, finding that arbitrators can rule on matters involving the existence of IP rights. It is possible that French court will step further in other kinds of issue in IP in the near future.

²²⁷ CA Paris, 28 February 2008, *Sté Liv Hidravlika DOO v. SA Diebolt, 1ère ch. C*, JurisData no. 2008-359055 (2008).

²²⁸ CA Paris, 24 March 1994, *Ste Deko v. G. Dingler et ste Meva*, 3 REV.ARB. 515 (1994).

3.3 Switzerland

A. Introduction and Arbitration Background

Switzerland is a neutral and famous country in international commercial arbitration. As an arbitration-friendly country, the Swiss statistics of the Swiss Supreme Court show that among 9 cases in 2000, none resulted in the award being set aside; among 12 cases in 2005, one award was set aside; in 2010, among 27 cases, 2 awards were set aside.²²⁹

Switzerland consists of 26 cantons, and each has its own legal system. Like the U.S., Switzerland has a federal legal system. In 1915, the Federal Supreme Court showed a sign to accept on arbitration agreements that “such type of agreements were governed, not by the federal law, but by cantonal law on procedure.”²³⁰ Switzerland became a Contracting State to the New York Convention on June 1, 1965 and adopted the UNCITRAL Model law in 1985. However, its arbitration law dissipated until the amendment in 1987. Prior to this amendment, a number of cantons adopted the International Arbitration Convention or *Concordat Suisse sur l'arbitrage* (“Concordat”) in 1969. The participating cantons agreed to unify their arbitration laws.

Article 1 of the Concordat provides that the Concordat’s provisions are to apply to “any proceedings before an arbitral tribunal”, the seat of which is located in a canton that is a party to the Concordat. Article 3 provides that the high court of civil jurisdiction of the canton where the arbitration takes place shall be the competent judicial authority to give judgment in any action for the annulment or review of awards, and the court may declare the award enforceable. Article

²²⁹ Felix Dasser, *International Arbitration and Setting-Aside Proceedings in Switzerland- An Updated Statistical Analysis*, ASA BULLETIN, 82 (2010).

²³⁰ Robert Briner, National Reports (Switzerland) in YEARBOOK COMMERCIAL ARBITRATION XIV, 1 (1989).

36 lists the grounds on which the court may set aside. One of the grounds was “arbitrary.” An award will be regarded as arbitrary if it constitutes an “obvious violation” of law or equity.

The Concordat governed Arbitration in Switzerland until 1987. In 1987, the Swiss Private International Law Statute or *Loi Fédérale sur le Droit International Privé* (“PLI”) was enacted and enforced on January 1, 1989. Chapter 12 of the PLI stipulates the arbitration provision.

B. Definition of Arbitrability and Public Policy and Legal Framework

Any dispute regarding “an economic interest” can be the subject of an international arbitration in Switzerland. The Swiss courts interpret “economic interest” broadly and include matters, such as competition law issues and expropriation disputes.²³¹ Although disputes involve construction projects, commodity trading, energy supply and license agreements, all these matters are referred to arbitration.

Chapter 12 of the PLI contains Article 176-194. According to Article 194 of Chapter 12, the New York Convention will govern the approach of recognition and enforcement of foreign arbitral award in Switzerland.

Article 17 (v) of the PLI provides that “the application of provisions of foreign law shall be precluded if it would produce a result which is incompatible with Swiss public policy.”

Article 27(3) of the PLI lists the grounds for refusal to recognize a foreign decision that is manifestly incompatible with Swiss public policy.

²³¹ Oliver Hargreaves, *Switzerland: A leading Venue for International Arbitration, Litigation, Arbitration & Dispute Resolution*, 150 (2010).

However, the two articles above do not provide direct terms for applying to international arbitration. Article 176 of the PLI insists that Chapter 12 applies to international arbitration. In order to qualify in international arbitration, one of the parties must have “habitual residence” outside Switzerland and that the seat of arbitration is in Switzerland.

The procedure for setting aside the arbitral award is regulated in Article 190-192 of the PLI. Article 190 (2) sets the grounds the award may be challenged in (e), where the award is in compatible with public policy. The second paragraph of Article 190 allows non-Swiss parties to exclude any setting aside by declaration in an agreement.

Public policy in Switzerland includes both “procedural” and “substantive” public policy. The former relates to fundamental procedural guarantees, and the latter is defined as the “fundamental principles, which from the Swiss perspective should be cornerstones of any legal system.”²³² The Swiss Federal Court considers that an arbitral award violates public policy “if it violates the basic legal principles so that it is incompatible with the legal system and basic social values. That also includes inhibition of right abuse (the *pacta sunt servanda* principle) and inhibition of expropriating properties without remuneration (the *Treu und Glauben* principle).”²³³ Thus, to set aside an arbitral award in Article 190 (2) (e) of the PLI, the sanctity of the contract (*pacta sunt servanda*) is included in this public policy ground, but only in narrow circumstances. An award will be contrary to public policy if it recognizes the existence of a contractual obligation but fails without any reason to sanction non-performance or to order performance, or

²³² Elliott Geisinger, Aileen Truttman & Schellenberg Wittmer, *The European & Middle Eastern Arbitration Review*, GLOBAL ARBITRATION REVIEW, Section 3 (2011).

²³³ See BGE (scil. The Collection of the Federal Court decisions) 116 II 72, 634 (1989).

if the award denies the existence of a contractual obligation but nevertheless orders damages or specific performance.²³⁴

Under Swiss law, the main requirement is that the parties intended to submit their dispute to arbitration with explicit expression in an agreement. The arbitration clause in the contract must provide an indication of the dispute to be decided by way of arbitration.²³⁵ Public policy is considered violated if the arbitral award is rendered in equity without the parties' agreement or if the parties' agreement on the applicable law has not been respected.

C. Cases

In *Terra Armata (gia Freyssinet Terra Armata) s.r.l. v Tensacciai s.p.a.*,²³⁶ Terra, an Italian company, and Tensacciai, a large international construction group, are companies specializing in staying cable and pre-tensioning systems. The two companies entered into a contract titled "Preliminary Association Agreement" providing for joint tenders. The agreement contained a clause prohibiting the parties to tender for the defined works except with each other. Later on, Tensacciai entered into other four contracts for the supply of works without Terra.

Terra brought the claim to I.C.C. arbitration in Switzerland. Tensacciai argued that the agreement was void as it was in violation of Italian and EC competition law. The object of the clause in agreement limited competition both between the parties and between potential competitors, and added that Terra sought to share the market out by manipulating the calls for tenders in circumstances where both parties had the technical and financial capacity to carry out

²³⁴ Geisinger, Truttman & Wittmer, *supra* note 232.

²³⁵ Hargreaves, *supra* note 231 at 150.

²³⁶ Judgment 1897/06 of 5 July 2006 in case no.4209/2005 r.g., *Terra Armata (gia Freyssinet Terra Armata) s.r.l. v Tensacciai s.p.a.*

the works alone. The agreement was not based on economic necessity but only on the convenience of the parties. The arbitrators ruled that the agreement was valid and not void in violation of Italian and EC competition law. Moreover, the panel found that Tensacciai had breached its obligation under the agreement intentionally. The panel thus ordered Tensacciai to pay compensation to Terra in the amount of €4,250,000.

Tensacciai then sought the annulment of this award before the Swiss Supreme Court, invoking the incompatibility of the award with substantive public policy pursuant to Article 190 (2) (e) of the PLI as its sole ground. The court stated that, “an award is contrary to substantive public policy where it violates the fundamental substantive legal principles of the determinant system of values.”²³⁷ At this time, the “determinant system of values” was that of Switzerland. In addition, the court added that, “one might say that an award is incompatible with public policy if it disregards essential and widely recognized values which, in accordance with conceptions prevalent in Switzerland, must constitute the foundation of any legal order.”²³⁸ Thus, the court found that as competition law does not meet this test, the economic context in the agreement did not provide an anti-competitive object. Therefore, the award was not in violation of public policy.

This case is similar to the *Thales* case from France. In *Thales*, the court stated that it would only set aside an arbitral award for incompatibility with EC competition law if there was a “flagrant, effective and concrete” violation of public policy. But for Switzerland, an award is contrary to public policy if it is contrary to “the fundamental substantive legal principles of the determinant system of values.” The standard of the Swiss court seems to be higher because it

²³⁷ *Id.* at 527.

²³⁸ *Id.* at 529.

requires the award to provide sufficient and high reasoning for the court to be able to satisfy itself that the arbitral tribunal followed the relevant competition law principles and applied them diligently. However, both the *Thales* and *Terra* cases asserted that incompatibility of EC competition law did not provide a clause to annul the award and have yet to clarify the term of ‘public policy exception’ for setting aside the award.

In 2010, the Swiss Federal Supreme Court case²³⁹ regulated that *pacta sunt servanda* (agreement must be kept) is part of public policy and may be grounds to set aside the award pursuant to Article 190 (2) (e), if the arbitral tribunal renders a decision that is incompatible with its own findings; for instance, if it does not apply a contractual clause after having admitted its binding nature. In this case, a Mexican football club (A) and a Uruguayan football club (B) entered into agreement concerning the transfer of a football player (C) from B to A. The transfer agreement stipulated that A would pay compensation to B in three equal installments. After A paid first installment to B, A and B discussed that C was unable to adapt life in Mexico. Later then, B sent the notice to A to annul the transfer agreement and insisted A pay the outstanding balance of other two installments. Subsequently, A released C from its contractual obligation, but declined to pay the outstanding money.

B took A before the Federation Internationale de Football Association (FIFA) in order to obtain the outstanding payment. FIFA rejected the claim. B appealed to the Court of Arbitration (CAS), and CAS reversed FIFA’s decision and ordered A to pay the rest of the payment, reasoning that the original transfer agreement still bound A and that A had to pay the remaining amount. A challenged the CAS’s decision to the Swiss Federal Supreme Court.

²³⁹ Judgment of 10 March 2010 in case no.4A_4/2010

A claim to the Swiss Supreme Court that the decision of CAS's award was contrary to public policy pursuant to Article 190 (2) (e) of the PLI. The award violated the principle *pacta sunt servanda* and the rules of *bona fide* (good faith).

The Swiss Supreme Court rejected A's challenge on the ground of *bona fide* since the court did not find that the CAS had violated the rule of good faith. The CAS had dealt with the arguments raised by both parties. Therefore, the Supreme Court could not see any reason how the findings of the CAS could in any way have violated the rules of *bona fide*.

On the issue of *pacta sunt servanda*, the Supreme Court asserted that this principle was only infringed if the arbitral tribunal did not apply a contractual clause after having admitted its binding nature or if the tribunal applied a clause despite having declared the clause inapplicable. However, the Supreme Court did not find that CAS's decision fell under concept of public policy under Article 190 (2) (e) of the PLI.

Accordingly, the Supreme Court concluded that the CAS's decision ordering A to pay the outstanding to B based on the transfer agreement was consistent with the principle of *pacta sunt servanda* and rejected A's complaint against the CAS award.

In this case, the Swiss Supreme Court made it clear that *pacta sunt servanda* and *bona fide* principles are under the concept of public policy of country under Article 190 (2) (e) of the PLI. However, the court interpreted the public policy ground in a narrow way. The claimant had to prove that the arbitrator has contradicted itself with regard to the application of contractual provision to set aside the award. Otherwise, the court would not deem it as a public policy exception. Contractual freedom of the parties is the most important factor to consider in arbitration or in any other form of agreement. From my perspective, I respect the court's decision

to recognize the *pacta sunt servanda* doctrine to be part of the public policy of a country since the freedom of the contract is beyond anything in party autonomy. However, if we look at the details of this case, it is a little unfair to party A to pay the outstanding compensation to B despite A having already released C and C's subsequent return to B's club. When parties enter into contractual agreement that means both sides need something in return: if A does not get C to play in its team, A should not pay the rest of the amount to B.

Another case²⁴⁰ of the Supreme Court supported the *pacta sunt servanda* doctrine by asserting that if the parties had an arbitration clause in the agreement, the parties were free to exclude the state court jurisdiction. The exclusion of the court jurisdiction was binding between parties. Although the arbitrator denied the claimant's right to address a constitutionally guaranteed state court with the claim, such action did not violate Swiss public policy since parties agreed to arbitrate the dispute. This expresses how the court respects the *pacta sunt servanda* doctrine. This case's dispute happened when one of the parties who resided in Switzerland initiated arbitration proceedings against the other, requesting payment of unpaid bills, while the other party brought the claim before the district court requesting payment based on its claim for goodwill. The agreement between parties contained an arbitration clause dated December 22, 2004.

The party who submitted the claim to arbitration then requested the district court to suspend the proceedings due to the pending arbitration concerning identical parties and claims, and filed the claim to the arbitral tribunal for damage from the other party due to violation of the

²⁴⁰ Judgment of 11 February 2010 in case no. 4A_444/2009.

arbitration clause. The tribunal declared that it had jurisdiction to decide the case and ordered the other party to pay damage.

The case has been brought to the Swiss Supreme Court since the party whom the award has been against alleged that the arbitrator did not have jurisdiction and that the award violated Swiss public policy. The Supreme Court held that the arbitrator had jurisdiction over the claim based on agreement between parties and that the order regarding the damage claim was not contrary to public policy violation.

The Swiss Court has construed the public policy in very narrow way. If the parties have a contractual obligation based on the agreement, the Court should respect that provision and leave the claim to the arbitrator's jurisdiction. Even Switzerland has a restrictive view of public policy, as in a recent case, the Swiss Federal Tribunal annulled the award on the grounds of public policy.

In most recent landmark case, the Swiss Supreme Court set aside the award on public policy defense is *Club Atletico de Madrid SAD v. Sport Lisboa E Benfica-Futebol SAD*.²⁴¹ In 2000, Benfica, Dutch football club AFC Ajax NV, submitted a claim to arbitrate the dispute with Daniel da Cruz Carvalho ("Carvalho"), alleging that Carvalho terminated his four-season contract before the agreed term and joined Club Atletico de Madrid ("Atletico") two weeks later. On June 1, 2001, Benfica claimed compensation for training Carvalho under the meaning of Article 14.1 of the 1997 FIFA Regulations for the Status and Transfer of Players. On April 26, 2002, the FIFA Special Committee awarded \$2.5 million to Benfica.

²⁴¹ Judgment of 13 April 2010 in case no. 4A_490/2009.

Atletico challenged the award in the Commercial Court of the Canton of Zurich in June 2002. The court ordered to void the award in June 21, 2004 based on the determination that the 1997 FIFA Regulations violated European and Swiss Competition laws. Benfica, instead of challenging the court's decision, brought another claim to the FIFA Special Committee in October 2004. The FIFA Committee subsequently denied to accept the claim on February 2008. Benfica then appealed the FIFA decision to the Court of Arbitration for Sports ("CAS").

The CAS reversed the decision of the FIFA award and ordered Atletico to pay Benfica €400,000. Atletico counterclaimed that Benfica's claim had *res judicata*²⁴² effect. The CAS rejected Atletico's claim because Benfica was not party to the Zurich proceedings, so it was not bound by the Zurich Commercial Court's decision.

Atletico appealed the award to the Swiss Federal Tribunal in April 2010. The Swiss Federal Tribunal annulled the Special Committee's award on the grounds that the decision impermissibly ignored the principle of *res judicata*, and so the award accordingly was incompatible with Article 190 (2) (e) of the Swiss Private International Law. The court accordingly ordered to the award set aside.

The Swiss Federal Court found that the CAS tribunal's award of €400,000 to Atletico ignored the earlier court's decision, which definitely held any such compensation improper. The court also emphasized that the CAS tribunal "obtaining jurisdiction later could not examine an issue which had already been decided."

²⁴² The principle of *res judicata* is the doctrine that bars the party to bring the same issue to the court once such lawsuit is decided, unless there is new material or evidence available.

The Swiss Federal Court ruled this case based on Article 190 (2) (e) of the Private International Law. Article 190(2) (e) deals with both procedural and substantive components. *Res judicata* deems to be a fundamental procedural principle and well established as a part of Swiss public policy. Thus, the court cannot accept it if there was a vivid expression of violation. This decision was the first in decade by the Swiss Federal Tribunal to overturn an arbitration award based on public policy. Generally, the Swiss court rarely vacates the award based on public policy defense, and public policy defense under Article 190 (2) (e) is very limited. However, this case expresses that the Swiss court accepts that public policy can be used as a state's defense; however, the court will be likely to interpret it conservatively to maintain the arbitration-friendly environment. One reason the Swiss Federal Tribunal annulled the award in this case was that the CAS impermissibly ignored the principle of *res judicata*. The purpose of *res judicata* is to prevent future judgments from contradicting from the earlier one. The doctrine assists to protect the defendant from overwhelming exploitation of the plaintiff. A plaintiff could not recover damages from the defendant twice in the same violation. Thus, *res judicata* is reserved to guard the citizen from harm: a fundamental basic right and considered as public policy. The court's negligence of *res judicata* is therefore unacceptable.

Arbitrability in Intellectual Property in Switzerland

There is no specific statutory provision on arbitration IP disputes in Switzerland. In 1975, the Federal Office of Intellectual Property ruled that arbitrators are empowered to decide on the validity of patents, trademarks, and designs.²⁴³ Accordingly, all aspects of IP, including the validity of IP rights are arbitrable in Switzerland without any restriction.

²⁴³ Decision dated December 15, 1975 published in the SWISS REVIEW OF INDUSTRIAL PROPERTY AND COPYRIGHT, 36-38 (1976).

The Swiss public policy defense has a limited scope in the context of proceedings for the recognition and enforcement of foreign arbitral awards. In an attempt to be a modern and arbitration-friendly, Switzerland has narrowed the concept of public policy. Any dispute involving a business interest is by itself arbitrable in Switzerland, including all IP matters, no matter what other laws say. The will of party always prevails as per *pacta sunt servanda* doctrine, and arbitral tribunal has jurisdiction to decide on its own jurisdiction. All of these make Switzerland one of the preferred countries for international arbitration and gains the trust of the parties.

D. Conclusion

In last 25 years, courts in the U.S. and Europe have begun to reduce the role of public policy in the definition of arbitrability.²⁴⁴ Certain European countries have adopted a “relaxed notion” of public policy, which is now said to cover only “fundamental principles”, or following the U.S. authorities, the “most basic notions of morality and justice.”²⁴⁵ The European courts seem to be concerned with the international comity rather than tightening their public policy. The public policy now favors arbitration. The competition law seems to be arbitrable in England, France, and Switzerland, without reservation. With respect to fraud or bribery, the court’s decision seems to be unsure as to whether it will authorize a tribunal to decide the case, as it is considered to be in scope of public policy matter. From all the cases, we can conclude that the public policy exception has to be injurious to the public good or wholly offensive to basic right (England); obvious, actual, and concrete (France); and violate fundamental legal principle determinant system of values (Switzerland). The court will consider all of these factors when

²⁴⁴ Kirry, *supra* note 90 at 377.

²⁴⁵ *Id.* at 378.

there is a challenge submitted to the court to set aside the award. The court will interpret public policy in a very limited way, but keep in mind that it is at least still a country's defense to protect the public interest and is another way to restrict the arbitrator in having excessive power to arbitrate the case.

CHAPTER 4 THE PRINCIPLE OF ARBITRABILITY AND PUBLIC POLICY IN AFRICA-RELEVANT LAWS AND CASES

Africa attracts foreign investors because of its abundant natural resources available for exploitation. Even though political risk is the first and the most important factor to be considered before conducting business in Africa, its current economic growth outweighs the potential drawbacks. Arbitration in Africa, in the view of foreign investors, seems to be unpredictable because African courts lack the commercial focus, although execution of arbitral proceedings may result in a relatively easily obtained intervention from the domestic court. Many African states had made an attempt to relive this problem by signing treaties, being members of conventions and adopting arbitration legislation, such as UNCITRAL Model Law and the New York Convention.

In the late 1950s and 1960s, some African states either enacted arbitration acts or revised their colonial arbitration laws.²⁴⁶ The development of specific and express provisions for international commercial arbitration was seen in 1984. Two categories of arbitration in legislative approach emerged—countries that adopted the UNCITRAL Model Law wholly or partly, and countries laws of which were not based on the UNCITRAL Model Law, but were rather influenced by their former imperial countries or by the 1993 OHADA Treaty.²⁴⁷ It should be noted that some OHADA member states are also parties to the New York Convention.²⁴⁸

²⁴⁶ Since arbitration legislations in African states were formed during post-colonial era, their arbitration laws were inherited from their former colonial countries.

²⁴⁷ Amazu A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, 120 (Cambridge University Press 2001).

²⁴⁸ These are Benin Republic, Burkina Faso, Cameroon, Central Africa Republic, Gabon, Guinea, Mali, Nigeria and Senegal.

Unlike the United States, Europe and Asia, in Africa, the New York Convention has so far been applied only to occasional cases.²⁴⁹ Moreover, not all of the African states are the parties to the New York Convention. Consequently, the enforcing party can choose in which legal regime to pursue its application. Each African state has its own approaches with divergent degree toward arbitration.

South Africa, Nigeria and Egypt are the three largest economies in Africa (and are the three countries chosen as case studies discussed in this paper). They all have different approaches to arbitration in their own territory. Nigeria and South Africa expand the grounds for the courts to intervene in arbitral proceedings wider than the grounds provided by the UNCITRAL Model Law. This expansion, however, may affect the development of arbitration in those countries. On the other hand, Egypt allows the arbitral award to be challenged in court based on a limited number of grounds in accordance with the UNCITRAL Model Law. The Egyptian approach, thus, is showing signs of cooperation and support of arbitral proceedings.

Introduction and Historical Background of Arbitrability in Africa

Arbitration law in Africa was developed based on the influence of the colonialism, especially France and the UK. For example, the 1889 UK Arbitration Act, which was predominant arbitration regime during the colonial era, had great impact on the development of arbitration legislation in many Commonwealth states.²⁵⁰ The first arbitration law in Africa was enacted to be applicable only to domestic disputes. It allowed the court to have tremendous influence in the arbitral process. The arbitration legislatives at that time were designed pursuant

²⁴⁹ Asouzu. *supra* note 247 at 186.

²⁵⁰ J.K. Schaefer, *Leaving Colonial Arbitration Laws Behind: Southeast Asia's Move into the International Arbitration Arena*, *Arbitration International* 16(3), 297 (2000).

to the prevailing legislation and the treaty obligation of the colonizing powers.²⁵¹ Currently, in the colonies, some arbitration provisions or legal cases are still present.

The first generation of arbitration laws in Africa may not set the limit the scope of subject-matter arbitrability.²⁵² This makes the question of arbitrability matter hard to answer and the power of arbitrators to decide on matters uncertain. In addition, it did not define ‘party autonomy’ indicating how much freedom the parties have in order to conduct arbitration between them. For example, the Egyptian Code of Civil and Commercial Procedure 1994 provided that the subject matter for arbitration must be one that can be the subject of a compromise by those capable of legally disposing their rights.²⁵³ Article 442 of the Algerian Law of 1996 did not permit matters concerning maintenance obligations, rights of inheritance, housing, clothing, or questions concerning public policy or the status and capacity of persons to be arbitrable.

The subject of arbitrability in the later period has not yet been contained in the provisions. Africa’s arbitrability scope was framed by the word ‘commercial’ by stipulating that the matter to be referred to arbitration must be a ‘commercial’ dispute and providing a list of subject matters that can be arbitrable.²⁵⁴ Nigeria’s Arbitration and Conciliation Act 1988 defined the word ‘commercial’ in Section 57 (1).²⁵⁵ In order to understand which subject matter is

²⁵¹ Asuozu, *supra* note 247 at 121.

²⁵² Asuozu, *supra* note 247 at 147.

²⁵³ The Egyptian Code of Civil and Commercial Procedure 1994, Article 501(4).

²⁵⁴ Asuozu, *supra* note 247 at 154.

²⁵⁵ Section 57 (1) of Nigeria’s Arbitration and Conciliation Act 1988 provides “Unless the context otherwise required, ‘commercial’ means all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, the construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements or concessions, joint ventures and other forms of industrial or business co-operation, and the carriage of goods or passengers by air, sea, rail or road.”

regarded as an arbitrable subject in Nigeria, Section 57 must be read along with Section 35 of the Nigerian Act, which provides that the Act shall not affect any other law by virtue of which certain disputes may not be submitted to arbitration, or may be submitted to arbitration but only in accordance with the provisions of that or another law. Egypt also contains the list of commercial cases in Article 2 of the Egypt Arbitration Law no.27/1994.²⁵⁶ Presently, the trend of arbitrability in Africa now is more obvious. Most African states stipulate the arbitrability in their provision as one of ground to refuse the enforcement of an award as a result of becoming signatories of the New York Convention. Arbitrable subject matter is thus defined in the arbitration law more widely than in the past, except for those disputes relating to public policy or personal status.²⁵⁷ However, there are some African court cases indicating that states courts would not interpret the New York Convention properly. This may be because of the unfamiliarity of judges and legal practitioners with the New York Convention and the lack of relevant information and material on arbitration in Africa.²⁵⁸ Nonetheless, there is a sign of development of arbitrability in Africa, even slow but in a good way.

²⁵⁶ Article 2 of the Egypt Arbitration Act Law no.27 of 1994 provides "An arbitration is commercial within the scope of this Law if the dispute arose over a legal relationship of an economic nature, whether contractual or non-contractual. This comprises, in particular, the supply of commodities or services, commercial agencies, construction and engineering or technical know-how contracts, the granting of industrial, touristic and other licenses, technology transfer, investment and development contracts, banking, insurance and transport operations, exploration and extraction of natural wealth, energy supply, the laying of gas or oil pipelines, the building of roads and tunnels, the reclamation of agricultural land, the protection of the environment and the establishment of nuclear reactor."

²⁵⁷ ASUOZU, *supra* note 241 at 158.

²⁵⁸ *Id.* at 187.

4.1 Nigeria

Nigeria is located on the West Coast of Africa and has English as the official language. It became independent in 1960. Its population exceeds 130 million people, making it the world's most populous black nation with the seventh largest oil reserve in the world.²⁵⁹ As a developing country, Nigeria relies on foreign investors to develop its vast natural resources, especially in oil and gas, making it one in respect of which an arbitration mechanism was considered highly desirable. Moreover, a variety of laws that support arbitration as a means of commercial dispute resolution currently exist in Nigeria.

Common law is the system of law of Nigeria. Like the United States, Nigeria has a federal government providing federal law that takes precedence over state law. Any state laws inconsistent with federal law are thus void.²⁶⁰ The National Assembly makes laws for the federation, while each state has a House of Assembly that makes laws for its respective state.²⁶¹ According to the Nigeria's Constitution, the National Assembly is empowered to make laws on subject areas that fall within the exclusive legislative list.²⁶² Subject areas exempt from this list are generally considered in the exclusive competence of the state Houses of Assembly. Arbitration, as absent from the list, is thus reserved exclusively for the state House of Assembly.

²⁵⁹ Available at www.eia.doc.gov/emeu/cabs/nigeria.html (last visited June 2011).

²⁶⁰ Constitution of the Federal Republic of Nigeria, Section 4(5) (1999).

²⁶¹ *Id.* at Section 4 (1999).

²⁶² *Id.*

A. Historical Background

Arbitration law in Nigeria has its roots in England and Wales owing to its colonial links.²⁶³ All legislations of general application in England and Wales before January 1, 1900 were thus applied in Nigeria. This law application was discontinued in 1990 as a result of Nigeria's arbitration law issuance in 1914.

