# *Chapter Six*

## Public Policy in relation to the Subject Matter of the Dispute

This subject matter of a dispute may raise various grounds for non-enforcement of a foreign arbitral award. It is important to mention that the public policy element here may overlap with the notion of arbitrability.[1] Public policy in this sense could be invoked in order to examine whether the award relates to certain kinds of disputes that by their subject matter are excluded from arbitration. Public policy could also be invoked where the outcome of the arbitrators' decision contradicts with interests that have significant importance to the state in which enforcement is required. Therefore, the breadth of this topic vary, depending on how the relevant state and their enforcing authority interprets the public policy ground. Attention will be given, therefore, to particular examples according to what have occurred in practice before national courts of different legal systems.

The analysis will be prefaced by a review of the various definitions of public policy, identified in chapter two.[2] Several writers interpret, and court decisions understand public policy as reflecting the fundamental moral, political and economic interests of every community. The subject matter of disputes has a bearing on most of these interests. This chapter will therefore examine the application of public policy under the following headings.

I. Issues of morality
II. Political Issues
III. Economic Issues

1. The relationship between public policy and arbitrability has been examined in chapter one. See Chapter One, at p. 54.

2. See Chapter Two, at p. 64.

# I. Issues of morality

## *A. Generally*

It is natural to find moral standards and cultural principles that are peculiar to every community. It is also common to find rules of law that stem from moral principles, which impose on the members of a given community orders and obligations that they cannot derogate from by their autonomous agreements. Such mandatory moral rules may vary from place to place and from time to time.[3] It follows that any agreement of dubious morality could be nullified for considerations of public policy, in the community in which such mandatory moral rules are invoked.[4] However, it is important to consider that there is no clear-cut definition of what could be regarded as a moral principle that could establish (under the head of morality) an obligation that would compel the members of a given community to comply. For example, it would be difficult to determine whether or not a certain custom or a religious principle has an imperative importance that lies at the heart of the legal system in a given community. Therefore, it will be difficult for an arbitral tribunal, and in a later stage for the court where enforcement of the award is sought, to determine the validity of an international commercial transaction according to its coherence and consistency with such variable national moral standards. No one can determine on behalf of a given culture what is acceptable and what is offensive to the moral standards as comprehended in that culture. It will also be difficult to establish moral standards that suit all nations and various cultures from different backgrounds.

With these difficulties in mind, it could be argued that determining the validity of a foreign arbitral award could only be based upon the national moral standards in the country in which enforcement is sought. However, one should recognise that international moral standards do also exist. This could be recognised if we consider that there are certain agreements or activities which are prohibited world wide because they violate standards of morality that are common to

3. See Karl-Heinz Bockstiegel, op. cit., p. 182. He states that: "The values and standards of communities are not stable, they change and develop. So does public policy since it is derived therefrom."; For example, gambling or prostitution, where the validity of such agreements may vary from country to country; Dennis Lloyd, op. cit., pp. 101 and 113; Van den Berg, op. cit., p. 376; Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 290; Mahmoud Hashim, op. cit., p. 148.

4. See Dennis Lloyd, op. cit., p. 104. He refers to the basic principal which provides that: "one cannot derogate by individual agreements from laws which concern public order or good morals."

all, or at least to the vast majority of countries. For example, agreements that violate human rights such as trafficking in human beings, or agreements that include employment of mercenaries or terrorist actions[5], organised crime, the trafficking of arms[6] or drugs[7] and corruption.

In the domain of international commercial arbitration, it has long been recognised that international arbitrators are obliged to not put into effect obligations the ultimate purpose of which is contrary to international moral standards. Also, enforcement of foreign arbitral awards could be refused if the subject matter of the dispute violates public policy rules and morality of the international community. To illustrate the effect of such international moral standards on the enforcement of foreign arbitral awards, I will focus on one of the common examples which has occurred in international commercial arbitration; this example relates to bribery, corruption[8], or what is known as the purchase of influence in international trade.

### *B. Corruption and purchase of influence in international trade*

Corruption is immoral behaviour whereby one of the parties obtains a contract that he would not be able to obtain without resorting to bribery, the illegal use of personal influence and corrupting governmental officials.[9] In international commercial relations corruption is

5. On terrorism, see, for example, General Assembly of the UN, "Resolution 34/ 145 (Measures to prevent intentional terrorism which endangers or takes innocent human lives or jeopardises fundamental freedoms, ...)", ILM XIX (I980), 533; General Assembly of the UN, "Drafting of an International Convention .Against the Taking of Hostages", ILM XVIII (1979), 1456; Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 306.

6. See, for example, The Chemical Weapons Convention of 1993; Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 585.

7. There are several UN Drug Control Conventions. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; See, web site address, (http://www.undcp.org/resolutions.html); also see, UN General Assembly, "Resolution 393/l41 (International Campaign Against Traffic in Narcotic Drugs)"; "Resolution 39/ 142 (Declaration on the Control of Drug Trafficking and Drug Abuse)" and "Resolution 39/143 (International Campaign Against Traffic in Drugs)", ILM XXIV (1985) 1157; Klaus Peter Berger, op. cit., p. 676.

8. One should consider that bribery is somewhat different from corruption, where a bribe is to try to make (someone) do something for you by giving them money, presents or something else that they want, where corruption is a dishonestly by using a position or power to achieve a personal advantage. However, both situations may lead to the same effect, which is to obtain benefits from a person in a public position.

