Chapter Seven

Summary and Conclusions

There is no doubt that public policy could affect the enforcement of foreign arbitral awards. The lack of a clear and comprehensive definition for public policy leaves the door wide open for domestic courts to determine the extent of those matters that are deemed contrary to public policy, according to their notion of the concept. This is particularly the case under Article V (2)(b) of the New York Convention, which does not clarify this ground nor offer guidelines for national courts to determine whether or not there is a distinctive policy to refuse the enforcement of a foreign arbitral award. Giving national courts such discretionary power in determining the scope and ambit of public policy has led to a variety of interpretations of this notion, which may expose the award to additional conditions other than the limited grounds provided under Article V (1) of the New York Convention. Accordingly, whether, or to what extent, this ground must be taken into account in determining the validity of foreign arbitral awards will ultimately depend upon the considerable powers conceded to the courts in defining a precise limit of public policy.

The prime objective of this study was to argue that there is room for discussion about the degree of control a state should exercise. There is also room for argument as to whether a distinction should be drawn between international and domestic arbitration, the former being less strictly controlled than the latter. The general trend in arbitral and court awards is to construe the New York Convention's public policy defence narrowly by restricting the application of domestic public policy to a minimum while at the same time the application of public policy rules and moralities of the international community must be considered. The discussion has drawn its inspiration from the growing international awareness of the notion of international public policy, which has developed according to the demands of international commercial relations.

To illustrate the effect of public policy on the enforcement of foreign arbitral awards, it was necessary to examine the application of this notion throughout the successive stages of the arbitration process. This was done by considering the possible application of this concept during the arbitration process by the arbitral tribunal then, by the courts in the country of origin and finally before the courts in the country in which enforcement is sought under Article V (2)(b) of the New York Convention.

At the first stage, it was important to examine the potential conflict of public policy rules during the arbitration process. The questions that were dealt with at this stage were, whether or not arbitral tribunals have a duty to consider the application of public policy rules during the arbitration process and how an arbitrator can determine the applicable public policy rules in the domain of international commercial arbitration. As stated in chapter three, arbitrators are obliged to respect the 'parties' autonomy' and the rules which they have chosen to govern their dispute. However, the efficacy of this concept is subject to public policy limitations. It has been argued that arbitrators could disregard the parties' choice of law if the underlying motives of their choice aimed at violating the public policy rules of countries that have a close connection to the dispute. This may be the case if the parties deliberately attempted to exclude parts or all of the mandatory rules of a particular national law, for example, the law which is duly applicable according to the conflict of law rules. Therefore, in spite of the arbitrators' obligation to apply the law chosen by the parties, arbitrators are not completely barred from applying other rules to the dispute, particularly if by disregarding the parties choice arbitrators would avoid derogation of the public policy of other countries connected to the dispute. This is due to the arbitrators' duty to make every effort possible to provide the parties with an award that is more likely to be recognised and enforced.[1] Moreover, arbitrators have a responsibility to the process of arbitration itself. For commercial arbitration to be effective there must be full confidence in the integrity of the process. Therefore, arbitrators should take account of the interests of the community or communities that would be affected by the resulting award. This may include taking into consideration the public policy rules of the place where

1. If an arbitrator made a decision without considering the applicable public policy rules, he would be infringing the duty he is expected to respect and abide by. As mentioned above, this approach corresponds to the modern tendency followed in international commercial arbitration, where arbitrators are obliged to ensure the validity of their award. See, Article 32 (2) of the LCIA Rules; Article 35 of the ICC rules of (1998); Gunther J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award," 18:2 Journal of International Arbitration (2001), p. 135.

arbitration proceedings are conducted, the place or places where enforcement may take place, the public policy of the law chosen by the parties and the public policy of the place where performance of the contract will take place. However, the diversity of legal systems that could have connection to the dispute might make the determination of the applicable public policy rules a matter of guesswork. The difficulty particularly arises since arbitrators have no allegiance to a specific state, and therefore they do not have conflict of rules of their own. Moreover, they are not expected to "scientifically investigate" the public policy rules of different legal systems and they may not have the time nor the knowledge to do so.

The conclusion drawn at this stage is that arbitrators are not expected to comply with national standards of public policy, especially where the national rules in question were designed to govern domestic relations only. Therefore, arbitrators must search for the proper public policy rules according to what they may consider to be closely connected to the dispute. They also have to ascertain the public policy rules that a national law considers essential to the protection of its national interests and moral values, those which are applicable to both national and international commercial relations. Finally, to avoid any potential conflict in deciding public policy issues, it has been suggested that arbitrators should consider the application of internationally accepted public policy rules as the most appropriate public policy rules to govern international commercial relations, which they must protect and guarantee.