The first arbitration law in Nigeria is the Arbitration Ordinance 1914. This law was substantially influenced by the English Arbitration Act 1889. The Arbitration Ordinance was applied throughout the Federation of Nigeria. In 1958, the Arbitration Ordinance 1914 was amended and reenact as the Arbitration Ordinance Cap 13.²⁶⁴ At that time, the arbitration law of Nigeria was used only with domestic arbitration. Consequently, the law pertaining to international arbitration in Nigeria was still ambiguous. However, in 1988, the Arbitration and Conciliation Act ("ACA")²⁶⁵ was enacted. ACA is a federal enactment on arbitration and was known as the Arbitration and Conciliation Decree No. 11 of 1988 (Cap.19 of 1990). The Decree was made by the military government pursuant to another Military Decree.²⁶⁶ ACA was unique and the first legislation in Africa based on the UNCITRAL Model Law with provisions or conciliation based on the UNCITRAL Conciliation Rules 1980. In 2004, ACA was amended and its provisions divided into four parts comprising of Section 1-58.

²⁶³ Eugene Cotran and Austin Amissan, *Arbitration in Africa*, 91 (1996).

²⁶⁴ Available at www.ohada.com (last visited September 2012).

²⁶⁵ Cap 19, Laws of the Federation of Nigeria (1990).

²⁶⁶ Constitution Decree No. 1 of 1984 (Military Decree) suspended key aspects of the 1979 Constitution that existed at that time, and gave the federal military government wide powers to make laws throughout the federation of Nigeria.

Nigeria has become the signatory to the New York Convention on June 15, 1970 and its arbitration law is modeled after the UNCITRAL Model Law. Nigerian ACA was unique as the first legislation in Africa based on the UNCITRAL Model Law.²⁶⁷ Most provisions of the UNICTRAL Model Law 1985 form part of the Nigerian Federal Arbitration with minor differences. The primary purpose of ACA is to provide a harmonized legal framework for the commercial dispute settlement by arbitration and to make the New York Convention applicable to any international arbitration award made in Nigeria or any other contracting state. The preamble to the ACA states that it applies to any award made in Nigeria and any New York Convention contracting state arising out of international commercial arbitration

Prior to the enforcement of the ACA, most Nigerian states already had their own arbitration laws in force,²⁶⁸ creating a diversity of arbitration laws. However, under the doctrine, if the intention of the federal law is to cover the entire field, federal law prevails over the state law. In addition to the ACA, as the main statute on commercial arbitration, there are some relevant statutes prescribing the arbitration.²⁶⁹ Thus, when parties step into the arbitration, all relevant laws should be considered before choosing arbitration as a dispute resolution method.

Nigeria started to have a good sign of accepting arbitration as a dispute resolving mechanism. In *C.N. Omuselogu Ent. Ltd. v. Afribank (Nig.) Ltd.*,²⁷⁰ Nigerian court has adopted a

²⁶⁷ Asuozu, *supra* note 247 at 125.

²⁶⁸ Nigeria is currently divided into 36 states and Abuja, the federal capital territory. The states are further divided into 774 local government areas (available at <http://www.statoids.com/nig.html>) (last visited August 2012).

²⁶⁹ See e.g. Petroleum Act, sec. 11, cap. P10, Laws of the Federation of Nigeria, 2004. See also Nigerian Investment Promotion Commission Act, sec. 26, cap. P117, Laws of the Federation, 2004; Public Enterprises (Privatization and Commercialization) Act, sec. 27, cap. P38, Laws of the Federation, 2004; Nigerian LNG (Fiscal incentives, Guarantee and Assurance) Act, sec.22, cap. N67, Laws of the Federation, 2004.

²⁷⁰ *C.N. Omuselogu Ent. Ltd. v. Afribank (Nig.) Ltd.*, 1 NWLR (2005) Part 940, 577.

positive approach to the enforcement of arbitration agreements by holding that arbitral proceedings are a recognized means of resolving disputes and should be taken strictly by both counsel and parties. One condition that should be kept in mind is there must be an agreement to arbitrate, which was made voluntarily. This decision is in line with Section 15 of the ACA, which states that the Arbitration Rules (set out in the first schedule of the ACA) are mandatory for arbitration proceedings, the tribunal must at all times conduct the proceedings in accordance with the ACA and fair hearing principles.

Another situation indicating Nigeria's awareness of arbitration is the enactments of two arbitration related laws in Lagos—one of the centers of commerce in Nigeria, in 2009. Law No. 8 is about the Lagos Court of Arbitration establishment, while Law No.10 provides for the resolution of disputes by arbitration in Lagos State.

B. Legal Framework

The ACA implements both the New York Convention and the UNCITRAL Model Law. It contains provisions applicable to both domestic and international arbitration. The introductory part of the ACA provides that the New York Convention applies to “any award made in Nigeria or in any contracting State arising out of international commercial arbitration.”²⁷¹ In addition, Section 54 (1) of Part III provides that the New York Convention shall apply to the enforcement of international commercial awards “made in Nigeria or any contracting State.”²⁷² The entire of Part III of the ACA, containing Section 43-55, applies exclusively to international commercial

²⁷¹ Cap 19, Laws of the Federation of Nigeria (1990).

²⁷² The ACA, Section 54 (1).

arbitration. Thus, Nigerian court will relinquish its state immunity over the enforcement of foreign arbitral award if commercial activities are involved. Consequently, a matter that will be referred to arbitration must necessarily arise from the clause contained in the agreement and must be a dispute arising from commercial transactions only.²⁷³ Similarly, commercial matter is defined in Section 57 (1) of the ACA.²⁷⁴ Hence, if Nigerian government decides to enter into a contract with a diversified foreign entrepreneurs choosing arbitration as a dispute settlement method, in doing so, Nigerian government will not be allowed to claim its own immunity.²⁷⁵

Generally according to the ACA, international arbitration will be deemed 'international' where one of the following is located outside Nigeria—the place where one of the parties has business, the place of arbitration, and the place where the parties agreed to perform an obligation. One of interesting points is that even though the nature of contract is purely domestic, parties can expressly agree that a transaction will be treated as an international arbitration.²⁷⁶ If parties choose to do so, an award can be set aside or refused the enforcement by the effect of Section 43, 48, and 52 of the ACA.

Generally, the Nigerian courts will not intervene in arbitral proceedings and the courts will support the doctrine of 'freedom of contract'. This is reinforced by Section 34 of the ACA providing that "A court shall not intervene in any matter governed by this Act, except where so

²⁷³ *Ogunwale v. Syrian Arab Republic*, 9 NWLR (2002) Part 771.

²⁷⁴ Section 57 (1) of the ACA provides "commercial means all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road."

²⁷⁵ G. Ezejiofor, *Sources of Nigerian Law in Introduction to Nigerian Law*, 111 (1980).

²⁷⁶ The ACA, Section 57 (2) (d).

provided in this Act.”²⁷⁷ However, Nigerian court may not be obliged to apply the provisions parties have chosen if such provisions are not compatible with Nigerian mandatory rules. Party autonomy rule is only applicable to the extent that it is not contradict to statutory restriction.²⁷⁸

An award made by arbitrator in Nigeria is final and binding.²⁷⁹ Although ACA does not provide any right for parties to appeal, a party may apply to the court to set aside an arbitral award or seek to resist the enforcement of the award on the grounds listed in ACA, such as the grounds for court to set aside the award in Section 29 (2), Section 30(1) and Section 48 (b) (ii). Section 29(2) authorizes the courts to refuse the arbitral award in case such matters are out of the scope of the arbitration agreement or submission. Similarly, Section 30 (1) gives the right to the court to set aside the award when arbitrator has caused misconduct or when the arbitral proceedings have been improperly procured.

Section 48 (b) (i) authorizes the court to set aside the arbitral award if the court finds that the award is non-arbitrable, while in (ii) is regarding matter is against public policy of Nigeria. Section 48 grounds are the same as those under Article 34(2) (b) of the UNCITRAL Model Law. Section 52 (2) (b) allows the court to refuse the recognition or enforcement of award, based on the same ground as the provision containing in Article V (2) of the New York Convention . In Section 52 (2) (b), the court may set aside or refuse the enforcement of the award if the court finds that (1) the subject-matter of dispute is not capable of settlement by arbitration under the

²⁷⁷ *Id.* at Section 34.

²⁷⁸ *M.V. Panormos Bay v. Plam Nig Plc*, 5NWLR Part 855 (2004) 1, 14; *Tawa Petroleum v. M.V. Sea Wimmer* 3 NSC 25.

²⁷⁹ The ACA, Section 12 (4).

laws of Nigeria; or (2) the award is against public policy of Nigeria. Under Section 43, Section 48 and Section 52 are applied only to international arbitration.

In keeping with UNCITRAL Model Law and the New York Convention, ACA does not list which matter is arbitrable or non-arbitrable. Thus, case laws are a good source to draw upon when describing the arbitrability situation in Nigeria,²⁸⁰ where arbitrability issue is not closed and is likely to widen the scope. Nigeria may issue a new provision to protect its own interest such as oil exploration and exploitation of other natural resources.²⁸¹ Such rules will be respected under ACA. Section 35 of ACA and Article 1(5) of the UNCITRAL Model Law seem to support this view.²⁸² However, Nigeria expressed its willingness to subject this issue of sovereignty over its natural resources to arbitration by enforcing the award of the International Court of Justice in the *Bakassi case*.²⁸³ In *Bakassi case*, Nigeria voluntarily relinquished the ownership of the Bakassi Peninsula—an oil rich area predominantly inhabited by Nigerians of the old Calabar decent to Cameroon. Critics of the judgment argued that Nigeria’s decision has no precedent in the history of the world court’s adjudicatory jurisdiction as in most countries. Even though

²⁸⁰ Adebayo G. Adaralegbe, *Challenge in Enforcement of Arbitral Awards in Capital-Importing States-The Nigerian Experience*, *Journal of International Arbitration* 23(5), 401 (2006).

²⁸¹ Andrew I. Okekeifere, *Enforcement and Challenge of Foreign Arbitral Awards in Nigeria*, *Journal of International Arbitration* 14(3), 235 (1997).

²⁸² Section 35 of ACA provides: “This Act shall not affect any other law by virtue of which certain disputes: (a) may not be submitted to arbitration; or (b) may be submitted to arbitration only in accordance with the provisions of that or another law.”

²⁸³ *Cameroon v. Nigeria: Equatorial Guinea Intervening (the Bakassi Case)*, <http://www.transnational-dispute-management.com/>, Southern Cameroons Peoples Organization (SCAPO) Versus Nigeria, Abuja, March 5, 2002 (Suit No. FHC/ABJ/CSS/30/2002). In *Bakassi case*, Nigeria voluntarily relinquished the ownership of the Bakassi Peninsula—an oil rich area largely inhabited by Nigerians of the old Calabar decent to Cameroon. Critics of the judgment said that Nigeria’s decision has no precedent in the history of the world court’s adjudicatory jurisdiction as in most countries

Bakassi case did not explicitly mention arbitrability of natural resource exploitation, there were ample indications that this was the case.

C. Arbitrability and Public Policy in Nigeria

The core case that put the foundation that criminal matters in Nigeria is non-arbitrable is *Kano State Urban Development Board v. Fanz Construction Co.*²⁸⁴ The Supreme Court of Nigeria has listed some matters that cannot be arbitrable, including an indictment for an offence of a public nature; disputes arising from an illegal contract, gaming and wagering; disputes leading to a change of status such as divorce petition, bankruptcy proceedings, and winding up a company; and any arbitral agreement that empowers the arbitrator to give a decision in property.

Public policy was also defined as “community sense and common conscience extended and applied throughout the State to matters of public morals, health, safety welfare and the like” as noted in *Dale Power Systems Plc v. Witt&Bush Ltd.*²⁸⁵ Hence, the enforcement of a foreign judgment against a Nigerian company that failed to honor its obligation to pay and does not deny the existence of the liability is not contrary to public policy.

*Ramon v. Jihad*²⁸⁶ is a case asserting that illegal activity offends public policy in Nigeria. The parties to this case executed foreign exchange transactions outside Nigeria (the transaction was made in England) without the approval of the Minister as prescribed by Section 3(1) (2) of

²⁸⁴ *Kano State Urban Development Board v. Fanz Construction Co.*, 4NWLR (pt 142) (1990). 1.

²⁸⁵ *Dale Power Systems Plc v. Witt&Bush Ltd.*, 8 NWLR (Pt. 716) (2001), 699.

²⁸⁶ *Id.*

the Exchange Control Act of 1962. Nigerian court, thus, refused the enforcement of the judgment on the grounds that the transaction giving rise to the judgment was illegal in Nigeria.

It can be assumed that any matter concerning illegal contract will be a matter of public policy bar against enforcement of an award. For example, the importation and sale of prohibited goods, such as cocaine,²⁸⁷ contracts that involve elements of bribery and corruption, illegal sale of government property and sale of vandalized government property would not be referred to arbitration.

In *BJ Exports & Chemical Processing Co. v. Kaduna Refining and Petrochemical Co.*,²⁸⁸ the Nigerian court decided that fraud is not arbitrable in Nigeria because the case was considered a criminal matter and the enforcement of the award would be contrary to public policy.²⁸⁹ In this case, *BJ Export & Chemical Processing Co.* (“*BJ*”) entered into agreement with *Kaduna Refining and Petrochemical Co.* (“*Kaduna*”) to rent the tankers used for shipment of petroleum products for a period of eight weeks. After the ending of the term of the contract, *BJ* still held the tankers, rather than returning them to *Kaduna*. However, *BJ* agreed to pay the surcharge and the tankers were subsequently returned to *Kaduna*.

BJ consequently brought the claim to the court, requesting *Kaduna* to pay damage in the amount of US\$85,016 alleging improper qualifications of the tanks and lack of relevant legitimate certificate, resulting in fines payable in Europe due to the breach of relevant

²⁸⁷ J. Olakunle Orojo and M. Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, 290 (1999).

²⁸⁸ October 31, 2002 delivered by Mahmud Mohammed, Justice of the Court of Appeal, Court of Appeal, Kaduna Division, Nigeria (unreported).

²⁸⁹ *Syal v. Heyward* 2KB 443 (1948), (1948) 2 All ER 576 (1948).

regulations. *BJ* and *Kaduna* agreed to refer the matter to arbitration. During the time between the appointment of arbitrators and the date of the award, the claim was raised to US\$400,000. *Kaduna* thus filed another claim to the court on the grounds of frauds, requesting the court to revoke the arbitration agreement and the arbitrator's authority. *BJ* filed an application for stay of judicial proceedings pending the determination of the arbitral proceedings. The application of stay of proceedings of *BJ*, however, was refused and the court's decision has been granted. The High Court's decision was in favor of *Kaduna* and subsequently revoked the authority of the arbitrator to decide the cases. The case was then submitted to the Court of Appeal.

BJ alleged that the trial court had no power to revoke the arbitral clause after arbitral proceedings had commenced, referring to Section 2, 12 and 27 of the ACA to support its accusation. Similarly, *Kaduna* argued that fraud was not arbitrable and thus the court had power to revoke the arbitration awards where the underlying contract is being challenged on grounds of illegality or fraud. Nigerian evidence law seems to support this view, as Section 38 of Nigerian Evidence Act provides "whenever an issue of fraud arises, even in the context of civil proceedings, the standard of proof is that required in a criminal case-beyond reasonable doubt."²⁹⁰

The Court of Appeal held that, according to Section 2 of ACA, "unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the court or judge." The court interpreted Section 2 so that the arbitral agreement between parties cannot be revoked; however, if one of the parties has a good cause to revoke the agreement, that party must request the court to grant the leave of the court to

²⁹⁰ Section 38 of the Evidence Act, Cap. 112, laws of the Federation of Nigeria (1990) and *Ugo v. Obiekwe* 1 NWLR pt99 566 (1989).

do so which is suitably done by the respondent of this case.²⁹¹ Thus, the arbitration agreement between parties in this case would be revoked because the issue of arbitrability was properly raised.

It may be of interest to discuss why the court in *BJ and Kaduna* raised Section 2 of ACA, instead of referring the revocation pursuant to Section 48 (b) (2) and Section 52 (2) (b) (2) based on the ground of public policy. Section 48 and 52 purport to be used to set aside the award or after the award has been made. Since this case occurred before the award was made, Section 2 was therefore raised to give authorization to the court to revoke the arbitration agreement.

Even though Section 2 allows the parties to revoke the arbitration agreement by the parties themselves or by leave of the court or judge, in this case, the court further held that once parties enter into a valid arbitration agreement, one cannot unilaterally revoke that agreement. If one party has a good cause to revoke the agreement, that party must apply to the court to be granted to do so, as was correctly done like in this case. This statement seems to contradict the Section 2, which gives the power to the party to unilaterally revoke the agreement. However, this court statement did not limit the revocation by the party in civil matter, but rather emphasized that, where there is an arbitration agreement and the issue of fraud arises, the proper procedure to be adopted is to seek leave of the court to revoke the arbitration agreement and the authority of the arbitrator. This is to ensure that arbitral tribunals are not given powers to arbitrate on issues of fraud because fraud cannot be determined in a civil action nor can such disputes be compromised lawfully by way of accord by the parties.²⁹²

²⁹¹ Paul Obo Idornigie, *The Principle of Arbitrability in Nigeria Revisited*, *Journal of International Arbitration* 21(3) 2004 at 287.

²⁹² *Id.*

The ACA does not affect any other certain disputes that are vested to be resolved by other laws.²⁹³ For example, Section 8 of the Trade Disputes Act²⁹⁴ provides that the provisions of the ACA are not applicable to the proceedings of an arbitral tribunal appointed under the Act. The industrial disputes should thus be resolved by conciliation and arbitration as provided in the Trade Disputes Act. In other words, trade disputes are not arbitrable in Nigeria.

Additionally, civil jurisdiction with respect to certain subject matter belongs exclusively to Federal High Court pursuant to the Constitution and certain other statutes in Nigeria.²⁹⁵ The Federal High Court has privilege jurisdiction to decide cases which are incapable of being submitted to arbitration unless the Act is expressly excluded.²⁹⁶ For example, trademark matters, patents, designs and copyrights cannot be arbitrable.²⁹⁷

In Nigeria, insolvency matters are complied under general rule of capacity. Since bankrupt person is a disabled person and thus deemed incompetent to enter into a contract, a bankrupt individual accordingly has no ability to submit the dispute to arbitration. Nigerian court may set aside an arbitral award if the party making the application furnishes proof that a party to

²⁹³ Section 35 of the ACA provides "This Act shall not affect any other law by virtue of which certain disputes (a) may not be submitted to arbitration."

²⁹⁴ Cap. 432, Laws of the Federation of Nigeria (1990).

²⁹⁵ Asouzu, *supra* note 247 at 155.

²⁹⁶ Idornigie, *supra* note 291 at 283.

²⁹⁷ Laws of the Federation of Nigeria: Copyright Act, Cap. 68, Trade Marks Act, Cap. 438 and Patents and Design Act, Cap. 344.

the arbitration agreement was under some incapacity under Section 48 (a) (i) of the Arbitration and Conciliation Act 1990.²⁹⁸

As mentioned above, matters that will be referred to arbitration under the ACA must be commercial under definition of Section 57. Moreover, such matters have to arise out of contractual relationship.²⁹⁹ This Nigerian approach makes the consequence of dispute about tortious relationship different from that implied by the Model Law and the New York Convention, which use the term to cover commercial matters, whether contractual or not. In contrast, the ACA includes only contractual relationship. Therefore, tortious relationships under Nigerian arbitration law are not arbitrable.³⁰⁰

D. Conclusion

It seems that, in Nigeria, all criminal matters are considered contrary to public policy. Although such activities do not affect any basic public morals or safety, it is likely that cases arising as a result of those activities will not be arbitrable, if any illegal criminal action is involved. In summary, public policy in Nigerian view seems to be restrictive. As Okekeifere said:

²⁹⁸ Section 48 (a) (i) of the ACA provides "The court may set aside an arbitral award (a) if the party making the application furnishes proof; (i) that a party to the arbitration agreement was under some incapacity."

²⁹⁹ The ACA, Section 54(1).

³⁰⁰ Idornigie, *supra* note 291 at 281.

“This public policy consideration in Nigeria will not be healthy for the development of arbitration and contradicts the stance of the government in applying the New York Convention and the Model Law.”³⁰¹

Several matters are still settled by the state, rather than arbitration. Even though the ACA does not clearly state the list of non-arbitrable matters, it is still sufficiently limiting, due to the terms ‘commercial’ and ‘contractual’ being used. Other civil matters that do not arise from contract may not refer to arbitration; such as tortious claims. In addition, the ACA is not the only source to consider at when the arbitrability issue concerns, because it still has the loophole that permits other laws to be used, under Section 35. In other words, if other laws already stipulate the specific arbitration process in their own rules, the ACA will not apply.

As mentioned above, the following categories of matters cannot be subject of an arbitration agreement in Nigeria: disputes relating to a change in status, such as divorce petition; an indictment for an offence of a public nature; disputes arising out of an illegal contract; disputes arising under agreements void as being by way of gaming or wagering.

Most disputes arising from illegal activities are not arbitrable since such cases are in conflict with public policy, such as disputes regarding prostitution and slavery³⁰² that violate the general principles of morality and justice. An award made from breach of principle of fair

³⁰¹ Andrew I. Okekeifere, *Public Policy And Arbitrability Under The Uncitral Model Law*, Int. A.L.R. 2(2). 70. 73 (1999).

³⁰² Okekeifere, *supra* note 281 at 234.

hearing was totally void in Nigeria.³⁰³ It is also against public policy in Nigeria to deny a party a fair hearing in any judicial proceeding.³⁰⁴ Such award will be set aside under Section 48 (b) (ii).

A question of Nigerian approach to arbitrability will thus be whether it is opened enough to help a promotion of foreign investment in its own country. Disputes in intellectual property, securities transactions and intra-company disputes are still uncertain. Moreover, antitrust and competition laws are still being developed. Even though Nigeria seems to interpret the scope of arbitrability broadly, it should be kept in mind that there is no specific list of what matter can be arbitrable in the ACA. Thus, arbitrability in Nigeria is not closed and is likely to change in the future in order to make Nigeria an attractive venue for use as an international arbitration center.

4.2 South Africa

South Africa Legal system is a mix of civil law, common law and customary law systems. Civil law in South Africa was acquired from the British, while the Dutch were the main influence in the development of common law system in South Africa. Finally, customary law was inherited from indigenous Africans.³⁰⁵ The Constitutional Court is a highest instance court and has jurisdiction throughout South Africa over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution. Matters not relating to the Constitution will be heard by the Supreme Court of Appeal, which is the highest court in South

³⁰³ *Id.* at 238.

³⁰⁴ *Id.* at 237.

³⁰⁵ Available at http://en.wikipedia.org/wiki/Law_of_South_Africa (last visited September 2012)

Africa. The court of first instance is the High Court and arbitration, as a non-constitution matter, is subject to this court.

Arbitration in South Africa is still an issue for foreign investors, as they are uncertain whether they can rely upon it or not. In 2005, a report issued by the Judge President of the Cape Provincial Division of the High Court of South Africa concluded that arbitration weakens judicial transformation in South Africa.³⁰⁶ In addition, the South African Law Commission has also referred to the perception shared among some black lawyers that white lawyers use arbitration to enable them and their corporate clients to avoid courts that are increasingly staffed by black judges.³⁰⁷ Another apparent indication is that South Africa has not yet adopted the UNCITRAL Model Law into its both domestic and international arbitration. In addition, South African judicial system does not recognize the severability of the arbitration clause from the whole contract,³⁰⁸ which will be an obstacle of arbitration development.

The arbitration perception in South Africa in international perspective accordingly seems conservative and can interfere with the enforcement of arbitral awards. Moreover, it is undeniable that apartheid problem in South Africa still exists. There is also a common preconception that arbitration will distort the justice systems and that it can be used as a tool to reinforce the racism.

³⁰⁶ John Brand, Emmylou Wewege and Bowman Gilfillan, *Is it safe to arbitrate in South Africa*, available at <http://arbitration.practicallaw.com/7-500-4315> (last visited November 2011).

³⁰⁷ *Id.*

³⁰⁸ D. W. Butler & E. Finsen, *Arbitration in Africa*, Kluwer Law International, 201 (1996).

However, there are two recent important cases indicating that arbitration is finally awakening. In 2007, Supreme Court of Appeal's decision indicated strong support for principle of party autonomy in arbitration proceedings. In *Telcordia Technologies Inc v Telkom SA Ltd*,³⁰⁹ the Supreme Court of Appeal pointed out that there should be minimal judicial intervention when reviewing international arbitration awards. In addition, in *Lufuno Mphaphull and Associated (Pty) Ltd v Andrews and Another*,³¹⁰ the Constitutional Court also indicated its strong support for the principle of party autonomy in arbitration proceedings. These two cases thus assure that arbitral award cases in South Africa will be conducted in keeping with the international standards.

The Arbitration Foundation of Southern Africa (AFSA) and the Association of Arbitrators (Southern Africa) are two principal institutions in South Africa. The AFSA provides and administers systems for the resolution of commercial disputes primarily by way of arbitration or mediation.³¹¹ It is the link between the legal, accounting professions and business, achieved through institutional representatives.³¹²

The Association of Arbitrators (Southern Africa) was held to promote arbitration in South Africa and to provide experienced arbitrators and ADR specialists to make arbitration and ADR

³⁰⁹ *Telcordia Technologies Inc v Telkom SA Ltd*, (3) SA 266 SCA (2007).

³¹⁰ *Lufuno Mphaphull and Associated (Pty) Ltd v Andrews and Another*, CCT97/07 ZACC 6 (2009).

³¹¹ Available at <http://www.arbitration.co.za/pages/default.aspx> (last visited August 2012).

³¹² *Id.*

more effective.³¹³ The Association's members are selected from professions in the construction industry as well as lawyers.³¹⁴

A. Historical Background

In the past, arbitration in South Africa was received from Roman Dutch law, with certain adaptation.³¹⁵ Until 1806, when the Cape became a British colony, the English Arbitration Act 1889 served as the basis for arbitration legislation.³¹⁶ Roman Dutch Law continued to apply, but was used to the extent that it was supplemented by legislation.³¹⁷ This colonial arbitration legislation did not supersede the Roman-Dutch common law; instead, it purported to facilitate the conduct of arbitral proceedings and provide a better and more efficient means of enforcing arbitral awards.

In 1965, the English Arbitration Act 1889 was replaced by the current Arbitration Act 42 of 1965. Thus, the English Arbitration Act 1889 formed the basis for the current arbitration act in South Africa. As English colonial legislatures gave influence to South African arbitration, in the absence of precedent cases in South Africa, the courts tend to refer to English case law.³¹⁸

The current South Africa arbitration act is applied to any arbitration commencing after April 14, 1965.³¹⁹ The Arbitration Act 1965 was formed, as there was an urgent need to modernize its

³¹³ Available at <http://www.arbitrators.co.za> (last visited July 2012).

³¹⁴ *Id.*

³¹⁵ Cotran and Amissan, *supra* note 263 at 193.

³¹⁶ *Id.* at 194.

³¹⁷ *Id.*

³¹⁸ Butler and Finsen, *supra* note 308 at 6.

³¹⁹ The Arbitration Act 42 of 1965, Section 42(3).

arbitration legislation to comply with internationally accepted standards.³²⁰ Its provisions apply to both domestic and international arbitration, irrespective of whether the parties to the issue are local or foreign. However, it was designed with domestic arbitration in mind and has no provisions specifically aimed at international arbitration.³²¹ Moreover, the Act gives opportunity for parties to involve the court as a tactic for delay the arbitration process and does not accommodate the arbitrators to conduct the proceedings with a cost-effective manner. Finally, the Act does not provide sufficient recognition for party autonomy.³²²

In 1976, South Africa acceded to the New York Convention. As a result, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 was enacted to give an effect to the accession of the New York Convention. The country made no declaration about reciprocity and provides the same grounds for recognition and enforcement as the New York Convention.³²³ However, certain differences in wording appear to widen the grounds on which enforcement could be refused. The 1977 Act implementation has been defective and has some drawbacks; however, a good progress toward international arbitration in South Africa has been made.