9. Steven R. Salbu, "Transnational Bribery: The Big Questions," 21 J. INTL. L. BUS. (2001), p. 435; Halsbury's Laws of England, 4th ed., vol. 9 (1974), para. 394, p. 268, where bribery is examined under the heading "Agreements Injurious to Public Life"; Chitty on Contracts, 25th ed. (1983), para. 1048, p. 557, where bribery is examined under the heading "Objects Injurious to Good Government: Domestic Affairs"; Cheshire Fifoot and Furmston, The Law of Contract, 11th ed. (1986), p. 355, where bribery is examined under the heading "A Contract Liable to Corrupt Public Life"; In Montefiore v. Menday Motor Components Company, Limited, 1918, 2 K.B. p 241, the court decided that: "It is contrary to public policy that a person should be hired for money or valuable consideration to use his position and influence to procure a benefit from the Government, and a contract for that purpose is therefore illegal and void."

regarded as an illegal act which violates the fundamental principles of contractual morality.[10]

In international commercial arbitration, disputes that involve the bribery of a foreign government official can be considered arbitrable and therefore could be determined by arbitral tribunals.[11] This may be due to the difficulty of distinguishing between illegal agreements which include the use of influence in international trade and other legal transactions that involve legal commissions, where the latter type of agreements are common in international trade. Therefore, arbitrators could examine the validity of such agreements to determine whether or not the contract is illegal on the ground of international public policy.[12] This was the view of the arbitral tribunal in ICC case No. 1110[13], the claimant, an Argentinean party, claimed for a commission that relates to a contract obtained by a British Corporation in Argentina. The contract was based on an earlier agreement according to which the claimant was to receive 10% of the value of £400,000 in return for his intervention with the Argentinean authorities in favour of the English company. The arbitrator recognised that a major portion thereof was to be used to bribe employees of the then Argentine government. Whilst neither party raised the issue of public policy, the arbitral tribunal held that:

"…it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good

10. The effect of corruption on the economic and social development of countries around the world has been recognised by several international conventions. See, the 1997 OECD Convention on Combating the Bribery of Foreign Officials in International Transactions, signed on 17 December 1997, and came into effect on 15 February 1999; also see, Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 293. He referred to the studies, recommendations and resolutions of the United Nations: "Bribery in contracts has been studied by the United Nations either as a subject in it self or in the context of other subjects such as the activity of transnational corporations; See "Resolution 3514 of the General Assembly, Resolution 2014 (LXI) of the Economic and Social Council (Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions)", ILM (1976). 1222; "UN Commission on Transnational Corporations: Report of the Working Group on the Formulation of a Code of Conduct" ILM XV I ( 1977), 709; "Economic and Social Council: Report of the Ad Hoc Working Group on Corrupt Practices in International Commercial Transaction", ILM XV I (1977), 1236; "Report of the Committee of the Economic and Social Council on an International Agreement on Illicit Payments", ILM XVIII (1979), 1025; "Draft Code of Conduct of the UN on Transnational Corporations", ILM XXII (1983), 177 and XIII (1984). 626.

11. See, Northrop Corp v. Triad, 593 F. Supp. 928 (1984), where commission (or bribery) was paid to foreign government officials. In the latter case the USA court did not find bribery inarbitrable on grounds of public policy; also see, Judgement of Mr. Justice Colman in Westacre Investments Inc v. Jugoimport SPDR Holding Co Ltd., [1998] 3 W.L.R. 770; [1998] 4 All E.R. 570; [1998] 2 Lloyd's Rep. 111; [1998] C.L.C. 409.

12. It has been established in Chapter Three that international arbitrators are not guardians of a particular national law, therefore, an international commercial arbitrator could apply moral standards which are common to the community of nations. See Chapter Three, at p. 147.

13. ICC case No.1110/1963, Yearbook Commercial Arbitration (1996), p. 47; also see, Julian Lew, Applicable Law International Commercial Arbitration, op. cit., p. 553; Julian Lew, "'Determination of Arbitrators' Jurisdiction..," op. cit., p. 84; Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 293.

morals and to an international public policy common to the community of nations."[14]

In another ICC case[15], the arbitral tribunal decided that the payment of bribes by a British firm was the cause of the obligation undertaken by a French firm. The tribunal decided to nullify the contract on the ground of its violation of international public policy. It held that:
"This solution is not only in keeping with internal French public policy, it is also dictated by the concept of international public policy as is recognised by the majority of states."[16]

The above two examples demonstrate the condemnation of corruption by international arbitral tribunals under the duty of protecting the interest of the international commercial community, whereby arbitrators could examine the merits of the dispute and determine the illegality of the subject matter of the dispute in conformity with the requirements of international public policy.

However, national courts in the country of enforcement will always have the last word, as they can review the arbitral award, and accordingly may revoke the award if it failed to take into consideration the invalidity of the parties' agreement due to bribery or corruption. Even if the arbitral tribunal had nullified an agreement on the ground of breach of public policy, national courts could vacate the arbitral award if it appears that the agreement does not breach national public policy. This was the case in Hilmarton v. OTV before the Geneva Court of Appeal.[17] The arbitral tribunal considered the circumstances under which the agreement was made and found that the consultancy agreement between the parties was contrary to public policy, since in order to obtain the contract Hilmarton breached the mandatory rules of Algerian law, which prohibit any intervention of intermediaries in the obtaining of a public contract. However, the Geneva Court

14. The tribunal further concluded that: "Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for the assistance of the machinery of justice, be it national courts or arbitral tribunals, in settling their disputes."

15. ICC No. 3913/1981, I Collection of ICC Arbitral Awards (1981), p. 497; Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 292.

16. The concept of good morals in international commercial relations was also asserted in ICC proceedings Case No. 2730/1982, Collection of ICC Arbitral Awards Vol. I (1984), p. 490; ICC case No. 3916/1981, 1982 1 Collection of ICC Arbitral Awards (1984) p. 507, concerning payment of bribes between French and Iranian parties; Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 292; Rubino Sammartano . M., op. cit., p. 315; Julian DM Lew, "Determination of Arbitrators' Jurisdiction…," op. cit., pp. 73 and 84.

17. Hilmarton v. OTV. Reported in (1994) XIX Yearbook 214; Cited in ILA Report, London Conference (2000), op. cit., p. 33.

of Appeal did not consider the contract to be in breach of the public policy of the Swiss law, which was the applicable law to the contract, and therefore overturned the award on the ground that it had been rendered without legal reason.

By contrast, a different view was followed by the English courts in Westacre Investments Inc. v. Jugoimport - SDPR Holding Co. Ltd.[18] The court expressed its confidence that if the issue of illegality by reason of corruption was referred to high calibre ICC arbitrators and duly determined by them, it would be entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission.[19] In Westacre v. Jugoimport case, the issue concerned the enforceability of a Swiss ICC arbitral award, in respect of a $^{500}$ million USD contract for the sale of weapons to Kuwait. The award related to an agreement for the supply of arms from Yugoslavia to Kuwait under which it was alleged that bribes had been made to Kuwaiti officials to secure the sale of arms. The defendant Jugoimport[20] contended before both the arbitrators and the Swiss Federal Court that the contract was illegal and unenforceable because the agreement violated public policy in Kuwait. The arbitrators rejected these allegations and considered the contract valid. The defendant later sought, before the English court, to introduce new evidence in support of its allegations of bribery. The court considered that the dispute has already been litigated and decided by a foreign tribunal as it held that:

"…the arbitrators had considered the allegations and ruled that the contract was not illegal without evidence of incompetence or bad faith that finding would be upheld."