At the second stage, it was important to examine the effect of setting aside an arbitral award for considerations of public policy in the country of origin. This relates to the fact that setting the award aside in the country of origin is one of the grounds for refusing enforcement in foreign countries under Article V (1)(e) of the New York Convention. It has been established that invoking the public policy ground to set an arbitral award aside should be based upon considering the connection between the arbitral award and the country of origin. In this regard it is important to keep in mind that enforcement of an award may take place in a country that may has no connection with the subject matter of the dispute. Courts are therefore required to consider the distinction between national and international arbitral awards. If the award has no connection to that country other than that it was chosen for convenience as a neutral forum then, there will be no rational reason for the court of origin to set the award aside

because it violates purely national public policy rules. This may particularly be the case if invoking national public policy standards would create a conflict with the mandatory rules of the law which are closely connected to the dispute. Also, it has been mentioned that the court of origin may not be able to determine the validity of an arbitral award according to its compliance with foreign mandatory rules, since a court in the country of origin cannot understand the subtleties of application and the exact extent of a public policy rule deriving from a foreign legal system. Moreover, a court in the country of origin cannot decide what a particular foreign rule is designed to prevent or how an international arbitral award would be treated under the legal system of that country.

It has been concluded that applying the concept of international public policy provides a reasonable solution for the conflict of public policy rules, and it is advisable in such cases that a court of the country of origin leave the determination of the exact extent of public policy to the courts of enforcement. This alleviates the problem of a court of the country of origin attempting to apply the public policy of a foreign legal system with which it is not familiar. Also, applying internationally accepted public policy rules might increase the chances of enforcing the award, which might ultimately preserve the integrity of the court's decisions when the award has been brought before the courts of another jurisdiction as a foreign arbitral award. To this end, it has been argued that whilst Article V (1)(e) of the New York Convention provides grounds for refusing recognition and enforcement of an award if it has been "set aside or suspended by a competent authority of the country in which or under the law of which, that award was made", a successful challenge that was based upon purely national public policy rules in the country of origin may not deprive the award of its binding effect in other countries. By reference to the phrase "recognition and enforcement may be refused" provided in Article V (1), it was possible to conclude that the grounds included in Article V (1) are discretionary and not mandatory. Therefore, the courts in the country of enforcement are not compelled to refuse the enforcement if the award was set aside by a court in the country of origin on the basis of purely national public policy rules, this may arise in exceptional cases, where the nullification order by the court of origin does not constitute a violation of public policy in the country in which enforcement takes place. For example, when the court of enforcement finds that the nullification order was based on unreasonable grounds or that the court of origin had set the award aside

due to the formal requirements of its national procedural law, such as where an arbitrator refused to sign the arbitral award, where this was not required by the applicable procedural law or by the public policy rules of the country of enforcement.

The final stage concerns examining the application of public policy in the country of enforcement. At this stage, several examples were examined in order to illustrate the extent to which public policy is applied as a ground on which to refuse the enforcement of foreign arbitral awards. Since public policy covers a wide range of issues, it was necessary to categorise these issues into two main areas; procedural public policy issues and those which relate to the subject matter of the dispute.

A foreign arbitral award may be examined by the court enforcing it for procedural irregularities in order to ensure whether or not arbitrators have considered the fundamental values of justice and fairness in making the award, and whether or not parties have had a fair opportunity to present their case. Attention has been drawn to the difference between the role of Article V (1)(b) and the public policy ground under Article V (2)(b) of the New York Convention. Whilst Article V (1)(b) provides grounds for refusing the enforcement of an arbitral award for procedural irregularities, the public policy ground could still be invoked as an additional control in order to remedy the procedural irregularities which are not covered by Article V (1) of the Convention.
Several reasons could be drawn to justify this view. Firstly, Article V (1)(b) provides that recognition and enforcement of the award may be refused if "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." The phrase "or was otherwise unable to present his case" has been construed as implying that a court may refuse to enforce the award on public policy grounds whenever it makes a finding of other procedural irregularities that would affect justice between the parties.
Secondly, Article V (1)(b) grounds could be raised by only one of the parties, whereas the public policy ground can be raised by the court of enforcement on its own motion. Therefore, if the court executing the award finds a procedural irregularity that violates national procedural public policy, then it may refuse enforcement on its own motion.

Finally, Article V (1)(b) does not identify under which law a court can determine whether a party has been given proper notice and whether or not he has been able to present his case. The absence of a clear reference to the applicable law might provide the court of enforcement with a legitimate reason to apply its national mandatory rules under Article V (2)(b) of the Convention.