South Africa is neither a member of OHADA Treaty, nor has it adopted the UNCITRAL Model Law. The Arbitration Act 42 of 1965 has been in force and has not amended for over thirty years; consequently, the arbitration law of South Africa has remained unchanged since 1965. In July 1988, the South African Law Commission published a report recommending South

³²⁰ D.W. Butler, *The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalizing Progress*, J. Int'l Arb. 21, 169, 171 (2004).

³²¹ Amazu A. Asouzu, *supra* note 247 at 123

³²² *Id.*

³²³ The Recognition and Enforcement of Foreign Arbitral Awards Act of 1977, Section 4.

Africa to adopt UNCITRAL Model Law and, in May 2001, the Commission proposed combining the best features of the UNCITRAL Model Law and the English Arbitration Act 1996, while maintaining some provisions of the Arbitration Act 42 of 1965 which have worked well in practice.³²⁴

B. Legal Framework

Section 2 of the South African Arbitration Act 1965 provides that (a) matters concerning matrimonial cause or any matter incidental to any such cause or (b) any matter relating to status will not be referred to arbitration.³²⁵

In addition, Section 33 of the South African Arbitration Act 1965 sets out three situations when a domestic arbitration may be set aside: where any member of an arbitration tribunal acted in misconduct in relation to the duties of an arbitrator or umpire; where an arbitration tribunal committed a gross irregularity in the conduct of the arbitration proceedings or exceeded its powers; and finally, where an award was improperly obtained.

Regarding foreign arbitral award enforcement, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 allows the court to refuse to grant an application for the recognition of a foreign arbitral award if the court finds that (1) a reference to arbitration is not permissible in South Africa in respect of the subject matter of the dispute; or (2) the enforcement of the award would be contrary to public policy in South Africa.³²⁶

³²⁴ South African Law Commission Project 94 Domestic Arbitration Report May 2001.

³²⁵ The Arbitration Act 1965, Section 2.

³²⁶ The Recognition and Enforcement of Foreign Arbitral Awards Act of 1977, Section 4.

Other defenses that may be raised by party against whom the enforcement of the award is sought are outlined as follows:

- when the parties to arbitration agreement have no capacity to the contract or the agreement is invalid under the law to which the parties are subjected to or of the country in which the award was made;
- when the party did not receive the required notice of the appointment of arbitrator;
- the award deals with a dispute outside the provision of the reference to arbitration or beyond the scope;
- the arbitration proceedings was not in accordance with the relevant arbitration agreement or with the law of the country in which the arbitration took place;
- the award has not yet become binding on the parties or has been set aside or suspended by the competent authority.³²⁷

There are seven potential defenses to enforcement of a foreign arbitral award in accordance with the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. Since the South Africa Arbitration Act 1965 is applied to both domestic and international award, foreign arbitral award accordingly has two more defenses arising from Section 2 as well as three from Section 33 of the 1965 Act. Thus, a party seeking to enforce a foreign arbitral award will face five more defenses to enforcement compared to a party seeking to enforce a domestic award.

³²⁷ *Id.*

As mentioned above, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 was enacted to complement the New York Convention. In Section 2 (1) of the Act provides that “any foreign arbitral award may, subject to the provision of section 3 and 4, be made an order of court by any court.” Comparing to Article III³²⁸ of the New York Convention, the Convention used the word “shall” in order to accommodate the effectiveness of enforcement for foreign arbitral awards as domestic arbitral awards. From the wording, it seems the New York Convention limits strictly the exceptions, whereas the 1977 Act gives arbitrary powers to its national judges.³²⁹

C. Arbitrability and Public Policy in South Africa

Section 2 of the Arbitration Act 1965 is limiting the scope of arbitration in civil disputes pertaining to matrimonial cause or any matter incidental to any such cause and matter relating to status.

In terms of matrimonial cause, the proprietary rights of husband and wife in divorce proceedings could not be referred to arbitration.³³⁰ The dispute relating the question of whether a parent could take the child on holiday irrespective of the timing of the dispute, i.e. either before or after the divorce, is in the court jurisdiction.³³¹

³²⁸ Article III of the New York Convention provides “Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory when the award is relied upon, under the conditions laid down in the following articles. there shall not be imposed the substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

³²⁹ Laurent Le Goff, *An International Arbitration Act for South Africa*, University of the Western Cape, South Africa, 67 (1998).

³³⁰ *Pitt v. Pitt* (3) SA 863 (D) (1991).

Matters concerning property can be referred to arbitration, as well as a dispute as to the liability of an owner of a sectional title scheme to pay levies.³³² The values of partnership assets, where it appears that interests of minors would be affected by such disputes, are not subject to arbitration.³³³ The action of a juristic person will, in such cases, be executed beyond the scope of articles of association and cannot be submitted to arbitration in terms of an arbitration clause in the articles is a matter needed to be decided by the judges.³³⁴

Moreover, any matter relating to status is not only restricted by the Arbitration Act 1965, but is also prohibited by the common law. The Act does not provide the definition of the term 'status'. Thus, it is depend on the court's discretion and *stare decisis* on what is considered included in 'status' definition. In South Africa, it is currently not permissible to give power to arbitrators to change the contractual capacity of a party. The office in a voluntary association is possibly a question of status which is not subject to arbitration.³³⁵

Even though there is no explicit provision stating that criminal matter is not in arbitrators' jurisdiction in South Africa, under common law doctrine, it seems that a dispute arising from a criminal subject cannot be arbitrated. In *Seton Co v Silveroak Industries Ltd.*,³³⁶ parties entered into a joint venture for the purpose of the production of leather for use in automotive upholstery. In addition, parties had agreed to enter into a non-competition agreement. The claimant later

³³¹ *Ressel v. Ressel* (1) SA 289 (W) (1976).

³³² *Body Corporate of Greenacres v. Greenacres unit 17 CC and Another* 2008 (3) SA 167 (SCA) (2008).

³³³ *Estate Setzen v. Mendelsohn and Another* (3) SA 292 (C) (1948).

³³⁴ *Grobbelaar en 'n Ander v. De Villiers NO en 'n Ander* (2) SA 649 (C) (1984).

³³⁵ *Compare Re Curators of Church of England v Colley* 9NLR 45(1888), 47.

³³⁶ *Seton Co. v. Silveroak Industries Ltd* (2) SA 215 (T) (2000).

claimed that the respondent breached the non-competition agreement and brought the claim to arbitration in Paris. The award has eventually been made in favor of the claimant for payment of compensation for damage incurred due to breach of contract made by the respondent.

The claimant applied to have an award recognized by the South African High Court. The recognition was opposed by the respondent on a number of grounds, one of which was that the enforcement of the award would be contrary to public policy as the award was obtained by fraud. The South African High Court accepted that a foreign arbitral award would be refused if it is contrary to public policy, in accordance with Section 4 of the Recognition and Enforcement of Foreign Arbitral Awards Act 1977. Extraneous evidence was still required to prove that the enforcement of such award would conflict with public policy. However, in order to request the court to refuse or set aside an award, the respondent must proceed in the jurisdiction of the court where the award was made, which, in this case, was French court. The South African High Court was therefore not entitled to refuse the recognition of the award.

In *Seton*, although South African court did not pinpoint whether fraud was arbitrable in South Africa, the court was still aware of the existence of the public policy exception in the 1977 Act, as it referred to the rule. The South African courts declined to refuse the award because the aim was to ensure consistency and prevent contradictory judgments. French courts may enforce the award because no opposition was raised against the award in its jurisdiction. Even though fraud was not mentioned by the South African court when the decision of whether it could be arbitrated was made, arbitration was likely to be disallowed under the common law doctrine

because fraud is a criminal matter. Only civil claim for damage arising out of fraud will be referred to arbitration.³³⁷

Matter arising from an illegal contract cannot be arbitrated. In *Veldspun (Pty) Ltd v. Amalgamated Clothing and Textile Workers Union of South Africa*,³³⁸ the court confirmed that the closed shop agreement³³⁹ containing in the arbitrator award, constituting an unfair labor practice, was contrary to public policy. If arbitrator makes an award that would have the effect of enforcing an illegal contract or offends against public policy, the court will set aside or refuse to enforce it.³⁴⁰

In *City of Johannesburg Metropolitan Municipality v International Parking Management (Pty) Ltd and Others*,³⁴¹ the applicant of this case requested the court to set aside the arbitral award under Section 33 of the Arbitration Act 42 of 1965 by claiming that the contract between the applicant and the respondent was contrary to public policy. The agreement between them supported the respondent to generate the fine revenue from issuing the parking ticket and stationary offences which contravened the pre 2004 by-laws and several other legal provisions. Thus, an arbitral award was made from illegal contract and should be set aside.

³³⁷ Butler and Finsen, *supra* note 308 at 55.

³³⁸ *Veldspun (Pty) Ltd v. Amalgamated Clothing and Textile Workers Union of South Africa* (3) SA 880 (E) 898G (1992).

³³⁹ An agreement that employer agrees to hire union members only and employees must remain members of the union at all times in order to remain employed.

³⁴⁰ *Veldspun (Pty) Ltd v Amalgamated Clothing and Textile Workers Union of South Africa*, *supra* note 338 at 898D-899A.

³⁴¹ *City of Johannesburg Metropolitan Municipality v. International Parking Management (Pty) Ltd and Others* (10548/2010) ZAGPJHC 5 (2011).

In this case, the court did not approve the applicant's request and mentioned that because stationary offences are at the lowest possible level of law enforcement, they did not relate to criminal records. They are not regarded as criminals and penalties are generally modest in the extreme. The contract between parties was therefore not against public policy.

The court in *City of Johannesburg* considered stationary offences as civil matters, and was not barred from arbitration. Even though the contract between the parties may encourage the respondent to issue more parking tickets, it nonetheless helps supporting the main purpose of parking regulations, which is to ensure equitable utilization of available space on street parking. Such contract, accordingly, was not illegal and made the arbitral award enforceable.

As can be seen from the above, South African courts are likely to determine the public policy in a narrow way to consider which contract will be illegal due to public policy contravention. In *Sasfin (Pty) Ltd v Beukes*,³⁴² the court preferred the utmost freedom of contract, and elaborated that commercial transactions should not be deprived from that freedom. 'Public policy' should properly take into account the need to enforce simple justice between individuals. Similarly, in *Botha, Griessel v Finanscredit (Pty) Ltd*,³⁴³ the Appellate Division emphasized that the court's power to declare contracts contrary to public policy should be exercised carefully and only in cases which the impropriety of the transaction and the elements of public harm are obvious. Although these two cases were not involved with setting aside the arbitration awards in view of public policy, they serve to demonstrate that South African courts construed public policy with prudence. Only when it harms the basic human rights, it will constitute a public policy contradiction.

³⁴² *Sasfin (Pty) v. Beukes* (1) SA 1 (1989).

³⁴³ *Botha, Now Griessel v Finanscredit (Pty) Ltd* (3) SA (A) (1989).

Insurance matters in South Africa are prohibited from arbitration under the Insurance Act,³⁴⁴ possibly due to the absence of publicity. As arbitration can be used as an avoidance of the glare of public, it is deemed that an insurer may misconduct and defeat claims through arbitration.

D. Conclusion

Even though, in South Africa, the Recognition and Enforcement 1977 Act is supposed to mirror the New York Convention, it has been seen that the 1977 Act is not only deficient, but has been not strictly enforced either. It contains only five Sections. In addition, South Africa also passed regulation to block it out (the Protection of Business Act 99 of 1978 prevented the enforcement of foreign awards made against South Africa in sensitive sectors³⁴⁵ unless the Minister of Trade and Industry consents to the enforcement, as per Section 1.³⁴⁶ The prohibition provision of this Act can prohibit the pro- enforcement doctrine in South Africa. This is may be because South Africa believes that its judicial system is reliable and there is no need for arbitration to be developed. The main reason for South Africa to accept arbitration as a dispute resolution mechanism is to attract foreign investments, as it has vast natural resources which can draw attention of the entrepreneurs.

³⁴⁴ The Insurance Act 27 of 1943.

³⁴⁵ The Protection of Business Act 99 of 1978 prohibits the enforcement of arbitral award made outside South Africa if such award arose from a transaction or an action regarding the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature whether within, outside, into or from South Africa. The enforcement of such award must obtain the consent of the Minister of Economic Affairs.

³⁴⁶ D.W. Butler, *Colloquium on International Commercial Arbitration and African States held in London in June 2003*.

Public policy toward arbitration in South Africa seems to be interpreted to cover all criminal matters, even fraud. South Africa seems to draw a distinct line between civil and criminal dispute by authorizing arbitrators to decide all civil and civil-related disputes in criminal matters. All disputes related to criminal will be set aside by courts due to public policy conflict nature. This theory seems to be conservative in a country that has common law system, as is the case of South Africa. However, South Africa arbitration cases can show that the courts tended not to use the term ‘public policy’ extravagantly. The court is likely to include only criminal matter which is ‘harmful to the human basic right’³⁴⁷ or ‘injurious to the public good’³⁴⁸ into ‘public policy’ scope.

Another obstacle that makes enforcement of arbitration award in South Africa unreliable is judges did not set aside the award made against ‘public policy’, as did other jurisdictions.³⁴⁹ This makes enforcement of foreign award more complex. South Africa is a part of the global economy and is subject to the business pressures that apply in the rest of the world. As the country is competing to attract as much foreign investment as possible, the current arbitration law seems insufficient. To elevate the arbitration system in South Africa to the international standards, the court should use other elements that would demonstrate its willingness to welcome arbitration. Currently, it is undeniable that judges still have a terrible hostility towards arbitration because they feel that it removes some of their prerogatives.³⁵⁰ This could result in widening the scope of

³⁴⁷ *Botha, Now Griessel v Finanscredit (Pty) Ltd* (3) SA (A) (1989).

³⁴⁸ *Deutsche Schachtbau-und Tiefbohrgesellschaft M.B.H. (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)* 2 Lloyd's Rep. 246, 254 (K.B.) (1987).

³⁴⁹ Other states will enforce or refuse the arbitral award if the award was made in the territory of countries which ratify the New York Convention . Also see *Seton Co. v. Silveroak Industries Ltd* (2) SA 215 (T) (2000).

³⁵⁰ J. Paulsson, *Arbitration in Africa*, Kluwer Law International, 33 (1996).

‘public policy’ because judges think that it should be in court’s jurisdiction, rather than that of an arbitrator.

It is likely to see South Africa adopt UNCITRAL Model Law to its arbitration law in the near future, as recommended by the South African Law Commission. As a result, we might see the different view of judge through the future cases. More sectors will be included in arbitration (at present, some key sectors, such as intellectual property, labor and consumer law, are sometimes excluded from arbitration because of their sensitivity) and hopefully ‘public policy’ will apply only to cases where the court’s intervention is really needed to preserve the interest of the public.

4.3 Egypt

The Arab Republic of Egypt is a populous country located at the northeast corner of Africa. Cairo, Egypt’s capital city, is the largest city in Africa and the Arab World with a population of nearly 17 million, most of whom are Egyptians and about 90% of the population is Muslim.

Egypt’s legal system is based on English common law, Shari’a (Islamic) law and French law. It is subject to judicial review by the Supreme Court and the Council of State, which oversees the validity of administrative decisions. Shari’a law is the principal source of legislation. Moreover, Egyptian arbitration law was influenced by the Shari’a, coexisting with European law, old French law and a socialist arbitration system. As Egypt acceded to the New York Convention in 1959, the arbitration law in Egypt was primarily inspired by the New York Convention provisions.

The Egyptian courts have a good record of enforcing arbitral awards, compared to Nigerian and South African courts, with a more modern arbitration mind. Under Egyptian law, foreign arbitration awards are formally recognized and enforced before the court of First Instance. Article 296 and 301 of Egyptian Code of Civil and Commercial Procedure describe the circumstances in which the Egyptian courts will enforce the arbitration awards and judgments made outside Egypt's jurisdiction. The judgment and award executed in a foreign country will be enforced in Egypt under the same conditions provided for in the Law of the foreign state for the execution of judgment and award. In addition, such judgment and award do not conflict with or contradict a judgment or order previously passed by another court in Egypt and do not include any violation of moral code of public order. Egyptian arbitration law does, however, recognize the challenge of arbitral award by means of a specific annulment action based on a limited number of grounds on accordance with the Model Law.

A. Historical Background

Muslim law had played an important role in Egyptian society for a long period of time. Even the law and regulations currently used in Egypt have been formed with the Shari'a law influence. The Egyptian arbitration law was developed in the 19th century by combining Shari'a and European laws. Later on, French law has influenced legal system in Egypt, including arbitration law. After the 1952 revolution, arbitration in Egypt was characterized by the socialist concept, which recommends that arbitration should not only purport to settle the disputes but also serve the guide for the state.³⁵¹ The Egyptian arbitration system and its implementation rules thus come from three sources: the Shari'a, old French law and a socialist arbitration system.³⁵²

³⁵¹ Cotran and Amissan, *supra* note 263 at 233.

Prior to the New York Convention accession, Article 501 to 513 of the Egyptian Code of Civil and Commercial Procedure 1994 played an important part in Arbitration legal system in Egypt. In 1959, Egypt acceded to the New York Convention and the Convention since then became a fundamental factor of Egyptian arbitration law. However, in practice, the Egyptian courts were not accustomed to the New York Convention implementation and continued to use Article 501 of the Code of Civil and Commercial Procedure 1994 to decide that the action was inadmissible.³⁵³ The most problematic issue of applying the Code of Civil and Commercial Procedure 1994 is Article 502,³⁵⁴ as it required the arbitrator to be appointed by name in the agreement between parties. The problem arises when the parties choose arbitration centre to arbitrate their dispute. That way the opponent party can request the court to set aside the agreement to arbitrate by claiming that the tribunal was not selected by name as required by Article 502. There was an evidence of Egypt court's decision in 1983³⁵⁵ agreed with this view and decided that not appointing the arbitrator by name is contrary to Article 502 and thus contrary to public order. Such agreement should be set aside and the arbitral proceedings at the permanent centre should be suspended.

In order to avoid the situation cited above, a committee was created to establish a new international arbitration act based on the UNCITRAL Model Law with minor modifications. Moreover, case law of the Court de Cassation on December 23, 1991 decided that Article 502/3

³⁵² *Id.*

³⁵³ *Id.* at 237.

³⁵⁴ Article 502 Paragraph 3 of the Code of Civil and Commercial Procedure required that "failing provisions of special laws, the arbitrators must be appointed by name in the agreement to arbitrate or a separate deed."

³⁵⁵ Cairo Court (14th Chamber), 31 December 1983. Case no. 11.477 (Franco-Egyptian). *See also Westland v. Arab Council of Industrialisation* (Case NO. 8165/1980-Cairo).

of the Code of Civil and Commercial Procedure 1994 provision was not related to public order and its implementation was thus not mandatory. Eventually, on April 18, 1994, a new arbitration act was promulgated, inspired by the UNCITRAL Model Law. The Egypt Arbitration Act no. 27 of 1994 (as amended by Law no. 9 of 1997) does not distinguish between international and domestic arbitration. The 1994 Act expressly recognizes party autonomy and limits the action for setting aside to only seven exhaustive grounds, in addition to any breach of public policy rules. The grounds to set aside are listed in Article 53 of the 1994 Act and public policy is stipulated in Article 58, in line with Article 34 of the UNCITRAL Model Law. Even though the new Arbitration Act no.27 of 1994 has shown the decreasing impact of Shari'a law, Shari'a has generally been kept in the background, due to commercial pressure.³⁵⁶

B. Legal Framework

Arbitration in Egypt is governed and regulated by the Arbitration Law No.27 of 1994 (“Egypt Arbitration Law”). The law is largely based on UNCITRAL Model Law and has adopted many of its principles.³⁵⁷ However, some slight modifications were made to the Model Law due to the necessity of fitting the new law in with the Egyptian legal system.³⁵⁸ In addition, Egypt is a signatory state of the New York Convention that came into force in the Arab Republic of Egypt on June 8, 1959. The enforcement of arbitral award provisions can be found in Egypt

³⁵⁶ Samir Saleh, *Commercial Arbitration in the Arab Middle East*, 342 (2006).

³⁵⁷ Essam Al Tamimi, *Practitioner's Guide to Arbitration in the Middle East and North Africa*, JurisNet LLC, 49 (2009).

³⁵⁸ *Id.* at 50.

Arbitration Law Article 55-58, provided that the enforcement of award in Egypt will be executed, provided that it does not contravene a precedent judgment of Egyptian courts, Egyptian public order, and the defendant has been duly notified of the award.

Article 11 of Egyptian Arbitration Law No.27 of 1994 provides that “arbitration is not permitted in matters where compromise is not allowed.”³⁵⁹ There is no explicit provision stating which type of dispute cannot be arbitrated. For example, Article 551 of the Code of Civil and Commercial Procedure 1994 defines matters that cannot be conciliated as matters pertaining to personal status and public policy. In addition, Article 53(2) of the Egypt Arbitration Law allows the court to nullify the arbitral award if the award constitutes the content contrary to the public policy. In addition, Article 58 (2) (b) provides the provision for court to enforce the award as long as it does not contradict public policy in the Arab Republic of Egypt.

Generally, the principal Egyptian provision applicable to the enforcement of foreign award is contained in Article 296 to 301 of the Egyptian Procedural Law. As a result of becoming the New York Convention signatory, in Egypt, the New York Convention supersedes the condition set out in Article 296-301. However, Article 296-301 is still effective for the enforcement of foreign award of the party if it is not a party to the New York Convention. The conditions stipulated in the Egyptian Procedural Law are more restrictive than the condition in the New York Convention.

The ground to set aside in New York Convention was described in Article V, while in the Egyptian Procedural Code is set out in Article 298 and 299. A non-arbitrable matter is set out in Article 299 and a public policy contradiction is stipulated in Article 298 (4) of the Procedural

³⁵⁹Article 11 of Egyptian Arbitration Law No.27 of 1994, Article 11.

Law. Moreover, the Procedural Law is not allowed to enforce any order conflicting to any previously issued by the court in the state in Article 298 (4) because it will acquire the force of a *fait accompli* which is a matter of great importance to public order in Egypt.³⁶⁰

In a matter of refusing or setting aside a foreign award, since Egypt ratified the New York Convention, non-arbitrable and public policy as grounds to refuse the recognition and enforcement of arbitral award in Article V (2) will apply. However, Article 53(2) and 58 (2) (b) of the Arbitration Law No.27 of 1994 and Article 299 and Article 298 (4) of the Egyptian Procedural Law will remain in force in case of arbitral awards rendered in the states that are not party to the New York Convention. Thus, there are three laws pertaining to international arbitration in Egypt—the Egypt Arbitration Law No.27 of 1994, Egypt Procedural Law and the New York Convention.

C. Arbitrability and Public Policy in Egypt

Many foreign awards have been enforced in Egypt under the New York Convention. Several case laws have indicated that the Egyptian courts interpreted public order restrictively. More specifically, the courts have refused several attempts to reject arbitral award on the grounds of Article V(2) (b) of the New York Convention.

The public policy notion in Egypt does not separate the domestic and international cases, since the Egypt Arbitration Law no.27 of 1994 is applied to both domestic and international arbitration. This application may result in making enforcement of foreign arbitral award in Egypt difficult because a foreign award may be adversely affected by the rules applied to domestic award. It has been said by Egyptian academics that “the reference of Law no.27 to the domestic

³⁶⁰ Tamimi, *supra* note 357 at 82.

provisions governing conciliation, a legal category derived from Shari'a and partly incorporated in the Egyptian Code of Civil and Commercial Procedure 1994 (Article 547-549), would make the process of internationalizing the notion of public policy, especially in civil matters rather an arduous task.”³⁶¹

The significant case in 1991 demonstrates how narrowly public policy has been interpreted.³⁶² On December 23, 1991, the Court of Cassation stated that “an arbitral award will not be recognized in Egypt if it is in breach of public order or on social, political, and economic grounds in the State.”³⁶³ In this case, the petitioner claimed that the arbitration agreement had to include the arbitrator’s names and any violation of this rule will be contrary to Article 502 (3) of the Procedural Law (currently been superseded by the Arbitration Law No. 27/1994) would breach public order. The Court of Cassation rejected his claim and provided that Article 502 (3) was not part of public order. Although this case is regarding the arbitration procedure rather than the substantive public policy, it was a very important case and is an example used in subsequent similar cases.

Since Article 11 of Law no. 27 of 1994 refers to Article 551 of the Code of Civil and Commercial Procedure 1994, matters regarding personal status, guardianship, marriage and divorce, are generally non-arbitrable and are instead subject to the exclusive jurisdiction of the

³⁶¹ Saleh, *supra* note 356 at 372.

³⁶² Tamimi, *supra* note 357 at 83.

³⁶³ Recourse No. 547 of the 51st Judicial Year.

Egyptian courts.³⁶⁴ Criminal matters are never within the scope of arbitrability. As a result, no civil transaction that has any link to criminal matters is arbitrable.

Administrative contract is now recognized by the Egyptian court as an arbitrable case. The Cairo Court of Appeal's decision in the *Silver Night case*³⁶⁵ (1997) confirmed this theory. The Egyptian Antiquities Organization filed the claim to the court to have an award set aside on the grounds that the award was made based on the construction contract between an English contractor and the Egyptian Antiquities Organization. It was an administrative contract, which made the issue non-arbitrable. The Court of Appeal ruled that dispute arising from administrative contract can be settled by arbitration under the Egyptian Arbitration Act 1994.

In the *Amal Tourism*³⁶⁶ case in 2007, the Ministry of Tourism, a claimant, requested the Court de Cassation to annul the award on the grounds that a domestic award was made relating to the land that belonged to the public domain and had been assigned to national defence purpose. Thus, the award violated public policy. The Court de Cassation rejected the claim.

In *National Cement Company v Andritz Company*,³⁶⁷ National Cement Company entered into contract with Deutsche Babcock, a consortium comprising of the Andritz Company and others to transform two cement production lines. The parties agreed to submit any dispute to arbitration under ICC Arbitration Rules and the law to be governed the contract is Egyptian law.

³⁶⁴ Saleh, *supra* note 356 at 373.

³⁶⁵ Court of Appeal, Cairo, Commercial Circuit No. 63, 19 March 1997, No. 64/113(j) (*Antiquities Organization v. Silver Night Company*) Yearbook XXIII 169-174 (1998).

³⁶⁶ Egyptian Court of Cassation, 27 December 2007, summary available at: www.kluwerarbitration.com.

³⁶⁷ National Cement Company requested the annulment of International Chamber of Commerce (ICC) arbitral award CK/9928 rendered on December 21, 1999.

The consortium provided a performance bond in the form of letters of guarantee amounting to 10% of the total value of the contract. The dispute occurred when National Cement Company alleged that the consortium did not execute the contract in the contractual time frame. The consortium, however, requested the cancellation of the letter of guarantee due to the fact that the validity period of such letters is 54 months from the date of the contract's entry into force.

The consortium accordingly initiated the arbitral proceedings. National Cement Company counterclaimed for damage for non-performance by the consortium. The tribunal rendered the award ordered National Cement Company to compensate the values of the letter of guarantee, together with an interest calculated at London Interbank Offered Rate (LIBOR) plus 3% per annum, starting from April 7, 1998 until the date of payment.