Furthermore, the court recognised that there is an international public policy rule of priority to be applied, which imposes the duty to recognise the finality of international arbitral awards. The court held that:

"The court deciding on the enforcement issue, would have to consider whether the policy of not enforcing illegal judgements outweighed the countervailing policy of encouraging finality in judgements. The policy of encouraging the enforcement of international

18. Westacre Investments Inc v. Jugoimport SPDR Holding Co Ltd, [1998] 3 W.L.R. 770; [1998] 4 All E.R. 570; [1998] 2 Lloyd's Rep. 111; [1998] C.L.C. 409.

19. Unlike the Hilmarton case, see above, the court in Jugoimport case decided that Jugoimport would not be entitled to reopen issues of fact already decided upon by the arbitrators under the Arbitration Act 1975 Section 5(3).

20. A Yugoslavian state owned company.

arbitral awards should outweigh the policy of discouraging international corruption."[21]

The above decisions raise an important question; which law should be applied to decide the validity of foreign arbitral awards that involve corruption in international commercial transactions? The following examples shed light on the trend that was followed by several national courts in determining this issue.

In the Hilmarton case the Geneva Court of Appeal referred to the public policy of the applicable law to the contract which was, at the same time, the national law of the court.[22] The English courts have also expressed this view when it was asked to enforce the Hilmarton award which has been mentioned above.[23] OTV applied to set aside the award before the English courts, contending, inter alia, that enforcement would be contrary to English public policy under section 103 of the 1996 Act because the award assisted the use of intermediaries in an agreement which was prohibited under the law of the place of performance (the Algerian law). The court held, refusing the application, that the arbitral award should be enforced even if the contract would have breached English public policy in that it required a contravention of Algerian law. The court decision considered that the arbitral award had been given effect under Swiss law (the applicable law to the contract) and that it is based on a finding of fact that the contract was not tainted by corruption.

There may also be other circumstances where national courts may determine the validity of such agreements by taking into consideration both their national law and other laws that have close connection with the parties' agreement, such as the law of the country in which the agreement will be performed.[24] This view was followed by the U.S courts in Northrop Corporation v. Triad Financial

21. Jugoimport appealed against the court order, but the court dismissed the appeal, it confirmed that: "…notwithstanding that neither Swiss nor English public policy would have countenanced the claim succeeding if bribery had been established, the arbitrators had considered the allegations and ruled that the contract was not illegal. Without evidence of incompetence or bad faith that finding would be upheld." See, [2000] 1 Q.B. 288; [1999] 3 W.L.R. 811; [1999] 2 Lloyd's Rep. 65.

22. Hilmarton v. OTV. Reported in (1994) XIX Yearbook 214; Cited in ILA Report, London Conference (2000), op. cit., p. 33.

23. Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd, [1999] 2 All E.R. (Comm), p 146; [1999] 2 Lloyd's Rep. 222.

24. It reported that in England: "Contracts for the purchase of personal influence, if to be performed in England, would not be enforced on the basis that they are contrary to English domestic public policy. But where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country (as well as of England) that the English court would not enforce it." See the ILA Report, London Conference (2000), op. cit., p. 31.

establishment.[25] The Californian Federal District Court refused to enforce an award concerning a contract which involved the payment of commissions to an agent in respect of arms sales to Saudi Arabia. The court established its decision on the grounds that the contract was based on payment of illegal commissions which is contrary to the United States Foreign Corrupt Practices Act of 1977 (FCPA)[26], and the Saudi Arabian Decree No 1275, of September 17, 1975.27

To determine the validity of commission agreements in relation to the relevant national mandatory rules of a foreign law, the national courts should bear in mind that this may vary from case to case, and could depend upon certain national rules which may prohibit commission in certain fields of trade, for example, commission agreements in relation to oil supply contracts. This view was followed by the English courts in Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd.[28] The dispute involved an agreement to pay commission on oil supply contracts. The commission contract was declared void under the laws of Qatar on the basis that its object was contrary to public policy in the state of Qatar. The court distinguished between domestic contracts and international contracts. It held that:[29]

"English courts should not enforce an English law contract which fails to be performed abroad where: (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality, and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country."

In addition, the court founded its decision upon the principle of international comity as a suitable reason for the English courts to refuse to enforce international agreements which would raise questions

25. Northrop Corporation v. Triad Financial establishment, 593 F Supp 928 (1984). Cited in Julian DM Lew, "Determination of Arbitrators' Jurisdiction...", op. cit., p. 80.

26. See Internet address: http://www.ita.doc.gov/legal/fcparev.html

27. This trend was also followed in an ICC award (Case No. 4409). An arbitrator was asked to decide upon the legality of certain payments promised as a counterpart for services aiming to facilitate obtaining a military procurement contract. After adjudicating the dispute, the arbitrator declared that the claimed payments are illegal because they were promised within the framework of an agreement having as its exclusive purpose the corruption of vital institutions that must be kept immune from any possible traffic of influence. In this award, Egyptian law was declared to be the governing law, and accordingly the sole arbitrator relied on the Egyptian domestic concept of nullity for illegal cause as a mandatory rule of national public policy; also see, Aktham A. El Kholy, "The Enforcement of International Arbitral Awards", Al- Tahkim Al- Arabi, Vol. 2, January 2000, p. 20 at 21.

28. Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd [1988] 1 QB 448 at 454; KA 297.

29. Ibid., [1988] 1 QB., p. 461.

of immorality.[30] The decision explicitly states that: "some heads of public policy are based on universal principles of morality".[31] Under the concept of international public policy the court recognised the duty to maintain the minimum standards of morality which oblige the international community to co-operate in order to prevent such evil agreements world-wide.[32]

The cases of corruption demonstrated above imply that an internationally accepted standard of morality does exist, condemning illicit commercial practices in international commercial agreements.[33] The immoral and damaging effect of corruption on the economic and social development of countries around the world requires national courts and international arbitral tribunals to consider this issue as a violation of international public policy.