The study argues that examining the validity of a foreign arbitral award according to its conformity with the national procedural public policy rules of the country of enforcement might lead to inappropriate results, particularly that a foreign arbitral award may have been correctly produced under a foreign law that has a close connection to the arbitral process. This may create a conflict of public policy rules between the procedural mandatory rules of the country of enforcement and the arbitral procedural rules that have a connection to the dispute.[2] An execution court is therefore, required to construe the Convention's public policy defence narrowly by confining the application on these grounds to the minimum standards of justice as known in the practice of international commercial arbitration. Accordingly, an arbitral award that is correctly produced under a foreign law must not be refused unless the resulting award leads to a serious violation of justice and equity between the parties. An execution court should also consider that the national mandatory rules of its law might include formal requirements, the violation of which may not necessarily lead to a denial of justice to the parties. Therefore, not every procedural irregularity constitutes a sufficient reason to refuse enforcement of foreign arbitral awards. Moreover, a court should give more attention to its ultimate duty which is confined to considerations of justice between the parties and not to the enforcement of formal requirements imposed by its national procedural law.

The examples that have been examined in chapter five reveal that the judicial practice of various legal systems distinguishes between national and international public policy rules. The latter mainly relate to the existence of mutual principles of justice common to the majority of countries, which represent the most fundamental notions of equity and justice. Therefore, international procedural public policy rules could be recognised as those principles of justice that are shared among the international community and should be respected no matter where the arbitration procedures take place. Consequently,

2. For example, the law or rules which the parties choose to govern the arbitral procedures and the law of the country in which the arbitral procedures take place.

this may lead to narrow the domain of formal conditions that are imposed by national mandatory procedural rules that may not be suitable for the requirements of international commercial arbitration.
Finally, the evidence which supports the argument that the notion of international public policy is increasingly recognised as a basis for interpreting Article V (2)(b) of the New York Convention has also been considered in issues that relate to the subject matter of the dispute.[3]

The conclusion that could be drawn from this study could be summed up as follows.
The growing acceptance of arbitration by the international commercial community has made it difficult for states to adopt or retain a negative approach to arbitration. A state that wants to participate in international trade should recognise the role of international commercial arbitration and should allow the enforcement of foreign arbitral awards except where there are the clearest breaches of international public policy. However, one should recognise the difficulty of forming a precise definition of international public policy. The absence of a clear definition should not, nevertheless, lead us to underestimate the importance of this concept. The drive towards trade growth and economic globalisation requires international public policy to be recognised as a guiding principle in order that judicial interference in foreign arbitral awards is restricted to the minimum. This will rest to a great extent upon the national courts' good conscience in providing new solutions that meet the direction of which the international commercial community is moving. A national court that does not recognise the necessity of transposing its domestic arbitration practice to an international level is "very much like the mother who does more harm than good to her children by locking them up under the pretext of protecting them from the different hidden and apparent risks and evils of the outside world, thus depriving them of the opportunity of acquiring the necessary experience to cope with the difficult problems of real adult life."[4] A national court should thus be aware that its role is not limited to the mechanical application of its national law as it stands, but extends to creative interpretation that recognises the specificity of international commercial arbitration. This will be a gradual step by step progression, and a time may come when a compelling need for change will drive national courts

3. Various examples have been examined in chapter six to illustrate how public policy could be interpreted to include morality, political and economic issues.

4. See Mohamed Abdel-Khalek Omar, "Reasoning in Islamic Law," Arab Law Quarterly [1998] p. 23 at 60.

to develop a stringent and straightforward case law that recognises the necessity of transposing their domestic arbitration practice to an international level. In order to achieve that, it will be important to train qualified and skilled judges who can distinguish international arbitral awards from purely national arbitral awards. All that can be expected of them is to recognise that the development of international trade brings increasingly complex issues that may not accord with traditional methods, procedures and ways of thinking. Therefore, they must consider that the evolution of international commercial relations requires the application of international public policy rules that are more suitable to international commercial disputes.

By way of final conclusion, I can do no better than to quote the comment of van den Berg who states that:[5]

"The interpretation of public policy is like the movement of a pendulum. It has moved from an earlier parochialism to the present attitude in favour of international commercial arbitration. It may reach a point where international commercial arbitration may be favoured too much by an overly narrow interpretation of public policy, and this may produce a counter reaction. But the pendulum has by no means reached that point. At present the judicial attitude in favour of intentional commercial arbitration is just emerging in various countries. This movement should be encouraged, to which end the distinction between domestic and international public policy is a useful criterion."

5. Van den Berg, op. cit., p. 368.