National Cement Company thus filed a request to Egyptian courts to have an award set aside. The Cairo Court of Appeal nullified the award on July 30, 2001 on the grounds that it violated public policy, as ordering to pay LIBOR interest rate plus 3% exceeded the maximum interest rate in accordance with Egyptian law and thus constituted a violation of public policy. The Court of Appeal's judgment was challenged before the Egyptian Court de Cassation, which reversed the ruling of Court of Appeal and stated that the award should be partially annulled, only the exceeding interest rate part due to public policy violation according to Article 53 of the Egypt Arbitration Act 1994. However, the remaining part of an award, which is consistent with Egyptian public policy, should be valid.

From this case, we can summarize that the exceeding interest rate in Egypt is something relating to public policy. According to Article 227 (1) of the Egyptian Code of Civil and Commercial Procedure 1994, interest rate cannot exceed 7% per annum (with some exceptions,

such as bank transactions).³⁶⁸ The Egyptian Code of Civil and Commercial Procedure 1994 is designed to apply to domestic matters. However, the reason the Egyptian court set aside the award by applying the Egyptian Code of Civil and Commercial Procedure 1994 was that the parties chose Egyptian law as the law that governs the contract. Generally, interest rate issues are not criminal matters; thus, Egyptian court most likely considered this case as a matter of public policy because the court aimed to protect the weaker party from usury. In other words, by allowing one such transaction, the court would open a possibility for more similar cases.

Generally, Egyptian court should not implement the Egyptian Code of Civil and Commercial Procedure 1994, as it is intentionally applied to the domestic rather than internationally use. If Egyptian court applied the same standards to international public policy as it does to domestic matters, the arbitration in Egypt would not be encouraged, and the foreign investments in Egypt would decline. Egypt's approach to public policy should be cautious and careful. Perhaps the Court de Cassation already has this in consideration, as we can see from the separability of an award (only exceeding interest part was set aside).

D. Conclusion

Since the Egyptian law does not distinguish between international and domestic public policy, 'Egyptian public policy' accordingly cannot be seen to imply international public policy. When public policy is violated, Egyptian court will set aside the arbitral award on its own motion

³⁶⁸ Article 227 (1) of the Egypt Code of Civil and Commercial Procedure provides that "The parties may agree on a different rate of interest, whether it concerns delay in fulfillment of an obligation or in any other cases where interest is stipulated, provided that the rate does not exceed 7%. Agreements to a higher rate of interest shall result in the reduction of interest to the prescribed rate

even if there is no party to raise the issue. Generally, Egyptian public policy violation will be considered if it contradicts the social, political, economic and moral values that relate to higher interest.³⁶⁹ Even though the new Arbitration Law No.27 of 1994 adopted a combination between the UNCITRAL Model Law and the old Egyptian Code of Civil and Commercial Procedure 1994, the new Act tends to be closer to the Code of Civil and Commercial Procedure 1994 rather than the UNCITRAL Model Law.

The new Arbitration Law No.27 of 1994 widens the scope of matters that can be arbitrable if compromise of such matters is allowed irrespective of the legal nature of the relationship, which is the subject-matter of the dispute.³⁷⁰ Thus, any party may choose arbitration to resolve any dispute whether it is contractual or not contractual, public or private, civil or commercial, unless it is related to public policy. The Egyptian Arbitration Law No.27 of 1994 opens matters where compromise is allowed to be referred to arbitration. However, some matters may not be subject to compromise, but can still be referred to arbitration. This can create confusion and uncertainty as to the possibility of resorting to arbitration. A good example of such cases is disputes in administrative contracts, which are matters where no compromise is possible but arbitration can still be pursued.

Administrative contract before the promulgation of the 1994 act was likely to be non-arbitrable. An advisory of the Conseil d'Etat acknowledged that administrative contract was non-arbitrable because it was exclusively in the jurisdiction of Conseil D'Etat (Consultative Section of 17 May 1985). Moreover, the Supreme Administrative Court in 1990 refused the arbitrability

³⁶⁹ Cairo Court of Appeals, 91 Commercial, Cases No. 108 and 111/121, 30/5/2005.

³⁷⁰ Article 1 and 11 of the Egyptian Arbitration Law No.27 of 1994.

of administrative contracts.³⁷¹ However, the *Silvernight* case in 1997 demonstrates that Egyptian court accepts a modern way of arbitration by referring issues pertaining to administrative contracts to arbitration. Thus, it seems that the trend of arbitrability for administrative contract in Egypt will change in a more international way.

Egypt is more inclined open the scope of arbitrable matter than are Nigeria and South Africa by allowing more area of matters to be solved by arbitration. However, criminal activities are still not arbitrable in Egypt due to public policy contrary, as exemplified by a judgment of the Egyptian Court de Cassation to support this concept.³⁷² Unlike arbitrability in Nigeria and South Africa, Egypt seems to determine only matters that will affect many people (public) as non-arbitrable—for example, criminal matters and matters relating to higher interest rate. The scope for nullifying an arbitral award in Egypt remains flexible and still opens the door to several interpretations.

Public policy in Africa, however, has not yet been fully supported by African court, as is the case in other countries in the world. As the New York Convention is likely to be ratified by the increasing number of African states, the public policy disputes would be invoked in some cases and is likely to be construed narrower. Hopefully, African states will subside their sovereignty and make non-arbitrable matters more limited.

³⁷¹ Alam al-D in, Muhy I alOD in and Ism a' il, *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration*, 9 (2000).

³⁷² In this case, a dispute arose when a thief had stolen cattle and parties tried to find the thief. An arbitrator, the wise man of the village, requested parties to sign promissory notes of thousand Egypt pounds which he would keep until the end of the arbitration. The case was referred to the Court of Cassation and the Court decided that the agreement was void because the subject matter was a criminal liability, which cannot be referred to arbitration. Cass., Case No. 1479/53, 19/11/1987.

CHAPTER 5 ARBITRABILITY AND PUBLIC POLICY VIEW IN MIDDLE EAST-SAUDI ARABIA

The legal system in Saudi Arabia is unique in the world. The law in Saudi Arabia is based on Shari'a law (Islamic law), which is derived from the Qu'ran, the written basis for all Islamic law providing the absolute authority on Islamic life, and the Sunnah, the prevailing customary law.³⁷³ The other two sources of Islamic law in Saudi Arabia are ijma and the Qiyas. The ijma provides the answers to questions that arise from changing social conditions and the Qiyas offers last resort answer to legal problems to which the Qur'an, Sunna and ijma cannot apply.³⁷⁴ According to Article 7 of the Saudi Basic Law,³⁷⁵ Shari'a Law in Saudi Arabia has supremacy over all laws and man-made regulations or normative instruments.³⁷⁶ Even a temporary condition of an emergency during turmoil cannot violate Article 7, which renders Shari'a the only source of regulation in the kingdom.³⁷⁷

Saudi law could not be separable from religion.³⁷⁸ The King lacks the power to legislate in almost any field that has already been regulated by Shari'a, in respect of which he is bound by the same duty of obedience as are all of his subjects.³⁷⁹ Accordingly, the law could not be

³⁷³ Christian Campbell, *Legal Aspects of Doing Business in the Middle East*, 265 (2007).

³⁷⁴ David J. Karl, *Islamic Law in Saudi Arabia: What foreign Attorneys Should Know*, 25 GEO. WASH. J. INT'L L. & ECON. 131, 139-40 (1992).

³⁷⁵ Article 7 of the Saudi Basic Law, Royal Decree No. (90/A) dated 28/06/1412 H. (1992).

³⁷⁶ Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*, 143 (2010).

³⁷⁷ Article 1 and 7 of the Saudi Basic Law, Royal Decree No. (90/A) dated 28/06/1412H. (1992).

³⁷⁸ Karl, *supra* note 374 at 131.

³⁷⁹ J. Schacht, *Problems of Modern Islamic Legislation*, *Studia Islamica* 12, 133-36 (1960).

independent from the religion in any respect affecting public life in Saudi Arabia. The King of Saudi Arabia is empowered to issue royal decree that supplements remaining Shari'a Law with the discretion to change when needed, e.g. in new trade and commerce circumstances.³⁸⁰ However, the kingdom of Saudi Arabia has an absolute monarchy, not the King.

Shari'a law in Saudi Arabia has been uniquely adopted in an uncodified form. The lack of codification of Shari'a results in variation of law interpretation and application.³⁸¹ As there is no judicial precedent in Saudi Arabia, court judgments can sometimes be inconsistent. The Saudi Arabian legal system is exceptional in the world of Islam, as the state regards uncodified Shari'a in its entirety as the law of the land and does not interfere with it.³⁸² It can be said that the legal system in Saudi Arabia focuses on the enforcement of Islamic culture and values.³⁸³

Saudi Arabian Unique Economically Principles

Before committing to conduct business in Saudi Arabia, the concepts of Riba and Gharar should also be understood, as they create the key economic differences between Islamic economics and Capitalist or Socialist economic systems. Riba forbids any action that would result in an unusually high interest rate being charged or an unreasonable and excessive profit margin realized.³⁸⁴ The parties in any contract must maintain general principles of fairness and equity in their dealings. There should not be any deception. Gharar prohibits gambling or any

³⁸⁰ Baamir, *supra* note 376 at 145.

³⁸¹ Peter W. Wilson and Graham Douglas, *Saudi Arabia: the coming storm*, 201 (1994).

³⁸² Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, 148 (2006).

³⁸³ Karl, *supra* note 374 at 131, 136-37.

³⁸⁴ Peter D. Sloane, *the Status of Islamic Law in the Modern Commercial World*, 22 INT'L Law. 743, 748 (1998).

contract that was made based on speculation and unsure event.³⁸⁵ Any action or contract made contrary to Riba and Gharar principles will be void and will not be enforced by the Saudi Arabia court.

Insurance is one form of speculation because an insurance contract was made based on an uncertain event. The policyholders will benefit from insurance contract only if there is a loss and loss is not guaranteed event. Thus the contract is void due to being ill-defined or speculative.³⁸⁶ However, Saudi Arabia now considers the importance of insurance industry in modern economy. As a result, Saudi Arabia permitted parties to use insurance as an investment tool, on the condition that insurance companies will not invest all insurance profit beyond the limits of Saudi Arabian borders.³⁸⁷ This type of insurance is not considered as immoral because there is no Riba.

A. Historical Background

Saudi Arabia has a long history of lack of consensus pertaining to international arbitration as a method to solve the dispute.³⁸⁸ Its current arbitration provision neither accommodates nor encourages the international commercial arbitration. Some arbitration practices that are internationally accepted by other countries are impossible to apply in Saudi Arabia. However, increasingly, there are attempts to encourage a means of resolving domestic disputes with a belief that mutual conciliation is better than conflict.³⁸⁹ For international dispute,

³⁸⁵ *Id.* at 745-46.

³⁸⁶ *Id.* at 749-50.

³⁸⁷ C.E. Acker, the Insurance Business, MIDDLE E. EXEC. REP., July 25 (1982).

³⁸⁸ Paul E. Pompeo, *East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems*, 14 Loy. L. A. Int'l & Comp. LJ. 815, 840-41 (1992).

³⁸⁹ *Id.* at 840.

Saudi Arabia at first restricted the use of arbitration with non-domestic dispute. In 1963, there was a law prohibiting government agencies from using arbitration on certain types of dispute.³⁹⁰ However, an arbitration regulation that was introduced in 1983 still does not allow Saudi Arabian government to choose arbitration as a dispute resolution method.³⁹¹

Prior to the adoption of the New York Convention, Saudi Arabian courts generally refused the enforcement of non-Saudi Arabian arbitral awards.³⁹² Thus, the court would conduct its own investigation to determine whether to enforce the award.³⁹³ Saudi Arabia became a signatory of the New York Convention on April 19, 1994 with the reciprocity reservation that it would only apply the Convention to arbitral awards made in another New York Convention contracting state. The New York Convention came into force in Saudi Arabia on July 18, 1994. Even though the country acceded to the New York Convention, no domestic law has ever been enacted to be in line with the New York Convention. Thus, the enforcement of foreign award in Saudi Arabia is only subject to the provision in the New York Convention.

The main Saudi arbitration law is the Arbitration law promulgated by Royal Decree No. M/46 dated 12/07/1403 H (corresponding to September 14, 1983) and its Executive Regulations promulgated by Prime Minister Resolution No. 7/2021 and dated 8/9/1405 (corresponding to April 29, 1985).³⁹⁴ Since Saudi Arabia acceded to the New York Convention in 1994 and the Saudi Arbitration Law was enacted earlier, the provisions of the New York Convention are not

³⁹⁰ Council of minister Resolution No. 58, Restricting Right of Saudi Government Agency to Submit to Arbitration, dated 1/17/1383.

³⁹¹ The Saudi Arabia Arbitration Act, Article 3.

³⁹² Sloane, *supra* note 384 at 765.

³⁹³ *Id.*

³⁹⁴ Tamimi, *supra* note 357 at 367.

incorporated into the Saudi Arbitration Law. In addition, Saudi Arabia does not adopt any provision in UNCITRAL Model Law into its own arbitration law. Thus, its arbitration provision does not reflect these two popular arbitration regimes.

In addition, the law gives the Saudi Board of Grievances³⁹⁵ a jurisdiction over enforcement of domestic and foreign arbitral awards.³⁹⁶ Due to several mandatory requirements, it makes arbitration in Saudi Arabia antiquated and enforcement of foreign arbitral award problematic. In other words, it is very hard to execute the enforcement of foreign award in practice.

Unlike other New York Convention signatories, there are no any arbitration institutions in Saudi Arabia. The only arbitration proceeding in Saudi Arabia is executed along the arbitration act. Under the Saudi Arabian arbitration act, the state courts are allowed to intervene in all arbitral proceeding. Commercial arbitration in Saudi Arabia faces many obstructions that should be kept in mind by any foreign investor before initiating the arbitral proceedings.

In commercial disputes between private parties, a judge from the Board of Grievances will act as a supervising judge. The Board of Grievances will ensure that the award does not violate Shari'a Law since it forms part of public policy in Saudi Arabia. In case there is a loophole in the Arbitration Act 1983, the supervising state judge has wide power to determine the arbitration.

³⁹⁵ The Board of Grievances is an independent administrative judicial commission responsible to the King.

³⁹⁶ Article 13(g) of Board of Grievances Law (2007) authorizes the Board of Grievances to have power over the requests for enforcement of foreign judgments and foreign arbitrator's judgments.

The Saudi Arabian government entities, without a permission of the President of the Council of Minister, are precluded from entering into contracts that nominate arbitration as a method of dispute resolution. This provision reflects a Royal Decree issued in 1963. Arbitration proceedings in Saudi Arabia must be regulated in Arabic. Notwithstanding choice of laws in contract, the arbitrators will apply Saudi Arabian law to the dispute before them.

It seems that Saudi Arabia has several hindrances to enforcing and recognizing foreign arbitral award system. The question of whether the award is binding or not has no clear answer in Shari'a law. There is no harmony among four leading Sunni schools on this issue.³⁹⁷

The New York Convention adoption is still a positive sign, as it indicates an intention of Saudi Arabia to raise its own arbitration to the international standard, in order to increase confidence of foreign investors.

B. Legal Framework

Saudi Arabia has traditionally been hostile to the recognition and enforcement of foreign arbitral award, finding the award contrary to Saudi Arabian law and public policy.³⁹⁸ Arbitrability and public policy are the most common grounds for refusing the enforcement of foreign arbitral award in Saudi Arabia. There is no specific list of grounds based on which enforcement and recognition of award can be refused in Saudi Arabian arbitration law.

³⁹⁷ Mark Wakim, *Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards In The Middle East*, *New York International Law Review*, Winter, 32 (2008); Four schools of Islamic jurisprudence consists of Hanafi, Shafi, Maliki and Hanbali.

³⁹⁸ Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Defense to Refuse Enforcement of Non-domestic Arbitral Awards?*, *Fordham International Law Journal* 8(3), 922 (1994).

Generally, it can be said that the grounds for setting aside are those accepted in most law.³⁹⁹ In addition, according to the Arbitration Act, arbitration will be allowed only in the areas of law where the conciliation is permitted.⁴⁰⁰ Thus, public policy is definitely not arbitrable. Public policy in Saudi Arabia is derived from three principal sources: (a) Shari'a; (b) royal power, which is drawn from Shari'a with an emphasis on public customs and public interest within the framework of Shari'a's prescriptions; and (c) public morals.⁴⁰¹ According to the Hadith⁴⁰² "Muslims must comply with contractual provisions except for those which authorize what is forbidden or forbid what is authorized."

Since public policy in Saudi Arabia is not precisely implemented in Saudi Law, it has no limit. Saudi Arabian public policy covers a vast area of practice that could include civil or criminal matters, whether contractual or commercial. Even though Saudi Arabia recognizes the New York Convention, Islamic law is likely to have a greater influence in public policy. When it comes to the issue of award enforcement refusal, Shari'a Law plays more important role than Article V (2) (b) of the New York Convention.

The decision of Saudi Arabian court has a little percussion on public policy because it serves as a supplementary and interpretation of Shari'a and relevant royal decree.⁴⁰³ Thus, we can assume that anything that violates Shari'a Law would be deemed contrary to public policy in

³⁹⁹ Abdel Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (3rd edition), 668 (Wolters Kluwer 2011).

⁴⁰⁰ The Saudi Arabia Arbitration Act 1983, Article 2.

⁴⁰¹ Baamir, *supra* note 376 at 142.

⁴⁰² Reports of the sayings and deeds of the Prophet (an individual who claimed to have been contacted by the supernatural or the divide).

⁴⁰³ Baamir, *supra* note 376 at 145.

Saudi Arabia. When an issue of public interest is involved, the Saudi Arabian authorities will consider Shari'a Law at first instance, balancing it with the interests of the public. Saudi Arabian public policy is one of the most distinctive ones in the world. The kingdom has listed negative activities for foreign investment, which are excluded and prohibited from benefiting from public interest.⁴⁰⁴ This might be a hardest point for foreigner when it comes to the enforcement of arbitral award in Saudi Arabia because it is hard to know what is considered as Saudi Arabian public policy. However, this is very important point, as cases not deemed a public policy internationally might fall into this category in Saudi Arabia. Even though Saudi Arabia made an effort to balance between tradition and modernization, it is still a very conservative country in every aspect since Shari'a plays an essential role of its culture and society.

C. Arbitrability and Public Policy in Saudi Arabia

As a result of the New York Convention accession, Saudi Arabia's public policy in arbitration was based on Article V (2)(b) of the New York Convention. The New York Convention is a double-edged tool for Saudi Arabia. The adoption of the New York Convention by Saudi Arabia can show intention to international community that Saudi Arabia is willing to open its arms to the globalized modern international arbitration, while the country can still use public policy exception under Article V(2)(b) to keep in line with its religious beliefs by construing it in a wide manner. Since Article V(2)(b) does not elaborate on the type of circumstances that are not considered public policy, it is possible for Saudi Arabian courts to reject the enforcement of foreign arbitral award in many ways according to its numerous

⁴⁰⁴ Negative list activities excluded from foreign investment is available at the Saudi Arabia General Investment Agency (SAGIA) website at www.sagia.gov.sa/en/business-environment/investment-laws/negative-list.html (last visited August 2012).

domestic restrictions. Consequently, the current public policy in Saudi Arabia will not only be considered under the New York Convention, but also under the Islamic law.

Criminal law is definitely and explicitly barred under public policy in Saudi Arabia, as Shari'a Law determined the fault and provides the sanction.⁴⁰⁵ A less obvious example would be complex financial structure for privately funded hospital that includes non-Shari'a-complaint funding.⁴⁰⁶ A well-known case between Arabian American Oil Company (*Aramco*)⁴⁰⁷ and the Saudi government in the 1960s benchmarked the one of the major points in Saudi Arabian arbitration. The case was about an arbitration relating to the interpretation of a concession agreement made on May 29, 1933 between the Saudi Arabian government and Arabian American Oil Company ("Aramco").

In January 1954, a contract between Saudi Arabian government and Aristotle Onassis, the Greek shipping tycoon (Onassis Agreement) was made. A contract gave Aristotle a thirty-year right of priority transport of Saudi Arab oil. The government of Saudi Arabia was entitled to receive royalty compensation from shipping oil and oil products from Saudi Arabian ports in the Gulf to any Saudi port in the Red Sea. Briefly, the dispute occurred when the provisions conflicted with the agreement with Aramco, which gave the latter the exclusive right to transport the oil from its concession area in Saudi Arabia. The Saudi Arabian government ordered Aramco to apply Royal Decree No. 5737 of 09/04/1954, which ratified the Onassis Agreement concluded

⁴⁰⁵ The notion of Islamic jurisprudence is that arbitration is only valid in disputes of a commercial nature and arbitration in issues connected to the "Rights of God" is not accepted; Faisal Kutty, *The Shari'a Law Factor in international Commercial Arbitration*, 28 *Loy.L.A. Int'l&Comp.L.Rev.* 565 (2006), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=898704.

⁴⁰⁶ Belal T I-Ghazzawi, Meriel Buxton and Tammam Kaissi, *Saudi Arabia*, *The European & Middle Eastern Arbitration Review*, 66 (2010).

⁴⁰⁷ *Saudi Arabia v. ARAMCO*, 27 *INT'L L. REP.* 117 (1963).

on 20 January 1954. The royal decree gave the Onassis Agreement a legal status similar to that of the Aramco concession agreement. Aramco rejected the Onassis Agreement and claimed that applying the Onassis Agreement would be contrary to the established worldwide custom and practice in international oil industry. Moreover, implementing Onassis Agreement made it impractical. Saudi Arabian government insisted that the concession agreement of 1933 did not exempt Aramco from regulatory power of the Saudi Government. Since Onassis Agreement had been ratified by Royal Decree No. 5737, it had become the law of the land that everyone had to respect. The dispute was raised to arbitral tribunal, which gave an award favoring Aramco and reasoned that Onassis Agreement was neither a law of the state of Saudi Arabia nor a governmental regulation. In addition, arbitral tribunal stated in the award that Shari'a Law did not have enough provision to deal with energy dispute and petroleum concessions and therefore could not be the governing law of the dispute. Arbitrator thus applied common practice in energy and oil sectors and made ruling against the Saudi government. The Aramco award affected many different areas of law and legal practice, especially international arbitration and economic policy. As a result, the Council of Ministers issued Resolution No.58 of 1963, which was supplemented by the Ministry of Commerce Circular of 1979, imposing some restrictions on the acceptance of arbitration clauses and agreements.

A major concern of Resolution No.58 of 1963 is when one of the parties is government entity, as it did not differentiate between international and domestic matters. Prior to 1963, the government always implemented arbitration as a method to settle disputes between itself and private parties. As the Aramco case led to an unfavorable outcome, Resolution No.58 restricted the arbitration as a dispute settling tool between government and private parties.

A result of this case makes a major change in Saudi Arabian arbitration law and brings the amendment to Article 3⁴⁰⁸ of the arbitration act. It is now explicitly stated in the act that government entities are not allowed to arbitrate their dispute. Dispute regarding administrative contract is accordingly considered as a non-arbitrable matter.

The definition of public policy under arbitration law in Saudi Arabia is still unclear, as there is no official or formal interpretation from the courts. In addition, as *stare decisis* does not play an important role in Saudi Arabia, it is hard to predict what will be included in ‘public policy’ term. Below is some definitions provided by scholars;

Faisal Kutty, an Islamic philosopher, described public policy under Shari’a Law that “Maslahah or public interest is an essential influence in the development of the Shari’a and was known as the only overriding objective of the Shari’a which encompasses all measures beneficial to people.”⁴⁰⁹

Al-Ghazali, another Islamic theorist said “the basic objectives of the Shari’a are preservation of life, property, family, religion, honor or dignity, and al aql (reason or rational knowledge).”⁴¹⁰ Together with ‘life and death belief in Shari’a, it makes Shari’a arbitration “significantly different from Western conceptions.”⁴¹¹

⁴⁰⁸ Article 3 of the Saudi Arabian Arbitration Act 1983 provides “Government bodies may not resort to arbitration for settlement of their disputes with third parties except after approval of the President of the Council of Ministers. This Provision may be amended by resolution of the Council of Ministers.”

⁴⁰⁹ Kutty, *supra* note 405 at 603.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

Another theory of Mark Wakim, a deep thinker in Islamic law, gave a detail of public policy under Shari'a as 'general interest'. The general rule is that "it is a must for all muslims to comply with contractual provisions except for those which authorize what is forbidden or forbid what is authorized, for example those which prohibit speculative contracts (Gharar) and those that forbid usurious interest (Riba)."⁴¹²

Under Shari'a law, any contract containing speculation, or contract clauses subject to an occurrence of a specified, yet uncertain event, is void. Pursuant to this doctrine, "insurance contracts as we know them in the West would be void under the Shari'a."⁴¹³ The notion of public policy in Shari'a is different from the Western countries since "Shari'a focus on collective while the West focus on individual rights."⁴¹⁴ Generally, arbitration agreement is a contract the parties agree to arbitrate future dispute or dispute not yet in presence. Considered under Gharar, arbitration agreement also falls under a category that depends on uncertain and unexpected event, which should be void according to Gharar doctrine. However, an agreement to arbitrate future dispute is accepted and enforced in Saudi Arabia in practice, "but arbitral award supporting aleatory contract or aleatory clauses, other than the arbitration clause itself, may be considered contrary to public policy."⁴¹⁵

⁴¹² Mark Wakim, *Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards In The Middle East*, New York International Law Review, Winter, 40-42 (2008).

⁴¹³ Kutty, *supra* note 405 at 606.

⁴¹⁴ *Id.* at 604.

⁴¹⁵ *Id.* at 606-607.

D. Conclusion

In the first phase, international arbitration was welcomed by Saudi Arabian government.⁴¹⁶ However, due to the outcome of the *Aramco* case in 1958, a drastic change of Saudi Arabian government's attitude toward international arbitration has made the conditions worse. Saudi Arabia perceives international arbitration as a threat to its national sovereignty and public policy in Saudi Arabia is in favor of refusal of an award rather than its recognition. As a result, the country's arbitration system remains the most uncertain jurisdiction in foreign award enforcement. The aftermath of *Aramco* case can show the Saudi Arabian government's attitude that it recognizes arbitration as a tool applied to protect the interests of Western corporations.⁴¹⁷ The view of Saudi Arabia toward international arbitration is one of the strictest in Islamic jurisprudence.

In respect of enforcement of an award, there are no specific laws dealing with the enforcement of foreign arbitral awards in Saudi Arabia. Thus, the provisions applicable to the enforcement of foreign judgments shall apply to foreign arbitral awards. According to Article 13 (G) of the Board of Grievances, the board has the authority to accept applications for the enforcement of foreign judgments in Saudi Arabia and most types of general commercial disputes and related enforcement of foreign arbitral awards are under the jurisdiction of the

⁴¹⁶ First attempt of Saudi Arabian government to use arbitration as a dispute settlement method is found in *Buraimi Oasis Case* in 1955. In the case, the arbitration agreement between the British Government, acting on behalf of the ruler of Abu Dhabi and His Highness the Sultan Said bin Taimur, and the Government of Saudi Arabia set up a tribunal to decide the dispute about the location of common border between Saudi Arabia and Abu Dhabi, and as to the sovereignty of the Buraimi Oasis. Pursuant to the arbitration agreement, the tribunal had to give due regard to all relevant considerations of law, face and equity, and in particular to the historical rights of the rulers in the area, the traditional loyalties, tribal organization and way of life of the inhabitants of the area; and the exercise of jurisdiction and other activities in the area.

⁴¹⁷ Y. AJ-Samaan, *The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia*, 9 ARAB L.Q. 217, 231 (1994).