The delicate problem remains to determine precisely where the line should be drawn between legal and illegal international transactions. Generally, in reaching a conclusion as to whether a particular arbitral award comes within a fully recognised class of situations that will be held to be void as contrary to morality, a judge in the country of enforcement must consider all circumstances which relate to the parties' agreement when it was made. For example, consideration should be made to the intention of the parties as whether or not they intended to commit an illegal behaviour, the applicable law to the agreement, the law of the country in which the agreement to be performed and the common practice in international trade relations, where in this regard the distinction between national and international agreements

30. In this case the court referred to Lord Halsbury L.C. in In re Missouri Steamship Co. (1889) 42 Ch.D. 321, 336., which demonstrates the English courts attitude in deciding on the validity of agreements that involve issues of immorality. In the In re Missouri Steamship Co. case the court held that: "Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it"; Andrew and Keren, op. cit., pp. 296 and 297.

31.Lemenda Trading Co. Ltd. v. African Middle East Petroleum Co. Ltd., [1988] Q.B, p. 459; also see the decision of the Italian Court of Cassation in Alarcia Castells v. Hengstenberge e Procurtore general presso la Corte di appello di Milano, RDIPP XIX (1983), 346. The court stated that: "the respect of international public policy is based first and foremost on the need to safeguard a legal and moral minimum which is common to the feeling of several nations". Cited by Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 277.

32. Also see, European Gas Turbines SA v. Westman International Ltd, 30 Sept. 1993, (1994) Rev. Arb. 359, and reported in (1995) XX Yearbook 198. The Paris Court of Appeal recognised that: "A contract having as its aim and object a traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community."; ILA Report, London Conference (2000), op. cit., p. 32; Rosell and Prager, "Illicit Commissions and International Arbitration: The Question of Proof," 15 Arb.Int., (1999), p. 329.

33. See in general Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 291. The writer states that: "arbitral condemnation of corruption may thus be characterised as either the application of a general principle of law 'recognised by civilised nations', or as the recognition of a 'substantive law of necessary application', or as the resort to a transnational public policy."

should be considered. Moreover, in arriving at a decision, a judge in the country of enforcement must base his decision upon the most basic notions of morality and justice that are common to all nations or at least to the vast majority of countries, which should be considered as representing the dominant opinion of the international community whose moral ideas should prevail.[34]

## II. Political Issues

The enforcement of a foreign arbitral award may also be questioned under Article V (2)(b) of the New York Convention on the ground that the award contravenes the political stance of the state in which enforcement is required. This could arise if the award involves actions that may threaten the political stance of the state or its good relations with a friendly state, for example, trading with enemy aliens[35], payment to be made to terrorists, etc.[36] The application of this ground to the enforcement of foreign arbitral awards is a subject of much debate, since political interests vary according to the political environment of each state, therefore this has led to different results.

Parties could raise this ground at the early stages before the arbitral tribunal, for example, this could be raised by a party as a defence by claiming that the non-fulfilment of his contractual obligations refers to a political decree which made performing his obligations impossible, such as the situation in boycott sanctions.[37] However, international arbitrators are not obliged to comply with the political orders of a given state as arbitrators are not guardians of a particular national law and they have no allegiance to a particular state.[38] But arbitrators may consider such situation as a 'force majeure', which may lead to exempt the defaulting party from his obligations on the ground that the situation was beyond his control since it was caused by external circumstances which prevents the performance of his contractual obligation.

34. ILA Report, London Conference (2000), op. cit., p. 32; Dennis Lloyd, op. cit., p 101.

35. Ertel Bieber & Co. v. Rio Tinto Co. Ld. [1918] A.C. 260; 34 T.L.R. 208; Kuenigl v. Donnersmarck. [1955] 2 W.L.R. 82; [1955] 1 All E.R. 46.

36. This may also include diplomatic conflicts, hostility acts or the brake of war.

37. Boycott sanctions are political orders that could be taken against a country in order to force it to change its policies. See Iain McLean, "Oxford Concise Dictionary of Politics," Oxford University Press (1996), p. 42.

38. Bernard Hanotiau, "What Law Governs the Issue of Arbitrability?," 12 Arb.Int., No4 (1996), p. 391; Daniel Hochstranger, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," 11 J.Int.Arb., (1994), p. 57 at 59.

This was the case in a dispute that arose between a Soviet Union public corporation (Sojuzne Ftaksport) and an Israeli private company (Jordan Investment Ltd.), concerning an agreement for importing oil from Russia into Israel.[39] The dispute erupted when the Soviet Union Government prohibited the exportation of oil from Russia into Israel[40], and therefore Sojuzne Ftaksport was prohibited from performing its contractual obligations. In accordance with an arbitration clause, which was included in the parties' agreement, Jordan Investment started arbitration proceedings claiming for damages from Sojuzne Ftaksport for breaching the importation agreement. Sojuzne Ftaksport encountered these claims and replied that the agreement was cancelled for reasons beyond its control, and that the political decision of the Soviet Union Government made performing its contractual obligations impossible. The arbitral tribunal decided that the breach of the contract was a result of a political decision which prohibited the importation of oil into Israel and that Sojuzne Ftaksport is a separate legal entity from the Russian government, therefore Ftaksport was not responsible for the breach of the importation agreement.

However, on many occasions international arbitral tribunals have declined to rely on political regulations of a given country as reason for revoking the parties' agreement.[41] For example, in ICC proceedings No. 3881/1994 [42] an arbitral dispute arose between a Swiss and a German company on the one hand, and a Syrian public body on the other hand. The defendant "the Syrian party" argued that the claimant had breached the Syrian public policy rules in disregarding the Syrian political stance which requires the boycott of Israel. The arbitral tribunal distinguished between public policy and boycott rules, and held that:

"…boycott rules do not have effect on contractual relationships, in addition to that the boycott rule did not apply until the company was put on the black list and until it became official."

39. Domke M., "The Israeli Soviet Oil Arbitration," American Journal of International Law, (1959), p. 787; Ibrahim Ahmmad Ibrahim, op. cit., p. 6.