Board of Grievances. The Board of Grievances will examine the case to make sure that the enforcement would not violate the Shari'a law principles. All documents to be submitted in this process must be in Arabic language and abide with the requirement. Consequently, the process usually takes very long time to complete.

In order to refuse the enforcement of arbitral award, Board of grievance will invoke 'public policy' exception in Article V (b) (2) of the New York Convention because it is not consistent with Islamic law as enforced in Saudi Arabia.

Public policy is of great importance to arbitration in Saudi Arabia, especially when it comes to the enforcement of an arbitral award, regardless of whether it is domestic or foreign. Public policy under Shari'a law differs from that applicable in Western world because the Shari'a is more complex and has more dimensions than public policy anywhere else in the world. Public policy under Shari'a has connection between God and humans with a rule that human is obligated to conform to other human beings humanitarily. It is something cultivated in every aspect of the Saudi nation's life. Altruistic behavior may be a good explanation for public policy under Shari'a law. It relates to "ritual acts of worship (ibadat) as well as with horizontal relations between human beings themselves known as mu'amalat like commercial transactions, family issues and so on."⁴¹⁸ All of these factors make public policy in Saudi Arabia inconsistent the practice in international arbitration.

Another drawback that makes public policy in Saudi Arabia hard to define is that there is no case precedent in Saudi Arabian legal system. As a result, there is a lack of clear position of which situation the court could refuse or set aside the award. In order to find the view point of

⁴¹⁸ Hunt Hanin and Andre Kahlmeyer, *The Sharia from Muhammad's Time to the Present Chapter: Tradition Sharia Law: Obligations to God and to Fellow Human Beings*, Islamic Law, 28 (2007).

Shari'a about certain issue, there is a hierarchy of sources in Shari'a, ranked according to their importance. However, different scholars and schools of thoughts still have different positions and views toward grounds for refusal. There is still no consensus in Shari'a related to public policy as grounds to set aside the award.

Enforcement of a foreign award under Saudi Arabian arbitration law faces numerous obstacles. In addition, there is no arbitration institution in Saudi Arabia and most importantly the heavy intervention from Saudi Arabian court in arbitration proceedings could make enforcement of foreign arbitral award almost impossible. State courts will intervene in most processes. For example, the judge confirms the nomination of the arbitrators and reviews the award before it is enforced. In practice, the award must be registered at the supervising court and the clerk of the judge's office will act as a secretary of arbitral tribunal and send out the notification to the parties.

A hindrance to arbitration in Saudi Arabia can delay the arbitration development, as investors may decide that the risk of legal proceedings would outweigh the benefits they will earn from their investment. Under the Saudi Arabian arbitration act, arbitration seems to be public rather than private process, unless the arbitrators decide otherwise, either at their own initiative or on the application of one of the parties. This concept is completely different from basic arbitration, as it aims to create the autonomy between the parties that can, essentially, customize what they think fits their transaction. However, Shari'a does not allow parties to select the governing law that would apply to an agreement. Considering the background of Saudi Arabian economy since the late 1970s, it is evident that Saudi Arabia began to reform its economy from oil industry to a more versatile industrial economy, with the intention to set up a

hydrocarbon-based petrochemical industry.⁴¹⁹ With the need of technology and expertise from foreign investors, Saudi Arabia should balance between the kingdom's economic needs and sovereignty protection by increasing the regulatory flexibility. This can make foreign investors feel more confident that they would be provided a fair and impartial dispute settlement mechanism by Saudi Arabia courts.

Actually, Saudi Arabia has been considering these issues. The reformation of arbitration in Saudi Arabia can be seen in the case whereby Saudi Arabia agreed to settle certain differences and claims relating to the Agreement on Guaranteed Private Investment and guarantees of Saudi public sector contracts and investments with the United States in 1975.⁴²⁰ In addition, Saudi Arabia joined the ICSID Convention in 1979, issued the Arbitration Act in 1983 and ratified the New York Convention in 1994. All of these actions clearly indicate that Saudi Arabia is willing to change its arbitration system to be more in keeping with international standards. It might take considerable time for the foreigners to start accepting this shift, since Saudi Arabian legal system is still deeply rooted in its traditional culture.

Furthermore, Saudi Arabia is a signatory to the 1983 Convention on judicial Co-operation between States of the Arab League ("Riyadh Convention") and the 1995 Protocol on the Enforcement of Judgment Letters Rogatory and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Cooperation Council ("GCC Protocol"), consisting UAE, Qatar, Bahrain, Oman and Kuwait. More importantly, a recent legal movement has taken place in Saudi Arabia, with the new law enactment in 2012. On April 16, 2012, Saudi Arabia enacted a new

⁴¹⁹ F. El Sheikh, *The Legal Regime of Foreign Private Investment in the Sudan and Saudi Arabia: A Case Study of Developing Countries*, 11 (2nd ed. 2003).

⁴²⁰ The Overseas Private Investment Corporation (OPIC) is currently no longer provides coverage in Saudi Arabia since 1995 due to failure of Saudi Arabia to comply with international labor standards.

arbitration law consisting 58 articles and the structure is based on the UNCITRAL Model Law. The new law removes many negative aspects of the previous arbitration act. It provides a clearer view of arbitration process in Saudi Arabia, which is now taken a more modern form, as it supports party autonomy by stipulating that the arbitral tribunal must apply the law and the process agreed between parties and the common practice applicable to the nature of transaction. Even the language in the arbitration process no longer needs to be Arabic, as it used to be the case. However, the entire process must still be in accordance with the Islamic principles of Shari'a and the public policy of Saudi Arabia. It is hoped that, with this new law, Saudi Arabia might get a step further towards the more modern system, without widening the public policy.

CHAPTER 6 ASIAN ARBITRABILITY AND PUBLIC POLICY IN INTERNATIONAL ARBITRATION

The 21st Century is the century of Asia, China in particular, due to its immense economic growth and development. Other Asian countries have also drawn attention of foreign businesses, as they offer a very competitive labor rates, lower rents, and are increasingly showing signs of increasing abilities and professionalism. With the increased economic interaction between Asia and the West, as well as within Asia itself, businesses are increasingly at risk of being sued in foreign jurisdictions, where their unfamiliarity with laws and procedural processes is high. In addition, Asian native language is the most difficult barrier for foreign businesses to overcome. Most of laws and regulations in Asian countries are stipulated in their own language without any officially translated versions. The courts also conduct judicial procedures in a non-English language. One of the most effective ways to avoid being sued in a non-familiar jurisdiction is to ensure that all commercial contracts that the business enters into contain a comprehensive and effective arbitration clause. Accordingly, arbitration in Asia starts to play a significant role in many commercial transactions. However, an arbitral award resulting from an arbitration agreement between parties still has no binding status and has yet to need judicial intervention from the local court to enforce the award. On the other hand, judicial intervention may be used to nullify an award in case such award is contrary to the fundamental law of local country.

Even though Asia has not had an expansive view toward arbitration, compared to Western countries, many countries have made an effort to lower their own sovereignty immunity by enforcing most of the foreign awards, provided that they are not contrary to the public policy. However, arbitration in Western countries has been developed long before it started to emerge in Asia. Consequently, arbitration in Asia may need more time to adapt and admit a concept of pro-

enforcement and narrow public policy. China and Hong Kong take a very modern view on the enforcement of foreign awards, which are enforced by the local courts most of the time. During the period between 2000 and 2008, Chinese courts refused to enforce foreign arbitral awards on public policy grounds were seven to eight times less often; however, none were approved by the Supreme People's Court of China.⁴²¹ Likewise, Hong Kong has an appealing statistic record of a pro-enforcement foreign arbitral award. While Thailand is making attempts to raise the standard of its arbitration to the international level, its 'public policy' exception to refuse the award enforcement is still broad and is likely to be raised as a state's protection.

6.1 China

Geographically, China is the third largest country, with a population of over one billion. Following the fall of the former Soviet Union, Chinese government became the largest and most powerful communist government in the world. A long sophisticated and abundant history of China spanned thousands of years of civilization. Traditionally, Feudalism, imperialism and imperial rule are good explanations for the legal system that prevailed in China in ancient times.⁴²² The emperor of China had exuberant power in executive, legislative and judicial branches. The empire was overthrown in 1911 and the Communist Party of China was

⁴²¹ According to the deputy Chief Justice (available at <http://www.rucil.com.cn/article/default.asp?id=798>), from the beginning of 2000 to the end of 2007, a total of 12 foreign arbitral awards were not recognized and enforced by the Supreme People's Court of China. Of those, none were refused on the public policy grounds; four were refused because the statute of limitations for application for enforcement had expired; five were refused because the concerned parties had not reached an arbitral agreement or the arbitration clause had been invalid; one was refused because the concerned party against which the arbitral award was enforced did not have any enforceable assets within China; and the remaining award was refused because the concerned party against which the arbitral award was enforced had not received the notice for appointment of arbitrators and arbitration procedure.

⁴²² Available at <http://faculty.cua.edu/fischer/ComparativeLaw2002/bauer/China-main.htm> (last visited May 2012).

established on July 1, 1921.⁴²³ In 1949, the Communist Party of China set up the People's Republic of China.

Chinese legal system is a complex combination of traditional Chinese approaches and Western influences.⁴²⁴ The People's Republic of China had adopted a Western-style legal code in the civil law tradition, with a significant influence of Soviet- system of socialist law.⁴²⁵ However, earlier traditions, stemming from Chinese history, have retained their influence, even to the present times.

With respect to arbitration law, China has gradually established a uniform arbitration system, as well as set up arbitration institutions. It had also regulated laws and regulations and arbitration rules with the intent to expand the scope of arbitration and encourage the reinforcement of its functions and form an arbitration system, including labor arbitration, economic arbitration and foreign-related arbitration. The most recently updated Arbitration Law of China is the People's Republic of China Arbitration Law 1994. It was promulgated by the Standing Committee of the National People's Congress of the People's Republic of China on August 31, 1994 and came into force on September 1, 1995.

Foreign-related arbitration in China applies in cases where a 'foreign interest' is in the dispute, but where the arbitral proceedings are governed by an arbitral institution that is

⁴²³ See <http://faculty.cua.edu/fischer/ComparativeLaw2002/bauer/China-main.htm> (last visited February 2012).

⁴²⁴ See http://en.wikipedia.org/wiki/Chinese_law (last visited May 2012).

⁴²⁵ See http://en.wikipedia.org/wiki/Chinese_law (last visited May 2012).

established in the People's Republic of China.⁴²⁶ Although the definition of 'foreign-related arbitration' has not been stipulated in Chinese Arbitration Law, the definition of the term can be found in China's other legal provisions.⁴²⁷

A famous arbitration institution executing foreign-related disputes in China is the China International Economic and Trade Arbitration Commission (CIETAC). CIETAC was established in 1956 with the task to resolve economic and trade disputes between a foreign entities and People's Republic of China entities.⁴²⁸ Chinese Arbitration Law requires foreign-related arbitral institutions to be organized and established by the China Chamber of International Commerce. Arbitration proceedings before CIETAC are administered by the CIETAC Arbitration Rules, which was updated in May 2005.

Similar to other countries, Chinese arbitration law allows the losing party in an arbitration to submit to the court to refuse the enforcement of an award. The Arbitration Law of the People's Republic of China and several other laws, regulations, judicial interpretations and guidance notes support the internationally accepted principles of arbitration, as a shield from judicial interference.⁴²⁹ Thus, the legislative framework in China is said to be supportive of arbitration. China acceded to the New York Convention on December 2, 1986 with a reciprocity reservation.

⁴²⁶ Ulrike Glück and Falk Lichtenstein, *Arbitration in the People's Republic of China*, available at http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_CHINA.pdf

⁴²⁷ Article 304 of the Opinions on Certain Questions Concerning the Application of the Civil Procedure Law, issued by the PRC Supreme People's Court on 14 July 1992, provides "a dispute involves a 'foreign interest' where: one or both parties are foreigners, foreign entities or foreign organisations; or the legal circumstances relating to the conclusion, modification or termination of a contractual relationship took place in a foreign country; or the subject matter of the dispute is located in a foreign country."

⁴²⁸ See <http://www.cietac.org/index.cms> (last visited April 2012).

⁴²⁹ Friven Yeoh and Yu Fu, *The People's Courts and Arbitration: A Snapshot of Recent Judicial Attitudes on Arbitrability and Enforcement*, *Journal of International Arbitration* 24(6), 636 (2007).

Therefore, a familiar mechanism by which awards are made in other New York Convention states are automatically enforced without their merits being reviewed by the local courts in China.

In the initial years of the Convention's adoption, China's enforcement record was inconsistent. The Supreme People's Court of China (SPC) was thus concerned and took steps to mitigate this issue by offering judges training on arbitration law, as well as setting up a centralized mechanism to review decisions to refuse enforcement.⁴³⁰ China's trend of enforcement of award is likely to have a bright future. The SPC's decisions below will explain how Chinese courts determined 'arbitrability and public policy.'

A. Historical Background

The first statutory rule about arbitration in China was the Provisional Executive Measure regarding the Conclusion of Contracts for Institutions State-owned Companies, and Cooperatives formed in 1950s. Even though it provided the provision allowing the parties to submit disputes to the Financial and Economic Council for resolution—not arbitration—most scholars recognize this rule as the first administrative rule for resolution about economic contract disputes in China.⁴³¹ Arbitration in China in the first period did not imply a real arbitration, but rather provided a resolution of disputes arising from administrative contracts.⁴³² When one of the parties was involved in economic activities, resolution of the dispute that would occur later was thus not based on parties' arbitration agreement, as no arbitration agreement was required. In

⁴³⁰ This topic will be discussed later in this chapter.

⁴³¹ Kang Baotian, *Conciliation and Arbitration of Economic Conflicts and Economic Judicatory*, 468 (1985).

⁴³² *The Arbitration Law of the People's Republic of China*, edited by the Civil Law Department of the Law Affairs Council of the Standing Committee of the National People's Congress and the Secretariat of the China's Economic and Trade Arbitration Commission, Beijing Law Press, 9 (1995).

addition, the economic conflict would be put out of the courts and administrative organization would decide the conflict based on the practice of the nation's economic plans.⁴³³

Arbitration in China became more concrete in October 1985, with the enactment of the Regulation governing the Procedure of the Arbitration Council for Economic Contracts. This regulation initiated the importance of arbitration in Chinese legal system by widening the arbitration scope beyond administrative arbitration and facilitating the arbitration procedure.⁴³⁴

With respect of international arbitration legislatives, the first regulation was Regulation concerning the Procedure Applicable to the Committee of Foreign-Related Trade Arbitration, enacted on March 31, 1956. The international arbitration at this time followed basic international principles. In 1988, the State Council of the People's Republic of China formed the International Economic and Trade Arbitration Commission and expanded the scope of arbitration jurisdiction to all conflicts related to international trade. Other important rules regarding international arbitration in China are the Law on Economic Contracts Involving Foreign Interests 1985, China's International Economic and Trade Arbitration Commission Arbitration Regulation 1988, China's Maritime Arbitration Commission Arbitration Regulation 1988, and China's Civil Procedure Law 1991.

The major reformation of arbitration law in China took place in 1994, as the Arbitration Law of China was enacted on August 31, 1994, and came into effect on September 1, 1995. However, the provision in the Arbitration Law of China mainly regulated arbitration in China,

⁴³³ Xiao Xun, *The Analysis of the Arbitration System: The Arbitration Procedure and the Arbitration Cases*, Beijing Chinese Law Press, 21 (1997).

⁴³⁴ Dominique T.C. Wang, *The Problem of the Arbitration Regarding Taiwan-Related Economic Conflicts in China and the Application of Law*, Scroll 22, no.2, The Law Symposium of National Taiwan University, 247 (1993).

whereby all domestic arbitration cases were completely detached from administrative organization. Moreover, arbitration commission was independent from administrative organs. The Arbitration Law of China also supported party autonomy by giving the right to parties to select arbitration or litigation and the single ruling system. During the period between 1995 and 2005, the SPC issued a number of individual circulars and replies on various issues concerning the implementation of the Arbitration Law 1994. In 2006, the SPC promulgated a full interpretation on the application of the Arbitration Law 1994,⁴³⁵ prior to which, the Civil Procedure Law 1991 constituted procedural principles governing enforcement of arbitral awards in general and the arbitration of disputes involving foreign parties in particular.⁴³⁶ There were also some other judicial guidelines from the SPC before 1994 concerning matters related to arbitration.⁴³⁷

Another legal provision related to foreign arbitration award in China is the New York Convention. Since China became a signatory of the New York Convention in 1986, the New York Convention is thus another source to consider in foreign-related arbitral award system.

B. Legal Framework

The concept of public policy in China was introduced by Article V(2)(b) of the New York Convention, in accordance with the Notice on Implementation of China's Accession to the

⁴³⁵ The Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Arbitration Law of the People's Republic of China was adopted by the Judicial Committee of the Supreme People's Court on December 26, 2005 and promulgated on August 23, 2006, effective as of September 8, 2006.

⁴³⁶ Chapter 28 of the Civil Procedure Law 1991 deals specifically with arbitration involving foreign parties, in particular Article 257-261.

⁴³⁷ The Reply of the SPC on Which Local Court Should an Application for Enforcement of Arbitral Award Be Put Forward was issued on January 17, 1985.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴³⁸ Hence, when Chinese courts refuse the enforcement of arbitral award, they will refer explicitly to Article V(2)(b) of the New York Convention.

When it comes to public policy exception in arbitration, Chinese domestic legislation adopted the term ‘social and public interest’ rather than ‘public policy’.⁴³⁹ The concept of ‘social and public interest’ appears in several other bodies of legislation, such as the Law of the People’s Republic of China on Economic Contracts Involving Foreign Interests,⁴⁴⁰ the Contract Law,⁴⁴¹ the Foreign Trade Law⁴⁴² and the Civil Procedure Law⁴⁴³ as one of the ground for refusing the enforcement of arbitral awards. However, none of them define the term ‘social and public interest’. For example, according to the Agreement Between Mainland China and Hong Kong SAR Concerning the Mutual Recognition and Enforcement of Arbitration Awards,⁴⁴⁴ if a court in the mainland decides that it is against the social public interests of the mainland to enforce an arbitral award rendered in Hong Kong, the court of mainland China may refuse to enforce the arbitral award. According to the Deputy Director of the Enforcement Bureau of the Supreme People’s Court of China, “‘social public interests’ is a concept that falls within the political

⁴³⁸ The Notice was issued by the Supreme People’s Court of China (SPC) on April 10, 1987.

⁴³⁹ Lanfang Fei, *Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach*, *Arbitration International Journal*, 26(2), 303 (2010).

⁴⁴⁰ Effective as of July 1, 1985 and repealed on October 1, 1999, Article 4 and 9.

⁴⁴¹ Effective as of October 1, 1999, Article 7.

⁴⁴² Effective as of July 1, 2004, Article 16.

⁴⁴³ Article 217 and 260 of the Civil Procedure Law 1991 provided the grounds for refusing enforcement of an arbitral award. Article 217 and 260 were later superseded by the Civil Procedure Law 2007, Article 213 and 258, respectively.

⁴⁴⁴ Available at http://www.law-lib.com/law/law_view.asp?id=13 (last visited March 2012).

domain rather a term of law....For a foreign-related or foreign arbitral award, social public interests are the same as the State's sovereign interests."⁴⁴⁵

The Arbitration Law of China 1994 also applied the principle of 'social and public interest' in the Civil Procedure Law 1991 by confirming the social and public interest as an exception to the enforcement of domestic and foreign-related arbitral awards in Article 63 and Article 71. In addition, Article 58 mentioned 'public interest' as one of a grounds for the court to set aside the award in Paragraph 2 as well as Article 70.

Article 58 of the Arbitration Law 1994 authorizes Chinese court to set aside an arbitral award if the court determines that the arbitration award violates public interest. Article 63 refers to the second paragraph of Article 217 of the Civil Procedure Law 1991 to disallow the award based on 'social and public interest' contradiction.⁴⁴⁶

In a matter of foreign-related award, Article 70 and 71 allow Chinese court to set aside and disallow the award if there are any circumstances listed in the first paragraph of Article 260 of the Civil Procedure Law 1991. Article 70 and 71 do not include the context of second paragraph of Article 260, which comes into force when the aim is to set aside or refuse to

⁴⁴⁵ Available at <http://cn.cietac.org/TheoryResearch/readbookcontent.asp?cgid=124>

⁴⁴⁶ Article 58, paragraph 2 of the Arbitration Law 1994 provides "If the people's court determines that the arbitration award violates the public interest, it shall rule to set aside the award."; Article 63 provides "If the party against whom the enforcement is sought presents evidence which proves that the arbitration award involves one of the circumstances set forth in the second paragraph of Article 217 of the Civil Procedure Law, the people's court shall, after examination and verification by a collegial panel formed by the people's court, rule to disallow the award."; First paragraph of Article 217 of the Civil Procedure Law 1991 provides "If the people's court determines that the execution of the arbitral award would contradict the social and public interest, the people's court shall order to not execute the award."

enforce a foreign-related award based on the social and public interest grounds.⁴⁴⁷ Thus, the provision applied to set aside or refuse the foreign-related award in China on the public policy grounds will be executed according to Article V (2)(b) of the New York Convention.

The Arbitration Law of China 1994 and the Civil Procedure Law did not provide any further guidance on how to interpret or apply the concept of social and public interest contained therein. In 2004, the SPC issued a document called ‘Explanations on and Answer to Practical Questions in the Trial of Foreign-related Commercial and Maritime Cases (No.1)’, whereby Article 43 attempts to define the scope of ‘social and public interest’, which would only be justified where the fundamental principles of Chinese law, the sovereignty or security of the state, or customs, traditions or fundamental moral standards of China were violated.⁴⁴⁸ However, although this explanation of social and public interest was designed for the application of foreign law, it might be used as a reference for courts when ruling on cases related to the enforcement of international arbitral award.⁴⁴⁹

⁴⁴⁷ Article 70 of the Arbitration Law 199 provides “If a party presents evidence which proves that a foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article 260 of the Civil Procedure Law, the people courts shall after examination and verification by a collegial panel formed by the people’s court, rule to set aside the award.”; Article 71 provides “If the party against whom the enforcement is sought presents evidence which proves that the foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article 260 of the Civil Procedure Law, the people’s court shall after examination and verification by a collegial panel formed by the people’s court, rule to disallow the enforcement.”; Second paragraph of Article 260 of the Civil Procedure Law 1991 provides “If the people’s court determines that the execution of the award is against the social and public interest, it shall order not to execute the arbitral award.”

⁴⁴⁸ Article 43 of the Explanations on and Answers to Practical Questions in Trial of Foreign-related Commercial and Maritime Cases (No.1) issued by the SPC on April 8, 2004.

⁴⁴⁹ Friven Yeoh and Yu Fu, *The People’s Courts and Arbitration: a Snapshot of recent Judicial Attitudes on Arbitrability and Enforcement*, *Journal of International Arbitration*, 24(6), 647 (2007).

C. Arbitrability and Public Policy in China

Similar to general arbitrability in other countries, marital, adoption, guardianship, support and succession disputes cannot be arbitrated.⁴⁵⁰

In *Shenzhen Baosheng Jinggao Environmental Development Co.; Ltd v. Hefei City Appearance Environmental Hygiene Bureau*,⁴⁵¹ Hefei, who represented the interest of state, imported a consignment of malfunctioning equipment. A dispute subsequently occurred and the arbitral award was issued and brought to the Higher People's Court of Anhui, which held that the award should not be enforced, as the enforcement would cause great damage to the state assets. The SPC disagreed with the lower court's decision, insisting that violating public interest actually meant 'violating the fundamental interests of China'. The fact that the imported machine was ineffective did not suit this standard and therefore did not lead to the refusal.

Likewise, in *Hengjin (HK) Cereal & Oil Food Co. Ltd. v. Anhui Cereal & Oil Food Import & Export Co. (Group)*,⁴⁵² the SPC clearly refused the decision of the Intermediate People's Court of Anhui, stating that the enforcement of the award would not only cause damage to the interests of Anhui Cereal & Oil Food, but would also be contrary to the legislative intent of the relevant PRC laws, as well as the basic principles of voluntariness, fairness, consideration and good faith in the conduct of all civil and commercial activities. In addition, the SPC asserted

⁴⁵⁰ The Arbitration Law 1994, Article 3.

⁴⁵¹ *Shenzhen Baosheng Jinggao Environemtnal Development Co. Ltd. v. Hefei City Appearance Environment Hygiene Bureau* [2005] Min Si Ta Zi [Civil Court Ruling] No. 45, SPC reply, issued on January 23, 2006, reprinted in 12(1) E'xiang Wan (ed.), *Guide on Foreign-Related Commercial and Maritime Trial*, 46-50 (2006).

⁴⁵² *Hengjin (HK) Cereal & Oil Food Co. Ltd. v. Anhui Cereal & Oil Food Import & Export Co. (Group)* [2003] Min Si Ta Zi [Civil Court Ruling] No.9, SPC reply, issued on November 14, 2003, reprinted in 7(1) E'xiang Wan (ed.), *Guide on Foreign-Related Commercial and Maritime Trial*, 36-40 (2003).

that infringing upon the interests of state-owned enterprises does not necessarily lead to the diminishing of the public interest, and therefore public policy could not be applied in this case.

In *ED&F Man (HK) v. China Sugar and Wine Company (Group)*,⁴⁵³ the award of the London Sugar Association on August 6, 2001 was refused by the Beijing Higher People's Court due to the public policy conflict. Two parties had entered into a contract in late 1994, whereby ED&F agreed to sell raw sugar to China Sugar. Along with the contract, ED&F also opened an account with the New York Mercantile Exchange for the purpose of using the 100,000 tons of raw sugar to speculate in futures (a form of financial derivatives contract). China Sugar was aware of this and agreed to the trading in the futures market. When China Sugar failed to make a payment, ED&F stopped delivery of goods and proceeded to terminate the contract. ED&F then submitted the dispute before the Sugar Association of London, on the grounds that China Sugar breached the contract and demanded compensation from China Sugar. An award was issued in favor of ED&F, which subsequently applied for the recognition and enforcement of the award with the resistance of China Sugar. China Sugar argued that the contract was in violation of mandatory laws of China, which prohibit Chinese companies from engaging in futures trading overseas without the approval of Chinese authorities.

The court reasoned that the parties' purpose for entering into the contract for the sale of sugar was to obtain a speculative profit from the sugar futures market. As Chinese law prohibits Chinese companies from being involved in foreign futures investment, enforcing the award would conflict with the futures and exchange regulations of China. However, the SPC agreed

⁴⁵³ *ED&F Man (HK) v. China Sugar and Wine Company (Group)* [2003] Min Si Ta Zi [Civil Court Ruling] No.3, SPC reply, issued on July 1, 2003, reprinted in 7(1) E'xiang Wan (ed.), *Guide on Foreign-Related Commercial and Maritime Trial*, 12-17 (2003).

with the Beijing Higher People's Court in the part that the action of China Sugar and Wine Group Co. involving in a foreign futures transaction was invalid in accordance with the Chinese law, but disagreed with the part of violating China's public policy. In its ruling, the SPC noted that the contract should indeed have been held invalid as it was in breach of mandatory Chinese laws. Nonetheless, a breach of mandatory provisions of Chinese law did not completely equate with a breach of public policy so as to justify non-enforcement under Article V(2)(b) of the New York Convention. The London award, accordingly, should be recognized and enforced because violation of mandatory law did not contain violation of public policy.

Similarly, in *Mitsui Co. (Japan) v. Hainan Textile Industry General Co.*,⁴⁵⁴ the Hainan Higher Court determined that Japanese Payment Agreement, which was not ratified by the State Administration of Foreign Exchange of China, was invalid, pursuant to Chinese law. Therefore, the award was deemed contrary to public policy of China. In this case, Hainan Textile had entered into a loan repayment agreement with Mitsui to repay, on behalf of a third party, certain foreign loans advanced by Mitsui to that third party. Repayments were to be made in Japanese Yen. Hainan failed to comply with the contractual obligation and Mitsui brought arbitration proceedings before the Arbitration Institution of Stockholm Chamber of Commerce. An award was finally issued in favor of Mitsui. Hainan Textile resisted the award enforcement to the Hainan Higher People's Court on the grounds that the award was made based on the action that disregarded of Chinese law because Chinese law, which was the law governing the agreement, required the relevant party to seek approval of the authority in charge of foreign exchange.

⁴⁵⁴ *Mitsui Co. (Japan) v. Hainan Textile Industry General Co.* [2001] Min Si Ta Zi [Civil Court Ruling] No. 12, SPC reply, issued on July 13, 2005, reprinted in 11(2) E'xiang Wan (ed.), *Guide on Foreign-Related Commercial and Maritime Trial*, 109-112 (2006).

Without such approval, the agreement would not have become effective or would simply be invalid. The award that was made from invalid agreement should thus not be enforced. The Hainan Higher People's Court agreed with Hainan Textile's arguments and considered that the award was in conflict with public policy of China.

The SPC dissented with the Hainan Higher Court's decision and held that, even though the action of the respondent's non-payment of debt to the applicant was illegal according to Chinese law because it violated the rule of the administrative regulation or department ordinance, such violations did not necessarily constitute a violation of the public policy of the People's Republic of China. On that basis, the application to refuse recognition and enforcement was rejected.

Chinese court seems to narrowly interpret public policy, as even though violating state interest will not be considered as public policy violation in China, public policy conflict in China has to be something affecting the fundamental interest of large area of population. In addition, we can assume that violation of Chinese mandatory laws, even it was illegal according to those laws, will not be considered a public policy contravention. Nonetheless, the above cases indicate that China is likely to open the door to international arbitration. However, the SPC court tends to recognize and enforce the award in the Western style, while the lower courts favor to extend the area of public policy in China. However, foreign party is now ensured of the interpretation of public policy by Chinese courts since an important judicial notice, called 'Notice of the Supreme People's Court regarding Several Issues to the People's Court's Handling of Foreign-related and Foreign Arbitration Matters', requires any court seeking to refuse enforcement of foreign-related or foreign award, regardless of grounds, must first obtain approval from the superior court in the same jurisdiction. A purpose of this official notice issuance is essentially to prevent the lower

courts from denying the enforcement of foreign or foreign-related awards due to the violation of public policy without the prior affirmation of the SPC.

Although Chinese court is showing signs of defining the term 'public policy' in international way, there are several cases where the SPC refused to recognize or enforce the foreign award. In the famous case *American Production Co. and Tom Flight Co. v. Chinese Women's travel Agency (Heavy Metal Music Case)*,⁴⁵⁵ the American Production Company and Tom Flight Company entered into an agreement with American actors to perform in China. In an agreement, there is one section stipulating that 'Actors should make every effort to comply with Chinese regulations and policies and secure that the performance is recreational.' Moreover, 'China has the right to examine and approve the details of the actors' performance'. Later on December 23, 1992, the two American companies, based on the former agreement, entered into a contract for performance in China with the Chinese Women's Travel Agency. The contract between the two American companies and the Chinese Women's Travel Agency contained the rules regarding the South American Band's 20 concert performances in China from January 25, 1993 to February 28, 1993. As the performance tour was ongoing and the band played heavy metal songs without any prior approval from the Ministry of Culture, the performance was subsequently banned. The dispute was brought to arbitral tribunal by the American Production Company and Tom Flight Company against the Chinese Women's Travel Agency, and the award was issued in favor of the two American companies and brought to the Chinese courts for enforcement of the award. The case was eventually brought before the SPC, which refused the award enforcement, reasoning that the performance of heavy metal songs was not suitable for China's national conditions and

⁴⁵⁵ *American Production Co. and Tom Flight Co. v. Chinese Women's travel Agency*, Ta [1997] No. 35, SPC reply, issued on December 26, 1997.

was contrary to Chinese social and public interests, based on the China Civil Procedure Law 1991. The SPC concluded that the American band did in fact breach the contract by not complying with the rule in the contract. Therefore, the arbitral award could not be enforced without damaging China's social public interests.

The SPC's decision in this case was different from those described above. This case does not affect only one group of people or just one government entity, as a large number of Chinese citizens would be affected if the American band performed the concert and the SPC believed that the public moral would be thus disturbed. However, since this took place in 1997, the moral issue may be changed now, since Chinese society is presently more open and heavy metal music may not be an issue of public policy anymore. We can thus summarize that the Chinese court will consider any matter regarding public moral as a public policy, which will make an award unenforceable in China.

In *Hemofarm DD, MAG International Trade Company, Liechtenstein Suramo Media Co. Ltd. v. Jinan Yongning Pharmaceutical Co. Ltd.*,⁴⁵⁶ all parties executed a joint venture contract with a purpose to establish Jinan-Hemofarm Pharmaceutical Co. Ltd. (Jinan-Hemofarm). Under the contract, the parties agreed to submit all future disputes to the International Chamber of Commerce (ICC). When a dispute subsequently arose, Yongning filed a lawsuit in the Jinan Intermediate People's Court (IPC) on August 6, 2002 against Jinan-Hemofarm for rent and the refund of a deposit of a rental property. Jinan-Hemofarm insisted to take the case to the ICC, as agreed. The Jinan IPC accepted the case and reasoned that the dispute between parties was out of the scope of lease of assets because Jinan-Hemofarm was not party to the joint venture contract.

⁴⁵⁶ *Hemofarm DD, MAG International Trade Co., Liechtenstein Suramo Media Co. Ltd. v. Jinan Yongning Pharmaceutical Co. Ltd.* [2008] Min Si Ta Zi [Civil Court Ruling] No.11, SPC reply, issued on June 2, 2008.

During the court proceedings, Yongning applied for property preservation and security, and the court ordered the seizure of part of bank deposits and products of the joint venture, as Yongning requested. Yongning eventually won the case and the Jinan IPC ordered Jinan-Hemofarm to compensate all the rent and return all the parts of rental property.

On September 3, 2004, Hemofarm DD, MAG International Trade Company, Suramo Media Co. Ltd., as co-applicants, applied to the ICC for arbitration by alleging that Yongning had violated its obligations under the contract and Chinese law by referring the disputes between Yongning and Jinan-Hemofarm to the Jinan IPC. They further alleged that the court's order submitted by Yongning for preservation of property affected Jinan-Hemofarm's business operation, which subsequently lead to the damage of US\$10,764,514 for investment losses, more than US\$2 billion for lost profits, and cost from the Chinese court proceedings. The ICC panel agreed with three co-applicants that the dispute should be referred to ICC, as agreed in the joint venture contract, and awarded damages to the co-applicants.

The three co-applicants subsequently brought the award to the Jinan IPC to be enforced, while Yongning applied for a refusal of the enforcement. As a result, the Jinan IPC refused to enforce the award, stating that the arbitral award went beyond the scope of the arbitration agreement and violated the public policy of China by dealing with issues of preserving property and the burden of litigation costs, over which the Chinese courts have exclusive jurisdiction. The case was subsequently filed to the SPC, which upheld the decision of the Jinan IPC. The arbitral award by the ICC had exceeded the scope of the arbitration agreement because the arbitration agreement in the joint venture contract could only be binding in investment disputes between the investors (the contracting parties), and was thus not applicable to the leasing dispute between Yongning and the joint venture itself. In addition, the ICC, hearing issues concerning the lease

contract between Yongning and Jinan-Hemofarm after Chinese courts had already made effective rulings for these matters, constituted a violation of China's judicial sovereignty and the jurisdiction of the courts in China. Thus, the arbitral award should be refused the enforcement pursuant to Article V(1)(c) and V(2)(b) of the New York Convention.

The Hemofarm case was the first occasion on which an arbitral award had violated China's judicial sovereignty and the jurisdiction of Chinese courts. We can summarize from this case that China considers the judicial sovereignty of the state in the scope of public policy. Preservation of property is an exclusive authority of the court, which cannot be relinquished to arbitration. Even though arbitration offers the freedom to the parties to govern their dispute settlement method, an arbitration agreement is only binding between the parties of the contract, thus excluding has all entities that have only a matter relating to the dispute. Any matter that goes beyond the scope of an agreement is thus under the court's jurisdiction.

Based on the SPC's cases, it is evident that public policy in China is related to the fundamental principles. Even violation of some mandatory laws will not constitute as public policy conflict, e.g. export and import control laws, exchange control regulations and price laws.⁴⁵⁷ There is an indication that antitrust law will be arbitrable in China in the manner adopted in the Western countries because China is likely to interpret that only a 'real' fundamental law violation will be considered as a public policy. In addition, only fundamental economic interests of the state will be deemed as public policy matter. Even the loss of state-owned assets does not violate the public policy.

⁴⁵⁷ Fei, *supra* note 439 at 310.

In the case of arbitrability of tortious claims, Article 29 of the Civil Procedure Law provides that “a lawsuit brought on a tortious act shall be under the jurisdiction of the People’s Court of the place where the tortious is committed or where the defendant has his domicile.” The provision indicates that a tortious claim is a matter for the court jurisdiction only. The issue was considered by the SPC recently in *Jilin Songmei Acetic Acid Ltd. V. WP International Group Inc.*⁴⁵⁸ and *Jilin Chemical Industrial Co. Ltd. v. WP International Group Inc.*⁴⁵⁹ Jilin Chemical entered in to a contract with WP International Group Inc. to perform a co-operative joint venture called Jilin Songmei Acid Ltd. The parties chose to submit all disputes arising out of or in connection with contract to CIETAC for arbitration. When a dispute arose, WP brought an action in trot before the Jilin High Court against both Jilin Chemical and the joint venture company, Jilin Songmei, alleging that, in the course of the joint venture’s operations, Jilin Chemical an Jilin Songmei conspired to defraud WP by manipulating the raw material price and making a false declaration of losses. In this case, the Jilin High Court had no jurisdiction over the dispute because the arbitration agreement was only binding to WP and Jilin Chemical, who were the contracting parties. Thus, as Jilin Chemical was the only proper defendant, the Jilin High Court rejected the jurisdiction agreement. The case was subsequently filed to the SPC.

The SPC confirmed the jurisdiction denial of the Jilin High court judgment, reasoning that the right of WP to bring a tort action against Jilin Songmei to the court was acceptable. Even though Jilin Songmei was not a party to an arbitration agreement, the alleged tort resulted from the joint acts of Jilin Songmei and Jilin Chemical. Thus, the arbitration clause could not have

⁴⁵⁸ *Jilin Songmei Acetic Acid Ltd. V. WP International Group Inc.* [2005] Min Si Zhong Zi No. 1, SPC ruling, May 10, 2005.

⁴⁵⁹ *Jilin Chemical Industrial Co.Ltd. v. WP International Group Inc.* [2005] Min Si Zhong Zi No. 16, SPC ruling, May 10,2005.

prevented an action in tort before the People's Court in view of Article 29 of the Civil Procedural Law.⁴⁶⁰

Jilin Chemical case seems to expand the scope of Article 29 of the Civil Procedure Law. Considered superficially, the SPC's judgment of *Hemofarm* case and Jilin case were inconsistent, as in both cases, –one of the defendants was not a party to an arbitration agreement and the judgment or the award has been given to expand to include them. The different point is the lower level decision was the decision of arbitrators in Hemofarm, while it was the High Court's in Jilin Chemical. The SPC aims to retain jurisdiction for the judicial body of the state. Since an arbitral award in Hemofarm case was out of the scope of the arbitration agreement, the award was refused accordingly. In contrast, it was a judgment of the High Court in Jilin Chemical which decided over the tort claim beyond the party of an arbitration agreement, the SPC thus upheld the lower court's decision.

Jilin Chemical case may thus raise the question of whether Article 29 of the Civil Procedure Law allows tortious claim to be arbitrable. Based on the decision of the SPC, this does not seem to be the case. However, it now has been further clarified by the Minutes of the Second National Work Conference on the Trial of Foreign-related Commercial and Maritime Cases⁴⁶¹ that, when it comes to an arbitration agreement regarding a foreign-related commercial contract, any dispute arising out of or in connection with the contract shall be submitted to arbitration. If the plaintiff files a lawsuit with the People's Court for which the cause of action is tort arising in

⁴⁶⁰ Kong Yuan, *Notes: Recent Cases Relating to Arbitration in China*, 2 ASIAN INT'L ARB.J. 179(2), 182 (2006).

⁴⁶¹ The Minutes of the Second National Work Conference on the Trial of Foreign-related Commercial and Maritime Cases, published by the SPC on November 10, 2006.

the execution and performance of the contract, the People's Court shall not take jurisdiction.⁴⁶² Following the Jilin Chemical case, the SPC has clearly clarified that Article 29 does not prohibit the pursuit of any tortious claim through arbitration where a valid arbitration agreement exists between all the relevant parties in dispute. Accordingly, tortious claim can be submitted to arbitration in China.

D. Conclusion

The unpredictability and complexity of the Chinese court system had led many foreign parties conducting business with Chinese entities to choose arbitration over litigation. China has taken great strides in establishing the legal infrastructure to support a feasible arbitration regime. Since the adoption of the New York Convention, China seems to be willing to create a legal environment that would be favorable for foreign investment. An obvious sign of China's intention to open its arms to arbitration is that, from 2000 to the end of 2008, in only about fifteen cases out of many applications the decision was made to refuse enforcement.⁴⁶³ Nevertheless, no foreign award had been vacated on the grounds of social and public interest until the final ruling in *Hemofarm* case in 2008.

In addition, China appears to reflect a pro-enforcement bias to a great extent by construing 'public policy' narrowly, as in Western countries. The term 'public' (large number of citizens) in China appears not to be sufficient to deem the case contrary to public policy, which

⁴⁶² Article 7 of the Minutes of the Second National Work Conference on the Trial of Foreign-related Commercial and Maritime Cases.

⁴⁶³ Remarks of Justice Wan E'Xiang, Vice President of the SPC, at Academic Conference Celebrating the 50th Anniversary of the New York Convention, Beijing, June 6, 2008. Also see Nadia Darwazeh and Friven Yeoh, *Recognition and Enforcement of Awards Under the New York Convention*, *Journal of International Arbitration* 25(6),840 (2008).

has yet to affect the fundamental principles of China. From the cases, it appears that administrative regulations do not constitute public policy. In fact, even a violation of a compulsory provision in an administrative regulation does not lead to violation of public policy. In order to justify refusal of enforcement, the SPC has determined in a number of cases that breach of mandatory provisions of Chinese law does not equate with public policy violation. The SPC has concluded that only in very serious cases would this ground be applied. A violation of public policy seems to require proof of an affront to the higher 'social public interest' of China as a whole, whether it relates to the moral order of the country or the sovereignty of the Chinese courts.

The nation's sentiment might fall within the scope of public policy, like in the *Heavy Metal Music* case, where the enforcement of an arbitral award was denied on the grounds of social and public interest principally. This may be because *Heavy Metal Music* was considered unacceptable in Chinese society in that period of time. Moreover, the judicial sovereignty of the state is included within the scope of public policy. Perhaps, a reason behind this Chinese stance is that the state might want to preserve this exclusive power to the judicial authority, since Chinese political system is based on communist and socialist regime, whereby the government is the hub of the country and all production is controlled by the state.

Chinese lower courts have a strong tendency to give public policy a wider interpretation when dealing with challenges to the enforcement of international arbitral awards, with a belief of local protectionism. While no one can guarantee an enforcement of foreign arbitral award, the issue has much wider-reaching implications. The SPC is now likely to rule against the lower court's decision. However, in international practice, the courts are discouraged from applying the public policy provision in proceedings for setting aside or enforcing foreign-related awards.

In addition, Chinese law requires an approval from the SPC whenever the lower courts refuse the enforcement of an award. Seemingly, the SPC have an effort to minimize interference with the merits of a foreign-related award and realizes that only in extreme cases the foreign-related award should be set aside on the grounds of a violation of social and public interest. Hopefully, the concept of public policy in China, as applied to foreign arbitral award, will be developed further, as China expects its economy to continue its global trend.

6.2 Hong Kong

Hong Kong is recognized as one of the world's leading commercial centers, where significant number of financial and business transactions is conducted daily. Hence, it is no wonder that Hong Kong is an attractive country for foreign investors. Factors that make Hong Kong the international financial and commercial capital of Asia are an excellent infrastructure, including a good transport system, good accommodation and telecommunications, and one of the most efficient airports in the world. In addition, as Chinese (Cantonese) and English are official languages of Hong Kong, this is another advantage for foreign party. From legal perspective, Hong Kong is a popular place for foreign parties because Hong Kong has maintained its well-respected common law legal system even after the handover from the United Kingdom to China in 1997. In addition, Hong Kong courts have a good record of pro-enforcement in enforcing foreign arbitration awards, in accordance with the New York Convention. The Hong Kong Courts tend to take a non-intervening approach toward international arbitrations.⁴⁶⁴ Consequently, as arbitration-friendly venue, Hong Kong has attracted Western business.

⁴⁶⁴ Benjamin P. Fishburne and Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. Pa. J. Int'l Econ. L., 297 (1997).

The Hong Kong International Arbitration Centre (HKIAC), established in 1996, is the main arbitration institution in Hong Kong. When the parties have no designated arbitrators in Hong Kong, the HKIAC will serve as a default appointing authority, according to the Arbitration Ordinance of Hong Kong.

A. Historical Background

Hong Kong arbitration law was influenced by the English statutory provisions governing commercial arbitration.⁴⁶⁵ Arbitration law was initially subject to ‘special case’ or ‘case-stated’ procedure, which could coerce an arbitrator to submit a point of law for judicial determination.⁴⁶⁶ Thus, arbitral awards in Hong Kong, akin to those in England, were subject to the review on the legal merits by the local courts.

In 1982, Hong Kong enacted a new Arbitration Ordinance as a part of its legal reform. The 1982 Arbitration Ordinance⁴⁶⁷ adopted many features fascinated by the international legal and business communities. The 1982 Arbitration Ordinance distinguished domestic arbitrations and international arbitrations and listed conciliation as an alternative means of dispute resolution for the first time.⁴⁶⁸ The 1982 Arbitration Ordinance also represented the beginning of Hong Kong's movement away from English arbitration practice. On the other hand, the 1982 Arbitration Ordinance retained the parties' right to appeal an arbitration award to a court

⁴⁶⁵ Kenneth R. Simmonds and Brian H.W. Hill, *Arbitration Law in Hong Kong: Commercial Arbitration Law in Asia and the Pacific*, Int'l Com. Arb. No. 2.3, 1 (1990).

⁴⁶⁶ W. Laurence Craig et al., *Hong Kong Law*, Int'l Com. Arb. No. 5, § 34.01, 595 (1990).

⁴⁶⁷ Hong Kong Arbitration Ordinance 1982, Cap. 341 (H.K.).

⁴⁶⁸ *Id.* Section 20.

for judicial review and the jurisdiction of the court to determine any question of law arising in an arbitration.⁴⁶⁹ However, the domestic regime of arbitration law was based on the English Arbitration Acts 1950, 1975, 1979 and 1996. The provisions of the 1982 Arbitration Ordinance were applied to domestic arbitrations in Hong Kong until the arbitration law reform in 2011.⁴⁷⁰

The next generation of arbitration law reform in Hong Kong was marked by the Arbitration ordinance 1990,⁴⁷¹ which adopted the UNCITRAL Model law to be applied for international arbitrations, while the domestic part was still retained from the previous statutes.

A very recent movement pertaining to the arbitration in Hong Kong was an enactment of the new Arbitration Ordinance (Cap.609) on June 1, 2011. Any arbitral proceedings that occurred prior to the new Arbitration Ordinance became effective will thus be governed by the old Cap. 341. The Cap. 609 removed the distinction between domestic and international arbitrations, which exists under the current Cap. 34. The new Cap. 609 provides a uniform regime based on UNCITRAL Model Law and is more user-friendly, as it effectively extends the application of the UNCITRAL Model Law to all arbitrations in Hong Kong.⁴⁷²

⁴⁶⁹ *Id.* Section 23 A.

⁴⁷⁰ Arbitration in Hong Kong now is governed under the same provisions under the Arbitration Ordinance Cap. 609.

⁴⁷¹ Hong Kong Arbitration Ordinance, 1990, Cap. 341 (H.K.); Cap. 341 was subsequently amended by the Arbitration (Amendment) Ordinance 1996, the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance 1997, the Arbitration (Amendment) Ordinance 2000 and the Arbitration (Amendment) (No.2) Ordinance. On June 1, 2011, Hong Kong passed a new Arbitration Ordinance (Cap. 609), which replaces the existing Arbitration Ordinance (Cap. 341).

⁴⁷² See <http://www.tannerdewitt.com/media/publications/hong-kong-new-arbitration-ordinance.php>.

In 1977, Hong Kong became a party to the New York Convention, through the United Kingdom.⁴⁷³ There are two eras of Hong Kong's application toward the New York Convention. The first period conceded with Hong Kong being a dependent territory of the United Kingdom, which had ratified the New York Convention on September 24, 1975 and extended the application of the New York Convention to its dependent territories on April 21, 1977. As a colonized territory of the United Kingdom, the New York Convention was accordingly applied to Hong Kong from April 21, 1977 to June 30, 1997, when Hong Kong's sovereignty was converted to China.⁴⁷⁴

The New York Convention is still applicable in Hong Kong as a result of China's membership of the Convention.⁴⁷⁵ Since China has made reciprocity and commerciality reservations, these reservations also apply to Hong Kong's application of the Convention. However, as Hong Kong is currently under Chinese's sovereignty, the New York Convention is no longer applicable to the enforcement of arbitral awards between Hong Kong and China because these awards are no longer considered 'foreign' awards made in another member state.⁴⁷⁶ In other words, an award made in China can be enforced in Hong Kong and vice versa, a

⁴⁷³ Subject to the reciprocity reservation, the United Kingdom acceded to the New York Convention on behalf of itself in 1975 and on behalf of Hong Kong in 1977. See *New York Convention: Contracting States and Reservations*, Int'l Com. Arb. pt. VI.4, VI.8 (July 1996).

⁴⁷⁴ Hong Kong was reverted to Chinese sovereignty on July 1, 1997.

⁴⁷⁵ China filed an instrument extending the application of the New York Convention to Hong Kong with the Secretary General of the United Nations on June 6, 1997. See www.cisg.law.pace.edu/cisg/countries/cntries-China.html

⁴⁷⁶ The award application between China and Hong Kong is under Arrangement Concerning the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region signed on June 21, 1999.

Hong Kong award can be enforced in China.

B. Legal Framework

The ‘public policy’ concept on foreign arbitral award was described in Section 40(E) and Section 44(3) of the Arbitration Ordinance Cap.341. Section 40(E) deals with the refusal of the award enforcement in Mainland China,⁴⁷⁷ and Section 44(3) pertains to the foreign award. Section 44(3) provides that “the enforcement of foreign award could be refused if it is not capable of settlement by arbitration, or if it would be contrary to public policy.”

Rules on the refusal of award enforcement in the new Arbitration Ordinance Cap.609 were provided in Section 86(2)(b), 89(3)(b) and 95(3)(b), governing the award enforcement, when it is neither Conventional award nor Mainland award. By unifying all provisions for all arbitral awards, regardless of the place where award was made, Cap. 609 stipulated that an award should be refused if it is contrary to ‘public policy’.⁴⁷⁸ All arbitral awards in Hong Kong are thus currently governed by the same rule, as a result of Cap. 609.

⁴⁷⁷ Section 44(3) of the Arbitration Ordinance Cap.341 provides “Enforcement of a Mainland award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration under the law of Hong Kong, or if it would be contrary to public policy to enforce the award.”

⁴⁷⁸ The Arbitration Ordinance Cap.609 Section 86(2)(b) provides “Enforcement of an award, whether made in or outside Hong Kong, which is neither Conventional award nor a Mainland award, may also be refused if (b) it would be contrary to public policy to enforce the award; Section 89(3)(b) provides “Enforcement of a Convention award may also be refused if (b) it would be contrary to public policy to enforce the award”; Section 95(3)(b) provides “Enforcement of a Mainland award may also be refused if (b) it would be contrary to public policy to enforce the award.”

C. Arbitrability and Public Policy in Hong Kong

One of the historical benchmark cases concerning public policy as grounds to set aside the award under the New York Convention in Hong Kong is *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*⁴⁷⁹ The case arose from an agreement dispute in which Hebei alleged that machinery purchased from Polytek was defective. An inspection of machinery at buyer's factory was arranged and proceeded with a team of technicians, together with arbitral tribunal. Polytek, however, was not aware of the inspection and therefore had no representative present.

The arbitral award was finally issued in favor of Hebei, and was later filed for enforcement in Hong Kong. Polytek requested the Beijing court to set aside the award by claiming that Polytek did not have an opportunity to present its case. The Beijing court, however, rejected Polytek's claim. Polytek subsequently submitted the rejection to the Hong Kong Court of Appeal by raising public policy claim and claiming that the chief arbitrator was present at the inspection. Thus, the arbitral award was made without the presence of Polytek. The Court of Appeal found that the interactions between Hebei's technicians and chief arbitrator were more than mere technical assistance required to operate the machinery. Thus, as these interactions affected the decision of tribunal, such an appearance of impropriety violated "the principle of natural justice" because arbitration "must not only be conducted fairly but also be seen to be conducted fairly, lest this undermines the public's confidence in the arbitration process."⁴⁸⁰ The limitations on Polytek's ability to respond to the inspection results violated Chinese laws requiring parties to have oral hearing unless they consent to forego them and giving parties the

⁴⁷⁹ *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.* [1999] 2 H.K.C. 205 (Ct. Final Appeal 1999).

⁴⁸⁰ *Id.* at 36-37.

right to question evidence.⁴⁸¹ The Court of Appeal thus refused to enforce the award because it violated public policy.

However, the Court of Final Appeal rejected Polytek's claim and disagreed with the decision of the Court of Appeal, finding instead that the inspections did not affect the award. In fact, an earlier oral hearing was held because Polytek had an opportunity to comment on the technician's report, but it declined to exercise this right.⁴⁸² In addition, Polytek failed to prove its underlying claim of lack of opportunity to present its case.

Hebei case established a strong bias in favor of enforcing foreign awards. The case constituted the doctrine that the court can exercise its discretion to the extent that it is consistent with the provisions of the Arbitration Ordinance and the New York Convention. In addition, it held that, even if the award was refused the enforcement from another court, it does not preclude the unsuccessful applicant from resisting enforcement of the award in the court of enforcement. The Court of Final Appeal considered that the term 'public policy' in *Hebei* should be narrowly construed and applied by holding that the expression meant "contrary to the fundamental conceptions of morality and justice of Hong Kong."

Similarly, in *Logy Enterprises Ltd. v. Haikou City Bonded Area Wansen Products Trading Co.*,⁴⁸³ the case involved the dispute that arose over the sale of steel wire rods. Chinese arbitration rule under CIETAC allows each party to choose one arbitrator. As Haikou's choice of arbitrator was unavailable, the CIETAC chair selected Zhai Bao Shan as a replacement. Logy

⁴⁸¹ *Id.* at 41-42.

⁴⁸² *Id.* at 9.