40. This was based upon a political decision as a result of the war between Israel and Egypt in 1956.

41. See P. Mayer, op. cit., pp. 285 – 286. The writer gives us an example of certain boycott laws that establish restrictions on the grounds of race and religion. He argues that an arbitrator should, in the name of international public policy, refuse to enforce such mandatory laws because they seek to institute racial or religious discrimination which contravenes the international public policy principles.

42. Award rendered in ICC proceedings No. 3881/1994, see, Sigvard Jarvin, Yves Derains, Jean-Jacques Arnaldez, Collection of ICC Arbitral Awards, Volume II, (1986-1990), p. 257.

Also, an ICC award rendered in 1978 [43] involved a dispute between Swedish shipyards and a Libyan buyer. The arbitral tribunal refused to apply Libyan laws and boycott regulations since the contract was subject to Swedish law.[44] The tribunal held that:

"The application of the Swedish law leads to the obvious consequences that the Libyan boycott law and regulations cannot apply to these contracts - except if a special reference is made in the contracts to this boycott law."

Accordingly, arbitrators may determine whether or not to consider the boycott sanctions of a given state according to the applicable law to the subject matter of the dispute, by examining whether or not the applicable law requires the same boycott sanctions.[45] It is important to draw attention to a distinction that could be considered here between situations where the boycott regulations are imposed by one state against another and the situation when such economic sanctions are imposed by the United Nations Security Council.[46] The latter situation could be regarded as the application of international public policy rules which should be taken into consideration by international commercial arbitrators.

The situation before national courts is different. Unlike international arbitral tribunals national courts are bound by the political situation of the state in which they exercise their jurisdictions. This may require consideration of such delicate matters, as considering the friendly relationships between the state of enforcement and a foreign friendly state. For example, in Regazzonni v. KC Sethia Ltd[47] the House of Lords considered the protection of essential interests of a friendly state. The case involved an international contract between a businessman domiciled in England and a businessman domiciled in Switzerland, concerning the exportation of jute from India to South

43. Case Nos. 2978, Yearbook Commercial Arbitration, (1981), p. 133; Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 295.

44. Also see, A B Gotaverken v. GMTC, VI Year book Commercial Arbitration (1981), p. 133. The arbitrator refused to give effect to the Lebanese Law on boycott regulations in order to justify the refusal to take a delivery of vessels, where the arbitrator came to the conclusion that Swedish law was applicable and that the boycott rule did not have an effect on the contractual relationship; See Rubino Sammartano . M., op. cit., p. 315.

45. However, one should bear in mind that such arbitral awards may not be enforced in the countries that order such boycott sanctions or even in other states that may have political interests with that country.

46. For example, Resolution 661, U.N. Security Council, which imposed mandatory economic sanctions against Iraq and established a committee (the Sanctions Committee) to monitor those sanctions. (S/Res/661). 6 August 1990. See the United Nations Blue Books Series, Volume IX, 168.

47. Regazzoni v. KC Sethia, 1958 A.C. 301; [1957] 3 All E.R. 286; [1956] 2 W.L.R. 204.

Africa. The agreement was subject to English law, but was considered null and void according to the Indian law, which prohibited shipment direct or indirect from India to South Africa following apartheid measures imposed on Indians in South Africa.[48] The following question arose, should the English courts take notice of and give effect to the Indian law in question, given that it was responding to a hostile act directed at another friendly Commonwealth State, or should it not be enforced because it was intended to be of political or penal character?

After examining the nature of the case, the court recognised that the Indian law was not aimed at safeguarding particular or selfish interests of the Indian State but rather to counter racist legislation which was contrary to the fundamental human rights. Accordingly, the court decided that the contract was unenforceable since an English court will not enforce a contract, or award damages for its breach, if its performance would involve doing an act in a foreign and friendly state which violates the law of that state. The court held that:

"…it is not in accordance with English public policy that a foreign and friendly nation should be harmed."[49]

This question was also discussed in Dalmia Dairy Industries Ltd v. National Bank of Pakistan.[50] The dispute erupted as a result of Pakistani decrees declaring any payment to an Indian party illegal. National Bank of Pakistan disputed before an ICC tribunal [51] that the arbitrator had became "functus officio" from continuing with the arbitration because of the outbreak of war between India and Pakistan. This objection was rejected by the arbitrator in an interim award in December 1969. In an enforcement proceeding the English Courts rejected the argument that it would be contrary to English public policy to enforce the award because both countries maintained friendly relations with England.

48. In exercise of the powers conferred by the Sea Customs Act, 1878, modified in December 1, 1950, Section 19, the Central Government of India duly made an order on July 17, 1946 prohibiting the taking "… by sea or by land out of British India of goods from whatever place arriving which are destined for any port or place in the Union of South Africa or in respect of which the Chief Customs Officer is satisfied that the goods although destined for a port or place outside the Union of South Africa are intended to be taken to the Union of South Africa."

49. Regazzoni v. KC Sethia, 1958 A.C., 301 at p. 309.

50. Dalmia Dairy Industries Ltd. v. National Bank of Pakistan [1978] 2 Lloyd's Rep. 223, C.A.

51. ICC Case No. 1512/1970, Yearbook Commercial Arbitration (1980), p. 174. This dispute arose from the non-performance by a Pakistani bank of a guarantee issued in favour of an Indian company which was made expressly subject to Indian law. The arbitral tribunal was faced with the question of deciding whether the bank was discharged from its obligations as a result of Pakistani decrees declaring any payment to an Indian party illegal because of hostilities between India and Pakistan which had broken out after the guarantee had been issued; see Yves Derains, op. cit., 250.