⁴⁸³ *Logy Enters. Ltd. v. Haikou City Bonded Area Wansen Prods. Trading Co.* [1997] 2 H.K.C. 481.

chose Zhai as an arbitrator but later found that Zhai was not on an approved list of arbitrators. Moreover, it was revealed to Logy that he was Director of the Technology Section of the Import and Export Commodity Inspection Bureau (CCIB), in which his position was not related to trading activities or steel wire rods. Logy thus claimed to the Hong Kong court that the award should not be enforced because the composition of the arbitral tribunal was not in accordance with the law of place arbitration took place (which is China). Since the award was made against the local law on CIETAC's arbitration rules,⁴⁸⁴ it was in violation of public policy. Nevertheless, the court of first impression and the Appeal Court in Hong Kong upheld the award reasoning that there was no evidence of a breach of public policy because Logy could not prove that Zhai had in fact acted partially.⁴⁸⁵ Public Policy needs proof to show something closer to actual basis which required in claims made under public policy.⁴⁸⁶

Even though Hong Kong has a very positive attitude toward the enforcement of foreign arbitral award, there is case the court refused the award due to procedural defects. In *Pakilto Investment Ltd. v. Klockner East Asia Ltd.*,⁴⁸⁷ the parties entered into a sale and purchase contract, choosing CIETAC arbitration to solve the dispute. When the dispute pertaining to the quality and quantity of goods occurred, the arbitral tribunal appointed an expert to give opinion on this issue. The defendant objected the opinion of the expert and informed CIETAC of its intention to make submissions on the report. The award was rendered in favor of the plaintiff before having received the defendant's comment. When the plaintiff submitted to the court to

⁴⁸⁴ Article 2 of the CIETAC arbitration rules require CIETAC to "independently and impartially resolve" disputes.

⁴⁸⁵ Logy, *supra* note 483 at 17-18.

⁴⁸⁶ *Id.* at 15.

⁴⁸⁷ *Pakilto Investment Ltd. v. Klockner East Asia Ltd.* [1993] 2 H.K.L.R. 39.

enforce the award, the defendant opposed the application on the basis that it had been prevented from presenting its case to the tribunal, which was inconsistent with Section 44(2)(c) of the Arbitration Ordinance.⁴⁸⁸ The award was made on the basis of procedural irregularity and public policy. The court rejected the public policy defense, stating that the public policy should be construed narrowly and enforcement may be denied on this basis if it violates the forum state's "most basic notions of morality and justice."

However, the court eventually refused the award because a serious procedural irregularity had indeed occurred during arbitral proceedings. The defendant had been denied a fair and equal opportunity of attending the arbitration proceedings. Accordingly, the defendant had satisfied the grounds set forth in Section 44(2)(c) and the court exercised its discretion to refuse enforcement of the award.

Although public policy was used as the grounds for refusing the award in *Pakitto*, the court actually relied on the narrow interpretation of public policy. In order to support strong pro-enforcement bias in Hong Kong, while preserving the fairness in judicial proceedings, the court decided not to make a 'public policy' exception to refuse the award. Procedural irregularity grounds are not considered public policy in Hong Kong. In addition, Hong Kong courts are prepared to exercise their discretion to refuse enforcement, but only in circumstances where the procedural defects are sufficiently serious to affect the fairness of the arbitral process or the outcome. The decisions in *Pakitto* and *Hebei* were thus inconsistent. In determining *Hebei*, the court considered whether Polytek was precluded from raising a public policy claim for the first

⁴⁸⁸ Section 44(2)(C) of the Arbitration Ordinance provides "Enforcement of a Convention award may be refused if the person against whom it is invoked proves; (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

time on appeal,⁴⁸⁹ while in *Pakilto*, the court has favored a narrow construction of the defense. Both *Pakilto* and *Hebei* case affirmed that actual bias was necessary to prove if public policy was raised as the grounds for award refusal, in a timely manner, during arbitration proceedings. In *Pakilto*, the defendant had been prevented from presenting its case and was thereby denied a fair and equal opportunity of being heard. The court accordingly exercised its discretion to refuse the award. In contrast, in *Hebei, Polytek* had failed to make a prompt objection during arbitral proceedings when irregularity might have been cured. The outcome of these two cases was thus different.

A very recent case in Hong Kong strongly confirmed the pro-enforcement doctrine which emphasizes that Hong Kong courts will not readily refuse to enforce arbitral awards and intended to interpret ‘public policy’ narrowly. In *Gao Haiyan v Keeneye Holdings Ltd.*,⁴⁹⁰ the Hong Kong Court of First Instance has refused to enforce an arbitration award issued by the Xian Arbitration Commission on public policy grounds where one of the arbitrators acted as both arbitrator and mediator. Gao Haiyan (“Gao”) agreed to transfer shares to Keeneye by entering into a share transfer agreement. Gao subsequently alleged that the agreement was void based on grounds of duress and misrepresentation. Arbitration was commenced by Keeneye, During arbitration proceedings at the Xian Arbitration Commission, the Commission asked the parties to switch from arbitration to mediation. Subsequently, the arbitral tribunal issued an award in favor of Gao and ordered the agreement to be revoked. Gao then sought to enforce the award in Hong Kong against Keeneye. Keeneye applied to set aside the court’s order enforcing the award complaining that the tribunal was biased in granting the award since the Secretary General of the Arbitration

⁴⁸⁹ *Hebei*, *supra* note 479 at 6, 11, 21.

⁴⁹⁰ *Gao Haiyan v. Keeneye Holdings Ltd.* CACV No.79 of 2011: 2 December 2011.

Commission and one of the tribunal had a dinner in the Xian Shangri-La Hotel with one of Keeneye's representative three months before the Award was issued. At the private meeting, Keeneye's representative was told that the tribunal intended to issue an award in their favor but that Keeneye must pay compensation of RMB 250 million. Keeneye refused and the Tribunal subsequently issued the Award in favor of Gao.

The Court of First Instance rejected the enforcement of award reasoning that there was an apparent bias on the part of the arbitrators, and that Keeneye had not waived its right to complain about it. The enforcement order was thus set aside. Gao subsequently appealed to the Court of Appeal. The Court of Appeal allowed the appeal and approved the enforcement of the award in Hong Kong since there was no apparent bias. The factor to determine what is contrary to public policy in Hong Kong is whether the relevant matter is contrary to “fundamental conceptions of morality and justice” in Hong Kong. Accordingly, the mere fact that the procedure adopted would give rise to an apprehension of bias if adopted in Hong Kong will not necessarily amount to a breach of public policy. If the procedure is acceptable practice in the jurisdiction in which it took place, it will not be in breach of public policy in Hong Kong unless it was so serious as to be contrary to fundamental conceptions of morality and justice.

Gao v. Keeneye made it clear that the public policy in Hong Kong will conduct restrictively. In considering the factual circumstances regarding a mediation over dinner in a hotel was an acceptable practice in mainland China, the court was aware how mediation is normally conducted in the place where it was conducted, even if that differs from the way in which a mediation is normally conducted in Hong Kong. Comparing the fact and the issue of bias, the Court of Appeal could not find an apparent bias, and accordingly enforce the award.

The enforcement of an award on public policy grounds should be refused only if it would be contrary to the fundamental conceptions of morality and fairness in Hong Kong.

D. Conclusion

To determine public policy in Hong Kong, the court will do it very thoroughly and carefully in order to ensure that ‘public policy’ was applied limitedly. *Hebei* and *Pakilto* may initiate a confusion for parties since the results of these two cases were different, even though the reason behind the refusal seems similar. In *Hebei*, the court focused on the importance of raising any irregularity in the arbitration procedure by giving the opportunity to arbitrator to rectify the issue.⁴⁹¹ In contrast, in *Pakilto*, the court believed in a good faith of the party and thus decided to exercise its power to refuse the award, since a party failed to raise the problem in time for the arbitral tribunal to remedy it. The losing party should be assured of a fair hearing in Hong Kong, as, even if the lower court already made a decision to enforce the award, such enforcement might be refused by the higher court in order to maintain the justice in judicial procedure. However, it has been indicated that Hong Kong court was very cautious when applying ‘public policy’ as a state’s sovereignty protection tool. To minimize the scope of ‘public policy’, the court has avoided the use such grounds when refusing the award enforcement.

Logy has followed this theory. The court in *Logy* was unwilling to put an error in arbitral proceedings into the ‘public policy’ scope. We can assume by all these cases that Hong Kong court will not refuse the award enforcement if the parties’ behavior in seeking remedies was reasonable and in good faith. *Gao v. Keeneye* reminds a pro-enforcement theory which Hong

⁴⁹¹ *Id.* at 22.

Kong court should construe 'public policy' very narrowly. Hong Kong thus is another place parties can reassure that their contractual agreement will be fully accepted by the judicial bodies.

Interestingly, the statistical record of enforcement of award in Hong Kong seems to support the paragraphs above. Between 1997 and 2003, the court heard 173 applications for enforcement of foreign awards with 38 out of those 179 was opposed the enforcement. Only in 7 cases the awards were refused enforcement. During the 2004-2011 period, 140 applications for enforcement were submitted to the court, with only 12 cases opposed, and only 3 where the award was set aside.⁴⁹² This number represents a considerable decline in opposition towards the enforcement of awards. In other words, Hong Kong now proves itself as being a very firm pro-enforcement state.

6.3 Thailand

Thailand, with civil law as a legal system, has been an arbitration-friendly country for over half a century. Even though Thailand has been attractive for foreign investments, there are several considerations a foreign investor should note before conducting business in Thailand, such as reflection and deliberation of the social and political environment as well as the stability of the Thai economy in the long run. Although Thai legislative and judicial policy recognizes foreign investment as a source of economic growth, corresponding legislative developments protecting businesses are generally viewed as slow-moving. In addition, the court proceedings take on average two years before court's decision is reached. Alternatively, arbitration may serve as a dispute resolution method. Investors considering investments in Thailand increasingly

⁴⁹² For statistic information of cases see <http://hkiac.org/index.php/en/hkiac-statistics/enforcement-of-awards> (last visited March2012).

consider including an arbitration clause into contracts, with a belief that it provides more efficient, less time-consuming results at lower cost.

However, foreign businesses that obtained awards from arbitration often find it difficult to enforce such an award, in addition to being subject to several objections by appeal from the losing party. One of a number of objection grounds is that the arbitration award is contrary to a provision of law regarding public order since Thai court considers this issue as affecting public moral and vast number of citizens.

Although there are numerous barriers to using arbitration as a dispute settlement method, Thai court has made attempts to encourage the use of arbitration. For example, Thai courts have adopted a policy of promoting private settlement through mandatory mediation sessions arranged by the court, which suspend the civil litigation process until completed.⁴⁹³ Mediation is conducted outside of the court, an independent mediator is appointed to oversee the session, and settlement discussions and terms are prohibited from being used as evidence by litigants in any subsequent court trial. Even though it is not a real 'arbitration', a concept of a mediation is almost equivalent, as the court offers a full 'party autonomy' in mediation process to parties.

In addition, Thailand has signed several Conventions regarding arbitration, such as the New York Convention, the Washington (ICSID) Convention,⁴⁹⁴ as well as numerous bilateral

⁴⁹³ Mediation procedure could be found in Section 850-852 of the Thai Civil and Commercial Code; Section 850 provides "a compromise is a contract whereby the parties settle a dispute, whether actual or contemplated by mutual concessions."; Section 851 provides "a contract of compromise is not enforceable by action unless there be some written evidence signed by the party liable or his agent."; Section 852 provides "the effect of the compromise is to extinguish the claims abandoned by each party and to secure to each party the rights which are declared to belong to him."

⁴⁹⁴ Thailand has signed the Washington Convention (ICSID), but has not yet ratified it.

investment treaties.⁴⁹⁵ The Thai Arbitration Institution (TAI)—a famous arbitration institution in Thailand—that serves as a primary arbitration organization, was formed in 1990 and is a subdivision of the Court of Justice of Thailand.

A. Historical Background

Arbitration in Thailand was initiated by the statutory provision in the Code of the Three Great Seals.⁴⁹⁶ Arbitration, under the Code of the Three Great Seals, was a voluntary process, similar to modern arbitration concept.⁴⁹⁷ However, it did not allow the parties to either bring an action against arbitrator for liability based on any mistake or challenge the arbitrator's decision.⁴⁹⁸ The Code of the Three Great Seals was effective until, during the reign of King Rama V, due to legal reforms the Code of Civil Procedure 1896 (CCP) was enacted.

Arbitration in the CCP described only in-court arbitration. At that time, arbitration did not offer any legal provision for out of court arbitration. Consequently, although the court recognized the validity of an arbitration agreement, it could not enforce it. An arbitral award was not considered a settlement of the dispute among the parties; instead, it was accepted by courts as evidence of a debt.⁴⁹⁹ As a result, arbitration seemed almost impossible. When one of the parties rejected to comply with the arbitral award, the other party had to bring a protest to the court that

⁴⁹⁵ Thailand is a party to the ASEAN Agreement for the Promotion and Protection of Investment 1987 and the ASEAN Common Investment Agreement 2009.

⁴⁹⁶ The Code of Three Great Seal was in forced during the King Rama I between A.D. 1782-1932.

⁴⁹⁷ Philip J. McConaughay and Thomas B. Ginsburg, *International Commercial Arbitration in Asia*, 492 (2006).

⁴⁹⁸ *Id.*

⁴⁹⁹ Anan Chantana-opakorn, *International Commercial Arbitration in Asia: Arbitration in Thailand*, 404 (2nd ed. 2006).

would initiate the new trial to hear the case. Thus, initially, in Thailand, arbitration was not truly a dispute settlement method. In fact, the court did not implement an arbitral award and arbitration—in the current sense—did not exist.

The first attempt of arbitration movement was recorded in late 1900s. In 1987, the Arbitration Act B.E. 2530⁵⁰⁰ was enacted with the support of the Ministry of Justice⁵⁰¹ and the Thai Arbitration Institute was incorporated in 1990.⁵⁰² Arbitration was promoted as a freely selected choice of dispute settlement. However, the Arbitration Act B.E. 2530 had some drawbacks that prevent the parties from achieving the ultimate goal of arbitration which is ‘party autonomy’. A review and modification of the 1987 Act were thus needed. Together with the legal reforms of Thai Constitution in 1997, the new ‘Arbitration Act B.E. 2545’ was enacted in 2002 and came into force on April 30, 2002,⁵⁰³ replacing the old 1987 Arbitration Act. Although the 2002 Arbitration Act was modeled on with the UNCITRAL Model Law, there are some differences regarding the procedure to obtain protective measure, which is authorized to arbitrator in the UNCITRAL Model Law, but it is still retained power to the court under the 2002 Arbitration Act. Thus, a party wishing to seek temporary order while arbitration case is still ongoing must go to the court. In addition, disputes between a state agency and a private person, even those related to administrative contracts, can be settled by arbitration⁵⁰⁴ unless they involve matters relating to public policy.

⁵⁰⁰ The Arbitration Act of 1987.

⁵⁰¹ Chantana-opakorn, *supra* note 499.

⁵⁰² *Id.*

⁵⁰³ The Arbitration Act of 2002, Section 2.

⁵⁰⁴ The Arbitration Act of 2002, Section 15 provides “In a contract between a state agency and a private party, whether it is an administrative contract or not, the parties may agree to resolve the dispute by arbitration, and such

The 2002 Arbitration Act does not distinguish the enforcement procedures between domestic and foreign arbitral awards, as was the case of the 1987 Act. Thus, all awards made in Thailand are considered local arbitrations and will be treated under the same arbitration provision under the 2002 Act, regardless of whether involving a foreign party or applying foreign law or procedures. The new Act removed the distinction between foreign and local arbitrations and utilized the Model Law's standard requirements for enforcement of all awards, whether foreign or local. In addition, the 2002 Arbitration Act is clearer and has much wider coverage than the old act and is still in use.

The 2002 Act was also influenced by the New York Convention, since Thailand acceded to the Convention without any reservation in 1959. Thus, the 2002 Arbitration Act of Thailand is designed with a combination of the UNCITRAL Model Law and the New York Convention.

B. Legal Framework.

The provision regarding the enforcement of foreign award in Thailand is found only in the Arbitration Act 2002, where grounds for setting aside the award are described in Section 40, consisting of two parts—arbitrability and public policy. The second part states that “(2) Where the court finds that : (a) the award deals with a dispute which is a non-arbitrable matter under the law; or (b) the recognition or enforcement of the award would be contrary to public policy of Thailand.” If one of the above cases takes place, the court shall set aside the arbitral award. Arbitrability rule in Thai arbitration law was stipulated separately from public policy rule by

arbitration agreement shall be binding upon the parties.”; However, on July 28, 2009, a Cabinet Resolution (expanding the 2004 Cabinet Resolution) was passed to restrict the use of arbitration in all types of contracts between a governmental organization and private companies.

following a model of Article V of the New York Convention. However, when the court decides whether the dispute is arbitrable, the public policy rule is always taken into account. Hence, arbitrability and public policy under Thai arbitration seem to be interrelated.

In Section 44, the Arbitration Act 2002 also listed arbitrability and public policy as grounds for refusing the recognition and enforcement of award.⁵⁰⁵ Section 43 also provides the grounds for refusing the award following grounds of Article V of the New York Convention. This section is applicable when the enforcement of an award may be refused if the party can prove that such award is unenforceable.⁵⁰⁶ In contrast, Section 44 applies when the court uses its own discretion to refuse the enforcement and recognition of an award.

In addition, Section 45 also offers an opportunity for a party wishing to appeal the court judgment made under the Arbitration Act 2000 on the grounds of infringement of public policy.

Cases that can be arbitrated in Thailand must be civil matters and not contrary to public policy. This does not stem from the Arbitration Act 2002 only, but also Section 150 of the CCP, which is a general provision applied to any legal act.⁵⁰⁷ Certain disputes concerning the civil status of persons and the validity of marriage matters are considered as relating to the public policy in Thailand.

As in other countries, public policy in Thailand has no specific definition, thus some of the definitions offered by scholars are given below.

⁵⁰⁵ Section 44 of the 2002 Arbitration Act provides “The court may dismiss the application for enforcement under Section 43 if it finds that the award involves a dispute not capable of settlement by arbitration under the law or if the enforcement would be contrary to public policy.”

⁵⁰⁶ Section 43 of the 2002 Arbitration Act provision is a duplicate of Article V of the New York Convention 1958.

⁵⁰⁷ The Civil and Commercial Code 1935, Section 150 is the general rule for legal act provides that “an act is void if its objective is expressly prohibited by law or is impossible, or is contrary to the public order or good morals.”

“Defining the public policy has to consider at the purpose of this term. The public policy is the benefit of the nation and society.”⁵⁰⁸

“Public policy is the rule applying to people in order to sustain the safety of the country and people within the country as well as the justice among people.”⁵⁰⁹

“Any legal act against to policy aiming to protect interest of government, society and general public deems to conflict to the public policy.”⁵¹⁰

“Public Policy is the matter which is not relating to interest of the private person, but it is the benefit of the government or general public, especially the protection of people’s safety and the protection of the people’s benefit economically and politically.”⁵¹¹

A public policy in Thailand purports to protect the interest of the public from not being injured by any person. In addition, its goal is to support the nation and the society in living peacefully. This theory is relevant to the basic law of public policy, as given in CCP Section 150. Thai court will not consider any legal act effective, if such act is against the public policy. However, Thai court will not interpret ‘the interest of the public’ covering the public interest of other countries, but only Thailand’s public interest.⁵¹²

⁵⁰⁸ Jeed Settaboot, *Explanation of legal act and debt*, 21 (1969).

⁵⁰⁹ Ukrit Mongkonnavin, *Public Policy of Thailand*, 14 (1975).

⁵¹⁰ Manoch Jaramach, *Point of law involving public order*, 10 (1965).

⁵¹¹ Viriya Kreadsiri, *Explanation of the Civil and Commercial Code: Focusing on Legal Act and Debt*, 17 (1974).

⁵¹² Dr. Saowanee Asawaroj, *Dispute Settlement by Arbitration: Rule and Theory, International Trade Seminar Program, Faculty of Law, Thammasat University*, 4 (2002).

Thailand has attempted to encourage the use of arbitration by allowing expanding its scope. Disputes arising from securities transaction are now permissible for arbitration. The Security and Exchange Commission has supported the use of arbitration in securities dispute by enacting the domestic rule of arbitration, including setting up the organization responsible for this matter.⁵¹³

C. Arbitrability and Public Policy

In Thailand, a court has its own discretion to decide which case is deemed inarbitrable or contrary to public policy. Two cases have drawn public attention concerning the award rendered against governmental entities are the *Expressway* case and *ITV* case.

The Expressway case was decided by the Supreme Court in 2006. In *The Expressway and Rapid Transit Authority of Thailand (ETA) v. BBCD Joint Venture (BBCD)*,⁵¹⁴ in 1995, ETA—a state-owned organization in charge of expressway construction in Thailand—entered into a construction contract to build a 55-kilometre expressway with BBCD, a consortium between CH Karnchang Public Company Limited, a Thai construction company, and Bilfinger Berger Bauaktiengesellschaft, and Dyckerhoff & Widmann AG, a Germany company. The contract stipulated that the 55-kilometer long expressway would be built from Bangkok to Bangna-Bangpee-Bangpakong (near Chon Buri province). A project was budgeted to approximately 25,193 million baht.

⁵¹³ Relevant arbitration rules and laws of the Security and Exchange Commission can be found at http://www.sec.or.th/enforcement/Content_0000000457.jsp?categoryID=CAT0000438&lang=en (last visited May 2011).

⁵¹⁴ Supreme Court Case no. 7277/2549 (2006) (Deeka 7277/2549).

The contract between ETA and BBCD determined that ETA will assist BBCD to obtain an approval for building the expressway from Department of Highway of Thailand within the date specified in the contract. In the case that ETA could not acquire permission and determine the area within such date, BBCD had the right to attain the reimbursement from ETA for the additional expense, which BBCD had to pay due to such delay.

Thereafter, ETA could not obtain the approval from the Department of Highway within the time limited in the contract. BBCD thus informed ETA's consulting engineer to extend the completion date of the project. ETA's consulting engineer approved 11-month extension. On June 18, 1998, ETA signed and amended the contract with BBCD by extending the completion date of contract. When the project was almost completed, BBCD requested ETA to compensate BBCD in amount of 8 billion baht due to the delay of obtaining permission from Department of Highway. ETA's consulting engineer considered the document submitted by BBCD and confirmed that BBCD had the right to be indemnified in amount of 6 billion baht. A dispute was subsequently filed with an arbitration institution in Thailand on May 24, 2000 by BBCD. An award in favor of BBCD was made on September 20, 2000. Later, BBCD filed the application to the Southern Bangkok Civil Court to enforce the arbitral award. ETA alleged that the contract between ETA and BBCD was the "administrative contract" and a dispute arising under the agreement fell under the jurisdiction of the Administrative Court. In this instance, the Civil Court was requested to dispose the case so that the consortium would be required to file its motion to the Administrative Court.

The Civil Court held that the arbitration agreement was not an administrative contract, as it was neither a concession agreement nor an agreement for public service, public utilities or

natural resource exploitation.⁵¹⁵ The Civil Court found that the issue in dispute involved the enforceability of the award and therefore ruled that it was not a dispute relating to an administrative contract under the Act. Rather, it was subject to the jurisdiction of the Court of Justice. Consequently, the Civil Court upheld the award and ordered its enforcement.

The case was later filed to the Supreme Court by ETA. In 2006, the Supreme Court reversed an earlier verdict by the Civil Court, finding that the contract, by its nature, was an administrative contract, which was executed by the Governor contrary to the law. At the time a contract was made, the governor of ETA signed the contract with the intent to buy the shares of BBCD, which appropriated and distributed the shares to the governor. The contract was thus made wrongfully and deemed contrary to the public policy resulting in a non-binding agreement. Because the underlying contract was unlawful, the enforcement of an arbitral award based on such contract would be contrary to public order and good morals and was, therefore, set aside.

As the case was instructed under the previous Arbitration Act 1987, the question of legality of arbitration clauses in administrative contracts and their enforceability had still been uncertain. The Arbitration Act 2002 later settled this ambiguity to a certain extent, as Section 15 provides that a dispute occurred between a state agency and a private person, regardless of whether it is an administrative contract, can be settled by arbitration, unless it involves a matter relating to public policy.

⁵¹⁵ Pursuant to the Act on Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999) defines the “administrative contract” that “the administrative contract includes an agreement (i) in which at least one of the parties is an administrative agency or a person acting on behalf of the State, and (ii) which exhibits the characteristics of (a) a concession contract; or (b) a public service contract; or (c) a contract for the provision of public utilities; or (d) a contract for the exploitation of natural resources.”

As a result of the *Expressway* case, a Cabinet resolution was issued in 2009 by a Thai Cabinet, prohibiting the use of arbitration clauses in public sector contracts.⁵¹⁶ Since Cabinet resolution is a statement of government policy and has no binding status unless implemented by law, decree or regulation, uncertainties concerning the use of arbitration between private and public parties can still occur. Although this Cabinet resolution has not resulted in arbitration law, it was nevertheless formally notified to all ministries, departments and other public authorities and they are likely to enforce it. Thai Cabinet gave reason behind this idea that restrictions on arbitration are seen as a way to avoid similar cases in future.

However, the reasoning behind this Cabinet's view does not seem truly justified. In the *Expressway* case, ETA, a government authority, lost the case at the arbitral award stage. There is no obvious evidence supporting a different outcome, if the dispute was resolved by the trial court. A Cabinet resolution thus cannot provide an honest reason behind this resolution. Perhaps, the size of compensation is behind the government's decision, as it wants to ascertain that a state's interests are still preserved.

On the other hand, an arbitral award in the *Expressway* case was originated from the wrongfully made agreement between the parties. A status of the award was thus considered a non-binding condition. Here, the governor of ETA had intentionally acted in favor of BBCD in exchange for some benefit. Even though, in this case, the court did not specify the law the governor has violated, it was likely to be the Criminal Code violation. Section 151 and 152 of the Criminal Code of Thailand provide the punishment for the government officer who acts in

⁵¹⁶ The Cabinet resolution recognizes that in some cases it may nevertheless be expedient to accept arbitration clauses. In such cases the matter must be submitted to Cabinet for case-by-case review.

exchange for any interest. As criminal act is a non-arbitrable matter, the award made based on the ground contrary to the criminal law should not be enforceable.

The *ITV* case⁵¹⁷ is another famous and long-awaited case regarding setting aside the arbitral award. The case is between the Prime Minister Office (PMO) of Thailand and ITV, a Thai television network controlled by Singapore's Temasek holdings. PMO and ITV have signed the 30-year concession agreement as a TV broadcaster starting from July 3, 1995, allowing ITV to broadcast the programs with the ratio of 70% news and documentaries, and 30% entertainment. The agreement set the concession payment schedule on the progressive rate calculating from the amount of income which ITV will receive.

The agreement stipulated that PMO would not allow other concessionaires undertaking business similar to that of ITV to advertise on their stations. In the event, as PMO allowed other concessionaires to undertake actions, which caused ITV to sustain financial damages, ITV was entitled to request compensation from PMO. In 1999, ITV filed the dispute to the arbitration panel, alleging that ITV's income has been decreased because of PMO's granting new TV concessions to other broadcasters. The arbitral tribunal rendered an award in favor of ITV by ordering PMO to compensate ITV, and it also reduced the concession-fee payments from those specified in the contract. Furthermore, the news-to-entertainment ratio of programming has been adjusted to 50: 50 between news and entertainment.

PMO challenged the award before the Administrative Court in order to nullify the award on the grounds that the award containing decision on matters beyond the scope of the concession

⁵¹⁷ Supreme Administrative Court Case no. 349/2549 (2006).

agreement. Generally, the process of changing or adding any content in the concession agreement must be approved by the Cabinet pursuant to the law.⁵¹⁸

The court ruled that the arbitrators' role should be limited to helping settle the dispute, and therefore should not have changed the terms of the contract. As the TV broadcasting was the public resource and was set up for public, the panel did not have the authority to diminish the concession fee or change the ratio of the programming without state consent. Such authority is under government's decision, not the panel. Hence, if the court enforces such award, it would indicate that there is an indication of potential damage to public interest. The court found that the enforcement of the award is in conflict with the public policy pursuant to the Arbitration Act 2002, Section 40, Paragraph 2(2). The court thus ordered to set aside the arbitral award. The case was later presented to the Highest Administrative Court and the award was affirmed.

With respect to the courts' judgment from the *Expressway* and *ITV* case, the courts' decisions of both cases may diminish a credit of Thai arbitration toward international view. Foreign investors might fear conducting business with Thai government, due to the perception that arbitration would not be conducted at an internationally accepted standard. A ban on arbitration clauses in contracts made with Thai government has caused real concern in business circles. Arbitration seems not to be the most optimal resolution method between ordinary commercial contracts involving the public sector, which are governed by ordinary civil and commercial law. Even though the Cabinet issued a clarification that the resolution was only intended to apply to concession contracts,⁵¹⁹ there is no clear definition of what constitutes a

⁵¹⁸ According to Section 21 of the Permission of Government Concession to Private Party Act 1992.

⁵¹⁹ The Cabinet Resolution states "A concession agreement is an administrative contract under current law and it is proper to submit disputes arising from such contracts to the Administrative Court or the Court of Justice."

concession agreement. Consequently, there is continuing uncertainty over how this term will be interpreted. A resolution only explained the definition of a concession agreement that “a concession agreement is an administrative contract under current law and it is proper to submit disputes arising from such contracts to the Administrative Court or the Court of Justice.” The Arbitration Act 2002 states plainly that disputes under administrative contracts may also be settled lawfully through arbitration. It is therefore very unclear why the resolution deems it ‘proper’ to submit a claim under administrative contract to the court. The lack of clarity is a real concern to companies seeking public contracts in Thailand, as there is potential for difficulties and uncertainty. Thai government’s resolution may create cause foreign entities to be skeptical toward receiving fair arbitration in Thailand. A reference in the Cabinet resolution suggests that restrictions on arbitration are seen as a way to avoid similar case in the future. However, the resolution not only decreases trustworthiness of the Thai arbitration system but also creates a doubt in the overall fairness of the Thai judicial system.

Compounding interest is considered as a ‘public policy’ matter in Thailand. In Supreme Court Case no. 230/2545 (2002),⁵²⁰ a shipping company in Thailand, plaintiff, signed the ship lease agreement (Fixture Note) with the defendant, lease, Thai incorporated company, to lease the ship with the fee (Demurrage) USD 3,500 per day. The agreement stipulated that the parties agreed to use the arbitration in London to solve the dispute between the parties.

The defendant was in default with respect to the payments to the plaintiff, which thus brought the dispute to the arbitral tribunal. The defendant refused to attend the arbitral proceedings. The

⁵²⁰ Supreme Court Case no. 230/2545 (2002) (Deeka 230/2545).

London arbitral panel finally gave the award on July 27, 2000 ordering the defendant to pay leasing fee (Demurrage) and arbitration fee to the plaintiff, as well as the compound interest at the rate of 8%, starting from the date the defendant was in default until the full payment is received by the plaintiff.

The defendant alleged that the award ordering the compound interest calculating from the date the defendant was in default is against the public policy. The defendant later submitted the award to the court to set aside pursuant to the Arbitration Act 2002, Section 40.

The court considered that, even though the both parties were Thai companies, the parties were allowed to use London arbitration to resolve the dispute. As the agreement between the parties, although made in Thailand, was related to overseas transportation, thus linking Thailand and London, the arbitral award made in London was deemed enforceable. However, the award in part of compound interest from the date the defendant was in default was considered contrary to Thai law,⁵²¹ which does not allow the compound interest during the time the debtor is in default. Thus, the court deemed that the award of arbitral tribunal was still enforceable, but the part of compound interest was not, as it was conflicting with the public policy.

Later, another Supreme Court Decision⁵²² supported this rule, since the court did not set aside the entire arbitral award made in London, but did set aside the part relating to the payment of compound interest.

⁵²¹ The Commercial and Civil Code of Thailand, Section 655 states “ Interest shall not bear interest, the parties to a loan of money may, however, agree that interest due for not less than one year shall be added to the capital, and that the whole shall bear interest, but such agreement must be in writing”.

⁵²² Supreme Court Decision 461/2545 (2002) (DeeKa GorKor 461/2545).

A judgment of the court to set aside the award regarding compounding interest may look very simple, but it was counted as public policy. A reason the courts decided that compound interest rate was contrary to public policy because Thai contract law stipulates that compound interest rate is only permitted when a foreign bank or financial institution is a loaner. With regard to a loan by other entities, the Thai Civil and Commercial Code allows the maximum of 15% interest to be charged and compounding interest is not permitted, unless at least one year's interest is in arrear and the borrower agrees that the interest may be compounded. In addition, such agreement must be made at the time such arrears have occurred, rather than in advance. Thus, it is difficult to enforce a judgment that contravenes such fundamental provisions of Thai law. Even though it is only civil law,⁵²³ exceeding or compound interest rate seems to be unacceptable under Thai law.

Trademark was historically considered a non-arbitrable matter by the Thai court. In Supreme Court Case no. 297/2546 (2003),⁵²⁴ a plaintiff, a company incorporated in Louisiana, United States who has an ownership of “EARTHTEC” and “PRISTINE BLUE” trademark, has signed the partnership agreement by allowing the defendant—a Thai-incorporated company—to use its trademark. The agreement permitted the defendant to use the “EARTHTEC” trademark on the products. The defendant, however, violating the agreement, registered the trademark “EARTHTEC” under its name and incorporated its own company under the plaintiff's name.

The plaintiff, thus, sent the notice to the defendant to terminate the agreement and demanded the defendant to revoke such registration. As the defendant ignored such notice, the

⁵²³ According to the Commercial and Civil Code, Section 150, “An act is void if it objects is expressly prohibited by law or is impossible, or is contrary to the public order or good morals.”

⁵²⁴ Supreme Court Case no. 297/2546 (2003) (Deeka 297/2546).

plaintiff submitted the dispute to the arbitral tribunal, which is American Arbitration Association (AAA), according to the agreement. The tribunal granted the award, ordering the defendant to terminate the violating action and pay the arbitration fee in the amount of USD 166,452.30.

The defendant subsequently brought the award to the court in Thailand in order to set aside the arbitral award by alleging that:

1. The arbitral proceeding was not equitable because all the tribunal are U.S. arbitrators. In addition, the tribunal did not accept the evidence in Thai language.

In this issue, the Supreme Court deems that the parties agreed to use the AAA in the United States to resolve any disputes that may occur in the future. As the parties mutually agreed in the agreement made prior the dispute arose, both are bound to the arbitral award, even though all arbitral proceeding were conducted in English language. In addition, the court did not find that the arbitral award lacked neutrality.

2. The trademark issue is non-arbitrable in Thailand

Trademark protects the creator (owner) from competitors stealing the identity or using a name or symbol so similar that it could cause confusion for public. It is not wrong to say that a trademark also protects the public from misunderstanding. Generally, the examination of the similarity of trademarks, in terms of special characteristics or general resemblance to a previously registered trademark cannot be arbitrated due to the public policy. Hence, such dispute should be under the court's jurisdiction.

However, the dispute in this case pertained to the relationship between private parties, and was meant to determine the party with the privileged right to use such trademark, according to

the agreement. The arbitral award ordering the defendant to terminate and revoke the registration in Thailand is the order to perform or non-perform, as stipulated in the agreement. Thus, the dispute between the parties is arbitrable.

3. According to the agreement, the losing party was liable to pay the arbitration fee. In fact, the arbitration fee was too high, compared to that incurred in Thailand. Thus, the enforcement of arbitral award was deemed contrary to the public policy.

The court believes that the parties could seek the cheaper dispute settlement method by choosing arbitration in Thailand. However, as the parties chose the arbitration in New York, they were accordingly bound by the agreement.

The arbitral award ordering the defendant to pay arbitration fee results from the agreement that parties have made to choose arbitration as a resolution method. As the enforcement of arbitral award is not contrary to the public policy, the court agreed with the arbitral award.

This court judgment confirms the inarbitrability of trademark issue in Thailand. Unlike arbitrability in Western countries, Thai law does not yet allow intellectual property to be arbitrable. However, in this case, based on the commitment in the agreement, the court decided that there was no similarity between the two trademarks. The court thus found that the arbitral award was not contrary to the public policy.

Arbitration fee does not seem considered ‘public policy’ in Thailand. The party likely claim that this issue was a ‘public policy’ concern because of the Supreme Court’s decision in case no. 183/2545 (2002)⁵²⁵ where the award was set aside, since the arbitration fee ordered by the

⁵²⁵ Supreme Court judgment no. 183/2545 (2002) (Deeka 183/2545).

arbitral tribunal was too high. A difference in this case is that the court determined that arbitration fee was a private issue, whereas, in case no. 183/2545 (2002), the fee was deemed too high to be related to public policy. In this case, a plaintiff, a financial consultation company in Singapore, and defendant, a Thai company, entered into a finance consultation service agreement. The parties agreed that the contract would be governed by UK Law and any dispute which may arise will be arbitrated by arbitration held in London. Later on, a dispute of non-payment was filed a claim to London Court of International Arbitration (LCIA) by a plaintiff. The award was made in favor of the plaintiff, ordering the defendant to compensate the plaintiff both the service and the arbitration fee in an amount of USD 254,000, as well as the attorney fee of 636,000 USD. As the defendant ignored the arbitral award, the plaintiff filed the motion to Thai court to enforce the award.

In this case, the court agreed with the panel's ruling to order the defendant to pay the plaintiff the service fee. However, the court disagreed with the panel's ruling in respect of arbitration fee and attorney fee because an amount the panel commanded a defendant to pay was not deemed reasonable. Even though the agreement was private, in which the parties have autonomy to agree to the amount of the fee, the court enforcing the award had the right and duty to step in and determine whether such award is in conflict of the public policy pursuant to the Arbitration Act 2002 Section 40(2)(b). In this case, the burden of the attorney fee was deemed too high for the defendant to be responsible for. Hence, as allowing the enforcement of an award in this part would be contrary to public policy and public moral, the court thus ordered the defendant pay 50% of the attorney fee, with the rest covered by the plaintiff.

The court did not directly set aside the full award; however, the intervention by the court indicates that this issue was deemed contrary to public policy. The fact that the court ordered the

new amount of arbitration and attorney fee meant that the court considered this contrary to the fundamental legal principle and the award in this part should not be enforced.

D. Conclusion

Even though Thailand has been an arbitration-friendly venue in international view, there is evidence showing that Thai arbitration practice is very conservative. Arbitrability and public policy in Thailand are closely related. Most of the time, when non-arbitrable matter is submitted to the arbitral panel and the award enforcement is subsequently filed to the court, the court always determines such cases non-arbitrable, deeming them contrary to public policy. Public policy is frequently raised by the court as a supportive reason to revoke the award enforcement.

Public policy concept in Thailand is thus used too broadly. However, intellectual property does not yet seem accepted by the court as an arbitrable issue, even though this is not the case in Western countries. Although intellectual property law is designed to fulfill the public policy objective of consumer protection by preventing the public from being misled as to the origin or quality of a product or service, it is economic issue that needs an urgent resolution in order to ensure that the original owner is protected. Allowing the intellectual property to be arbitrated can increase the credibility of Thai arbitration as well as promote the investment in Thailand. While Thailand allows securities issue to be arbitrable, it is hard to explain why intellectual property cannot be arbitrated. Perhaps the securities organization (SEC) encourages and motivates the use of arbitration in securities matter.

Award orders pertaining to interest or compensation that are deemed unreasonable will be considered 'public policy' matters. Thai court really gives an importance to this matter as Thai society has a big gap between the poorer and the richer. In order to protect the poorer from being

taken advantage from the richer, Thai court would control and may intervene. Hence, Thai court is likely to control an amount of interest and ensure that any type of compensation is at a moderate level, as it perceives this matter as harmful to the interest of society and public moral.

It was observed that the notion of public policy in Thailand was interpreted based on the culture and economy situation. The term 'public policy' in Thailand may be understood differently from other countries. In Thailand, broadly speaking, it is seen as related to any imperative rule of national law. In addition, the court also includes the basic notion of morality and justice. If the court deems that there is harm to the public interest, the court may, under its discretion, nullify the award even though it did not violate any laws. At this point, Thailand needs to transform itself from a closed society to one that is governed by transparency and rule of law by following the path of other global legal and business systems. Otherwise, international arbitration in Thailand will not obtain the confidence from international society.

As we continue to build the civilization where arbitration is increasingly becoming the manner in which legal disputes are resolved, several factors that might affect the full ability of party autonomy doctrine should be considered, one of which is judicial intervention. One area that is still a topic of continuing debate is the proper role and scope is 'public policy'. Extant tension between the importance of the effectiveness of arbitral awards, on one side, and the concerns generated by sovereignty immunity policy on the other, create tension that can result in awards that are inconsistent with fundamental rules or laws of a relevant foreign state. Prior to construe 'public policy' as a ground to refuse or annul the arbitration award, courts may consider several factors "such as the pro-enforcement spirit of the New York Convention, a respect for party autonomy, sensitivity to the needs of the international system and the desire for finality"⁵²⁶ in order to ascertain that the 'public policy' exception will not be used extravagantly.

The New York Convention allows signatories to refuse the enforcement of arbitral award pertaining to non-arbitrable matters or issues contrary to public policy. From time to time, 'public policy' and 'arbitrability' are increasingly interrelated and inseparable; hence, some jurisdictions may refer to both terms in a single situation as a bar to recognize and enforce the arbitration award. Thus, it is not erroneous to say that there is a very special bond between 'public policy' and 'arbitrability'.

Public policy is an establishment that has been given much attention in the law of arbitration. Irrespective of whether it is raised as grounds for refusing the recognition and enforcement of a foreign arbitral award, or for setting aside a domestic award, because of the

⁵²⁶ Susan Choi, *Judicial Enforcement of Arbitration Awards Under The ICSID and New York Conventions*, *New York University Journal of International Law and Politics*, Symposium Issue, *The Interaction Between National Courts and International Tribunal* Fall -Winter, 125 (1995-1996).

adopted restrictive interpretation, it rarely prevents an arbitral award from producing desired effects. The content of public policy depends on the time when it is examined, as well as the territory to which it applies. In order to ensure the sanctity of arbitration, courts should subject an arbitration decision to review only in cases where it is clear that the public will be affected and the community will be adversely influenced if such award is enforced.

As the New York Convention does not provide an explicit definition of ‘public policy’, this is likely the main weakness of this important convention. Moreover, determining the scope of this exception is not straightforward, as each country has a unique mechanism to handle to this issue. Case laws have shown that domestic courts could effectively decrease or expand the benefits of ‘public policy’ exception by strategically limiting or expanding the scope of its application. In respect of applying ‘public policy’, in each specific case, it is useful to contrast the New York Convention to potentially more favorable local law, since the New York Convention leaves contracting states with broad discretion over domestic implementation.⁵²⁷ Analysis of a series of cases in each country this study considered has demonstrated that local laws are more favorable when applied to ‘public policy’, compared to the provisions in the New York Convention. Public policy in most countries, however, has a similar basis as described as ‘a fundamental morality and justice’, even though the term ‘fundamental’ may not be seen as equally important in all countries. The notion of public policy differs widely from state to state and it is subject to discretion of the judicial system, subject to moral, cultural, economic and social necessity of each state. For example, China considered heavy metal music style as ‘public

⁵²⁷ Article VIII(1) of the New York Convention provides “ The provision of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of the arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”

policy' contradiction during 1990s and Chinese court subsequently refused the arbitration award in *Heavy Metal Music Case*. On the contrary, a different outcome would be likely if this issue was raised in the U.S. during that time. In addition, public policy will change over time in line with societal changes.

Despite the fact that 'public policy' defense is the most frequently litigated defense, there is a marked paucity of successful outcomes, most likely due to the narrow interpretation of public policy by the court as well as to the tendency to favor the international public policy over the domestic one. Public policy as the basis for refusing to recognize and enforce a foreign award is thus the most difficult to establish under Article V of the New York Convention and therefore may not be a useful approach. Courts generally refuse this defense by applying the narrow construction.⁵²⁸ An obvious example of this outcome is in Western countries, as U.S. courts, for example, have shown tendency to decide in favor of arbitration. Those decisions in *Scherk* and *Mitsubishi* were held enforceable when in conflict with Federal securities and antitrust laws. A similar line of reasoning is found in the decision of *Parson v. Whittemore*, which the court also referred to the general pro-enforcement bias of the New York Convention. Moreover, emphasizing the need to uphold public policy in the enforcement of foreign awards implies that they should only be denied on this basis "where enforcement would violate the forum state's most basic notions of morality and justice."

In England, the national courts are reluctant to excuse an award from enforcement on grounds of public policy. It used to be said that "there is no case in which this exception has been

⁵²⁸ Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: The "Refusal" Provisions*, 24 Int'l Law Summer, 507 (1990).

applied by an English court.”⁵²⁹ Even though ‘public policy’ exception was applied in *Soleimany* case, English court is likely to strongly encourage the pro-enforcement doctrine and hold the presumption that public policy will be affected if it is “clearly injurious to the public good or, wholly offensive to the ordinary reasonable.”

France has a history of expanding the view of public policy dating back to the 19th century. However, it is now held by the Paris Cour d’Appeal that “although it is forbidden to enter into arbitration agreements concerning disputes implicating public policy, that rule does not mean that every case which in some respect depends on regulations based on public policy will be held non-arbitrable on those grounds.”⁵³⁰ Subsequently, French courts concluded that Article 2059 and 2060 of the Civil Code did not apply in international arbitration agreements.⁵³¹ As French court also confirmed the arbitrability of competition law in *Thales*, these circumstances clearly indicate that French courts are likely to be more open to hearing the cases relating to public policy. French courts have progressively narrowed the scope of non-arbitrable matters as non-arbitrable only where mandatory statutory text expressly requires this result.

Swiss courts have considered the term ‘public policy’ in the same way as their U.S. counterparts, as well as those in England and France. Since the enactment of the Swiss Arbitration Act in 1987, there was no the annulment of arbitration award on the public policy grounds. However, in 2012, in *Club Atletico*, the award was annulled based on substantive public

⁵²⁹ Kerr, *Concord and Conflict in International Arbitration*, 13 *Arbitration International*, 140 (1997).

⁵³⁰ Judgment of 21 February 1964. *Meulemans et Cie v. Robert*, 92 J.D.I. (Clunet) 113 (Paris Cour d’ appel) (1965).

⁵³¹ Judgment of 20 June 1969, *Impex v. Malteria Adriatica*. 1969 Rev. arb. 95 (Paris Cour d’ appel). Article 2059 of the French Civil Code provides that “all persons may submit to arbitration those rights which they are free to dispose of.” Moreover, Article 2060(1) provides that “one may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or to disputes concerning public bodies and institutions and more generally in all matters in which public policy is concerned.”

policy grounds by the Swiss Supreme Court. As the violation was rather obvious in this case, the annulment of the award is no indication that the Swiss Supreme Court intends to be more intrusive into arbitrators' award. Otherwise, Swiss courts tend to abide by the limited grounds for challenging the international award.

'Public policy' in arbitration, as applied in the U.S. and the Europe, was construed in narrower sense than it is anywhere else in the world. Thus, owing to the national court allowing a minimal mechanism of intervention, public policy exception in the U.S. and the Europe are deemed an impeccable model to other countries.

Public policy is an important factor in relation to arbitrations in Africa. Since there are various cultural, linguistic, religious and political diversities between, sometimes even within, African states, public policy can be more widely construed compared to the Western countries. Public policy consideration in some states in Africa is still widely regarded as a formidable tool to deprive the jurisdiction of national courts. Criminal matters, for example, are deemed as unacceptable for arbitration in most African states, where public policy is construed in a narrower sense than would be expected. In *Nordwind* case, Nigerian Supreme Court had highlighted the danger of reaching decisions on the basis of public policy, stating the following:

"It is dangerous for a court to base its decision mainly on public policy, which indeed would be another means of avoiding the rules, law and procedure which govern a matter. Public policy is usually equated with public good. To ask a Court to decide only as a result of public policy or public good, goes beyond the measure of liberalism in the application of the law or even viewing a matter from the socio-economic context of law. Who is to determine what

constitutes public policy? To rely on public policy or public good simpliciter, is to give room to uncertainty in the law. It is a way 'to beg the question.'⁵³²

It is evident that, when applying the concept of public policy exception in South African court cases, it is still unclear whether a narrow interpretation or a broader direction would be used, which makes the outcome even more uncertain. Refusing the enforcement of foreign award based on public policy ground case still can be seen in South African court.

China and Hong Kong's public policy, on the other hand, is in line with the Western application, but is yet to reach the level adopted in the U.S. This may be because Asian culture is more conservative than that prevalent in Western societies. As public policy is typically conserved to ascertain that social culture changes in line with the needs of the society, akin to evident cultural changes, arbitration in Asia may converge towards the modern international arbitration over time.

On the other hand, public policy is not construed narrowly in every court, as in some countries, its broader interpretation is accepted by the court. While Saudi Arabia has a strongest public policy presumption because Islamic law plays a key role in every aspect of people's lives, Thailand, surprisingly, has widened the scope of public policy to several aspects of law, such as excessive interest rate or fee ordered by arbitrator, which would be annulled, due to being interpreted as public policy contrary to Thai society.

Another issue that should be noted is the case when one of the parties of arbitration agreement is a state entity. The arbitration can only proceed validly on the basis that the state concerned has agreed to arbitrate, and such an agreement is generally held to be a waiver of

⁵³² *Sonnar Ltd. v. Nordwind* (1987) NWLR (Pt. 66).

immunity.⁵³³ A waiver theory of sovereign immunity has been adopted by national courts in many Western countries, whereby the position adopted by each country can be assessed in reference to the legislations of that country. However, when these laws fail to provide a precise position that country will take, the court's practice is a better indicator of that country's standpoint. For example, in the U.S., the Foreign Sovereign Immunities Act⁵³⁴ does not specify whether an agreement to arbitrate entered by a foreign state could be regarded as a waiver of immunity from the jurisdiction of the U.S. court. The U.S. court eventually made this issue clear by deciding in *Liamco*⁵³⁵ case that an award made against Libyan state was recognized by the U.S. court, where the arbitration took place.

England takes the same view as the U.S. on this issue, whereby, according to the English State Immunity Act 1978, the state will not be immune in respect of proceedings in the courts of England that relate to the arbitration.⁵³⁶ On the other hand, France explicitly prohibited public entities to enter into arbitration agreements in the French Civil Code.⁵³⁷ Interestingly, one of the case law from the French Cour de Cassation held that:

⁵³³ Alan Redfren and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 550 (2004).

⁵³⁴ Foreign Sovereign Immunities Act 1976, Title 28, US Code, Section.1605(a)(1).

⁵³⁵ *Libyan American Oil Company (Liamco) v. Libyan Arab Republic*, 20 I.L.M. 1 (1981); the arbitral award was made against Libyan state in this case. The U.S. courts enforce the award made under an agreement to arbitrate.

⁵³⁶ The English State Immunity Act 1978, Section 9.

⁵³⁷ Article 20602 of the French Civil Code provides that "One may not enter into arbitration agreements in matters of status and capacity of natural persons, in those relating to divorce and judicial separation or in controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned. However, certain categories of public institutions having an industrial and commercial character may be authorized by decree to enter into arbitration agreements."

“The obligation entered into by the State by signing the arbitration agreement to carry out the award according to Article 24 of the International Chamber of Commerce Arbitration Rules implies a waiver of the State’s immunity from execution.”⁵³⁸

However, such approach is still an exception on the international scale.⁵³⁹ It is, however, not surprising that this decision has been given by French court, since France is a very arbitration-friendly country. At least, a strong evidence of pro-enforcement of arbitral award in respect of state-owned entity in France existed and had been possible, even it is not widely accepted.

Developing countries, including African states and Thailand, seem hard to waive its state immunity when a state entity is involved in the arbitration matter. They tend to preserve state’s benefit and jurisdiction to be exclusively decided by national courts, due to the widely held view that foreign investors may use arbitration as a tool for depriving their state immunity. Political risk is an unavoidable factor when conducting business or executing any transactions with governments of these countries.

The expanding scope of the claim that may be submitted to arbitration is determined by the strength of each sovereign immunity policy. Even though there seems to be a general tendency of most jurisdictions towards narrowly interpreting the public policy exception in favor of enforcement, it is likely that a few jurisdictions will opt to interpret it broadly. As shown in a few cases, we cannot deny the existence of inconsistency of judicial application of the public policy exception. However, they are not strong enough to oppose the general trend of pro-

⁵³⁸ Cass.le.iv., July 6, *Creighton v. Ministere des Finances de l’Etat du Qatar*, 127 J.D.L. 1054,1055 (2000).

⁵³⁹ American Arbitration Association, *Handbook on International Arbitration Practice*, 348 (2010).

enforcement. There are several attempts by numerous organizations suggesting the application of 'public policy' in limited to specific situation below.

United Nations drafting committee of the New York Convention intends to limit the application of 'public policy' to cases 'in which the recognition or enforcement of a foreign arbitral award would be distinctly contrary to the basic principles of the legal system of the country where the award was invoked.'⁵⁴⁰

Another source of useful guidelines for states to draw upon when considering 'public policy' is the recommendations of the International Law Association (ILA)'s Final Report 2002,⁵⁴¹ which provides a guide for an enforcement court's discretion by emphasizing that refusal to enforce an award should occur only in "exceptional circumstances."⁵⁴² In addition, such "exceptional circumstances may in particular be found to exist if recognition or enforcement of the international arbitral award would be against international public policy."⁵⁴³ The international public policy of any state will thus include "(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; and (iii) the duty of the state to respect its obligations towards other states or international organizations."⁵⁴⁴ The Final Report is an excellent example of the arbitration system

⁵⁴⁰ Report of the Committee on the Enforcement of International Arbitral Awards, 28th March 1955, UN Doc. E/2704 and E/AC.42/4/Rev.1.

⁵⁴¹ International Law Association (ILA) on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference, 2002.

⁵⁴² *Id.* at Recommendation 1(a).

⁵⁴³ *Id.* at Recommendation 1(b).

⁵⁴⁴ *Id.* at Recommendation 1(d).

internalizing its own regulatory function and thus signifies a major contribution to the civilization of arbitration.

In my view, a reformed concept of public policy is needed in the countries where a strict public policy is applied, as, at present, The New York Convention permits the states to use too wide a discretion when applying the 'public policy' exception. As a result, the arbitration could not perform a full function regarding the finality of an award, since national court may raise this issue to bar the award enforcement. Even though there is a likelihood that 'public policy' exception is the international—than domestic—public policy, local courts can still exercise their own discretion to choose whether to apply domestic or international standard pertaining to public policy. This is a loophole that allows a dishonest party to use 'public policy' as a tactic to reject the binding of award, since it is difficult to decide without any ambiguity which matter is considered as 'public policy' of each country.

Each country has adopted a difference approach to arbitration. As the world's economy system becomes more integrated, states should continue to develop cooperatively an international public policy by applying it restrictively. Finally, I would hope that this approach will be welcomed by supervision court of the relevant states. Consequently, international arbitration will be strengthened and the enforcement of foreign arbitral awards will follow a similar path of integration into the global legal and business system. Public policy defense will, accordingly, achieve its purpose, rather than be served as an untrustworthy mechanism.

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