The effect of including political notions in the numerous interpretations of public policy raises several problems. In particular, the courts may readily be used as an instrument of pressure by a dominant political party when in power. Public policy could thus become a badge of discrimination ready to be used by the state courts to protect the perceived innate superiority of the forum's political views. Therefore, it is important to not to rely on political circumstances unless there are reasonable and serious reasons that may affect the vital interests of the state. Therefore, national courts have been reluctant to give effect to political orders as reasons for refusing enforcement of foreign arbitral awards. For example, in Parsons & Whittemore Overseas Inc. v. RAKTA[52], an application to enforce a foreign arbitral award in the United States was made by RAKTA (an Egyptian corporation) against Overseas (a United States corporation). The two corporations were parties to an agreement relating to the construction of a paper board mill in Egypt. During the six-day Arab-Israeli war, Egypt expelled all Americans except those who would apply and qualify for a special visa. Thereupon, Overseas abandoned the project and notified Rakta that it regarded itself as excused by force majeure, Rakta disagreed and obtained an award in its favour. In an enforcement action before the United States Court of Appeal, Overseas argued that it was obliged "as a loyal American citizen" to abandon the project as it considered that this conduct was part of its duty to defend national interests, which it argued is integral part of United States public policy. The United States Court of Appeal for the Second Circuit held that public policy did not equate with "national policy" (in the diplomatic or foreign policy sense), and it would not refuse to enforce an award in favour of the Egyptian party merely because tensions at that time emerged between the United States and Egypt.[53] The US Court rejected Overseas' arguments and declined any connection between article V (2)(b) of the New York Convention and Overseas allegations, where it asserted that:

"In equating 'national policy' with United States public policy, the appellant quite plainly misses the mark. To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of public policy. Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every

52. Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'lndustrie du Papier RAKTA and Bank of America 508 F. 2d 969 (2nd Cir. 1974).

53. Van den Berg, op. cit., p. 364.

indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis. To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defence intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement. We have little hesitation, therefore, in disallowing Overseas' proposed public policy defence."

The same view was confirmed by the United States courts in National Oil Corp. v. Libyan Sun Oil Corp.[54] The court rejected a request to refuse the enforcement of an arbitral award on the ground that the award was in favour of Libya "a state known to sponsor international terrorism". The court refused to accept this reason as a ground to refuse the enforcement of a New York Convention award. Furthermore, the court pointed out that the United States recognises the government of Libya, had not declared war on it, and had specifically given it permission to bring an action to confirm the award.

The conclusion which could be drawn here is that construing public policy to include concepts of a political nature may seriously undermine the utility of the New York Convention. This could ultimately lead to negative effects on the interests of the state of enforcement, as it would lose the reputation as an attractive forum for international commercial and financial relations, and could thus be deprived of opportunities for (sustainable) economic integration and development.

As was evident from the judicial practice in various jurisdictions, a defence which relies on political reasons as a ground to challenge the enforcement of foreign arbitral awards is increasingly unsuccessful in international commercial disputes. Therefore, unless there are reasonable and serious grounds, that may have a significant impact on the non-negotiable interests of the state, public policy should not be interpreted to expose international commercial relations to the unpredictable political circumstances between states.

54. A United States case, 733 F. Supp. 800 at 819, District Court, D. Del, March 15, 1990, 85 American Journal of International Law 178 (1991); ILA Report, London Conference (2000), op. cit., p. 23.

# III. Economic Issues

## *A. Generally*

There are two contradictory policies that should be taken into consideration when determining the validity of a foreign arbitral award for its possible violation of the economic mandatory rules of a given state. On the one hand, one should consider the economic strategies which many countries may adopt in order to encourage international investments to come into their territories.[55] To achieve the goals of such economic strategies, countries may tend to eliminate any legal barrier that may scare international investments away.[56] The positive effect of such strategies has led to liberalisation as regards the parties' autonomy in international commercial agreements, including recognising the parties' freedom to oust the jurisdiction of national courts in international commercial disputes and resolve their disputes instead by arbitration.[57] On the other hand, countries may impose various limitations to the parties' autonomy on the ground that there are certain commercial activities which may have injurious effects on the economic policy of the state. It is thus inevitable to find national mandatory rules that constitute the substantive content of the economic policy of the state[58], which aim to protect the economic strategy goals of the state.[59] One of the important limitations that could affect the parties rights in international commercial arbitration is that a state may prohibit the parties from resolving their disputes by arbitration, on the ground that the interest at stake requires special

55. This could be recognised if we consider the economic strategies of both, developed and under development countries. In general, the economic strategy of the developed countries aim to maintain their advanced level of technological and economy progress; and the economic strategy of under development countries is to strive to meet the standards of the development of international trade and to catch up with the speed of international economy in order to not be left behind.

56. This is due to the fact that parties of international commercial relations try to avoid being faced by laws which they may be ignorant of, and to overcome any barriers these laws may pose in the face of their trade.

57. See Redfern and Hunter, 2nd ed., op. cit., p. 103. The writers state that: "A national law which does not permit the free flow of goods and services across national frontiers may not be the most suitable law to govern international commercial contracts and the dispute which may arise from them."

58. Christopher B. Kuner, op. cit., p. 88. The writer comments that important norms of certain economic policy such as antitrust rules and currency, import and price controls, are considered matters of German public policy.

59. It has been reported that national courts could also rely on international public policy as a ground to refuse the enforcement of a foreign arbitral award even if the interest which is at stake concerns the national mandatory rules of the state of enforcement. See, Courreges Design v. Andre Courreges, 5 Apr. 1990, (1992) Rev. Arb. 110. The Paris Court of Appeal stated that: "the rules relating to public control over foreign investment express, via mandatory provisions, the idea of interna¬tional economic public policy, because these rules aim at preserving, in the pub¬lic interest, the balance of economic and financial relations with the rest of the world, by controlling the movement of capital across the border." See ILA Report, London Conference (2000), op. cit., p. 24.

treatment that could only be obtained under the supervision of the national courts.[60]

Accordingly, determining the enforceability of a foreign arbitral award should be based upon establishing a balance between the liberality and freedom of commerce and the protection of the economic policy of the state. However, establishing such a balance is not easy since national courts in the country of enforcement have inclusive power to decide which kind of transactions may or may not be considered to affect the economic policy of the state.[61] The problem may arise since the differences between the economic public policy requirements of various states might lead to the risk that one state may set aside an award for reasons of public policy which other states would regard as unimpeachable. This is so because under the head of public policy, a court could refuse to enforce a foreign award on the ground that the award violates the national economic interests of the state. Also, a national court may refuse to enforce the award under Article V (2)(a) of the Convention on the ground that the subject matter of the dispute is not capable of being arbitrated. The arbitrability issue may create serious problems since countries may determine which matters may or may not be settled by arbitration in accordance with their own economic policy [62]; for example, by declaring that certain types of agreements are not capable of settlement by arbitration for being contrary to the public policy of the state, such as certain notions of anti-competition or antitrust disputes, intellectual property disputes, agreements to evade exchange control regulations and awarding punitive damages in arbitration.[63] Article I (3) of the New York Convention may also be of crucial importance here, since a state could declare, when it ratifies the New York Convention that

60. See, Redfern and Hunter, 2nd ed., op. cit., p. 138; Christopher B. Kuner, "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention," 71 J.Int.Arb., (1990), p. 88.

61. This is the case under Article V (2)(b) of the New York Convention.

62. Article V (2)(a) of the New York Convention does not provide a sufficient explanation of what kind of disputes could be considered non-arbitrable subject matters. Rather the Convention left determining the arbitrability of the subject mater to the national law of the country where enforcement will take place. Therefore, enforcement might be denied for considerations of national mandatory rules. See Bernard Hanotiau, op. cit., 403.

63. In Laminoirs-Trefileries-Cableries de Lens SA v. Southwire Co., 484 F. Supp. 1063 (N.D. Ga. 1980), a United States Federal District Court sitting in Georgia had refused to enforce a foreign arbitral award under the New York Convention on public policy grounds. The Georgia Court concluded that the arbitrators' deci¬sion that interest rates should rise by an additional five per cent constituted a penalty (which the court considered to be punitive damages) and therefore would not be enforced. See in general, Jhon Y Gotanda, "Awarding Punitive Damages in International Commercial Arbitrations in the Wake of Mastrobuono v. Shearson Lahman Hutton, Inc.," 38 Harvard International Law Journal (1997), p. 59; Hakan Berglin, "The Application in United States Courts of the Public Policy Provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 4:2 Dickinson Journal of International Law (1986), p. 180; Christopher B. Kuner, op. cit., p. 81; ILA Report, London Conference (2000), op. cit., p. 21.

it will apply the Convention only to differences arising out of commercial relationships. Thereby enabling the national courts of that state to freely construe this reservation under their national law.[64] This might create problems for the enforceability of foreign arbitral awards since the member states are under no obligation to define what they consider to be a commercial dispute when declaring the commercial reservation.[65] Accordingly, a claimant in an enforcement procedure cannot be sure whether the court in a country that made this reservation will declare a dispute non-commercial, and thus refuse to recognise and enforce the award. This may particularly be the case in certain kind of disputes that involve intellectual property rights and technology transfer issues.[66]

It is thus important to examine the limits of the discretionary powers of national courts in applying public policy as a ground to refuse the enforcement of foreign arbitral awards for considerations of protecting the national economic policy. The question of whether a national court should distinguish between national and foreign arbitral awards will be examined again under this heading. The question in this regard will be whether or not it is possible for a national court to disregard the national mandatory rules of its law and to apply instead notions that consider the special character of international commercial relationships. Therefore, determining the validity of a foreign arbitral award could be established upon drawing a distinction between situations that require the application of national public policy rules: that is when such rules aim to avoid a result which may be injurious to the very interests of the state's economic strategy; and situations that do not necessarily damage the supreme national economic interest of the state.

64. Article I (3) of the New York Convention.

65. Article V (2)(a) of the New York Convention left determining the arbitrability of the subject mater to the national law of the country where enforcement will take place, therefore, enforcement might be denied for considerations of national mandatory rules.

66. Some countries do not consider intellectual property disputes to be of a commercial nature. In a decision made by the High Court of Bombay (India Organic Chemicals Ltd v. Chemtex Fibres Inc., April 1977 (et al. India No. 4)), the court held that technology transfer was not a commercial transaction. Cited in Van den Berg, op. cit., p. 53; P.D. Caramichael, "The Arbitration of Patent Disputes," 38 Arbitration Journal 3 (1983); See Mladen Singer, "International Commercial Arbitration and Intellectual Property and Technology Transfer Disputes," Internet Address, http://themis.Wustl.edu/ibll/contract/ComArb.htm; Mladen Singer, "Commercial Arbitration as a Means for Resolving Industrial Property and Transfer of Technology Disputes," 3 Croat. Arbit. Yearb. 1996, p. 107. However, one should consider that many countries recognise the commercial nature of intellectual property rights. For example, Article 2 of the Egyptian 1994 law provides that: "An arbitration is commercial within the scope of this Law when the dispute arises over a legal relationship of an economic nature, whether contractual or non-contractual. This comprises, for example, the supply of goods or services, commercial agencies, construction and engineering or technical know-how contracts, the granting of industrial, touristic and other licenses, transfer of technology...".

As will be established in the following examples, there are limits to the use of economic norms (as reasons of public policy nature) for determining the validity of foreign arbitral awards. Not every mandatory economic norm necessarily violates the fundamental economic interests of the state, particularly in relationships that involve international elements. It is also important to consider the scope of application of Article V (2)(a) of the New York convention, as national courts are required to give a wide interpretation to arbitrability in international commercial relations.
Since such problems could relate to various types of commercial activities, thus it would be difficult to explore all of the various situations within the limits of this chapter. Therefore it may suffice to examine the applicability of Article V (2)(a) and (b) in the field of intellectual property rights and a further examination will be made in relation to different types of trade restrictions.

### *B. Intellectual property rights*

Intellectual property rights[67] are now regarded as one of the most valuable assets in the modern global market.[68] The importance of intellectual property rights to the economic strategy of the state or states in which such rights are protected has led national laws of various legal systems to consider the protection of such rights as part of their public policy.[69] This could be recognised since several legal systems require to determine the ownership and validity of intellectual property rights to be made only by a particular competent authority, for example, a registry office or a particular court.[70] Accordingly, various limitations have been imposed on the free will of the parties; for instance, some countries do not allow for a private

67. It would be difficult within the limits of this topic to provide a coherent definition for intellectual property rights or all details that concern the classification of intellectual property rights. Also there are many details that concern the different legal status of intellectual property rights, such as, patents, trademarks and copyrights, as determining the arbitrability of such property rights may differ according to their type. For detailed information about these issues see, William Grantham, "The Arbitrability of International Intellectual Property Disputes," 14 Berk. J. Int'l Law, 1996, p. 172.

68. This could be recognised since the economic success of a given state is now measured by how advanced its technology is and how sophisticated innovations that are used in its industry are. See Gary L. Benton and Richard J. Rogers, "The Arbitration of International Technology Disputes Under the English Arbitration Act 1996," Internet address, (www.coudert.com/practice/arbtech.htm). The writers reported that the size of the world-wide information technology market has grown from US$ 696,880 million in 1996 to $1,056,052 million by 2000; In the United States, for example, the software industry grew at a rate of 12.5 per cent for 1990-1996, nearly 2.5 times faster than the overall US economy, making it the third largest manufacturing industry in the country.

69. William Grantham , op. cit., p. 173.

70. In England and Wales, under the 1977 Patents Act this could be the Comptroller General of Patents; under the Trade Marks Act 46, 47 (1994) a court may revoke or invalidate a trademark; also see the Copyright, Designs and Patents Act of 1988.

body, such as an arbitral tribunal, to decide the validity and scope of intellectual property rights.[71] The latter restriction raises the problem of non-arbitrability, as national laws may reserve the determination on intellectual property rights for the exclusive jurisdiction of the national courts.[72]

The problem of arbitrability has a significant importance in international commercial relations particularly in the field of international licensing agreements[73] where very often parties include an arbitration clause under which they agree to resolve their disputes by means of international commercial arbitration.[74] This could also be the case if an international commercial transaction involves issues of intellectual property as part of the main contract, where the arbitral tribunal may be required to look into the validity and infringement of the intellectual property rights that are under question. Therefore, raising doubts about the arbitrability of intellectual property rights may create uncertainty to a wide range of international commercial relations, since parties and arbitrators cannot be sure whether the final award will be enforceable. For example, if an arbitral tribunal determines issues that concern the validity or infringement of such rights, then it may be possible that such a dispute would be declared non-arbitrable by the courts of the country where enforcement may take place, and therefore it may refuse to recognise and enforce the award.

It is important to recognise that various legal systems do not recognise the arbitrability of intellectual property issues at all. This means that parties to intellectual property disputes are prohibited from resolving any dispute that relates to determining the validity, disposal and infringement of such rights by arbitration.[75] On the other hand,

71. Marc Blessing, "Arbitrability of Intellectual Property Disputes," 12 Arbitration International No. 2 (1996), p. 191, at 198; Karl-Heinz Bockstiegel, op. cit., pp 197 and 198. He refers to the Italian Supreme Court in 1978. (Corte di Cassazione 12 May 1977 in Scherk v. Grandes Marques, Yearbook Commercial Arbitration IV (1979) 289, which confirmed that a generally binding decision declaring such property rights null and void cannot be issued by arbitration, but only by the state authorities or courts; also see Van den Berg, op. cit., p. 370; Roberto Ceccon, "Arbitration and Intellectual Property in the Italian Legal System," 13:1 Journal of International Arbitration (1996), p. 65.

72. See, Karl-Heinz Bockstiegel, op. cit., p. 197; Mladen Singer, "International Commercial Arbitration and Intellectual Property and Technology Transfer Disputes," Internet Address, http://themis.Wustl.edu/ibll/contract/ComArb.htm.

73. Licensing agreements generally include that the intellectual property owner grants rights to use a trade secret, to manufacture or distribute copyrighted or patented products, or to utilise a trademark in the marketing of a product. Such agreement may also oblige a licensee to preserve the confidentiality and secrecy of the technology. Intellectual property disputes may arise in such agreements, for example, for allegations of improper use of the property right by the licensee. See, Gary L. Benton and Richard J. Rogers, op. cit., p. 2.

74. Parties to such international commercial agreements prefer to resolve their disputes by arbitration because they want to avoid the uncertainties of foreign laws and the risk of bias by foreign courts.

75. It is reported that in many countries, "questions of the validity of intellectual property titles, even on an inter parties basis were excluded from arbitration by public policy." Note prepared by the International Bureau of WIPO, p. 5. Cited in Mladen Singer, "Commercial Arbitration as a Means for Resolving Industrial Property and Transfer of Technology Disputes," 3 Croat. Arbit. Yearb., 1996, p. 15, footnote 24; also see Rene David, op. cit., p. 188.

various legal systems limit this prohibition to issues that relate to determining the validity of intellectual property rights.[76]

However, there is a growing tendency towards recognising arbitration as a suitable means of resolving intellectual property disputes in international commercial relations. It is reported that, in 1991- 1992, a comparative study of the International Association for the Protection of Industrial Property (IAPIP/AIPPA)[77] focused on the arbitrability of intellectual property disputes between private parties according to national laws and statutes with regard to ownership, validity, scope, infringement and licences of intellectual property rights; according to the IAPIP summary, which was based on 24 national reports, "none of the reported national legislations forbid arbitration in respect of intellectual property rights from the outset".[78]
The situation has been fully determined in the United States and Switzerland, where arbitrability of intellectual property disputes has always been affirmed and recognised. In 1982 the American Congress added Section 294 to Title 35 of the United States Code[79], which expressly provides that all disputes related to patents, including validity and infringement may be arbitrated.[80] In 1975, the Swiss Federal Office of Intellectual Property specifically accepted the en-

76. Some legal systems limit the scope of the non-arbitrability to disputes that relate to determining the validity of intellectual property rights. See Mladen Singer, op. cit., p. 15. The writer provides an example form the Croatian Law, and concluded that: "the relevant law explicitly forbids arbitration deciding upon the validity of industrial property rights. Article 11 of the Changes and Amendments of the Law on Protection of Inventions, Technical Improvements and Signs of Distinctions, which is in Croatia applied as a Law of the Republic, explicitly states that Croatian courts have exclusive jurisdiction to decide all disputes relating to validity of industrial property rights which were recognised by the State Patent Office or which are in force in the Republic of Croatia."; also see, Marc Blessing, op. cit., p. 201. He states that: "arbitrators are not entitled to declare a French patent invalid"; Under Articles 2059 and 2060 of the French Civil Code arbitrability is likely to be denied in disputes over the validity of registered intellectual property grants, see the decision of the Cour d'appel de Paris of 3 February 1992, published in PIBD 1992 III 359; Rene David, op. cit., p. 188-89.

77. See Web Site address: (http://www.aippi.org).

78. See IAPIP Yearbook 1991/VI; the IAPIP Yearbook 1992; Cited in Marc Blessing, op. cit., p. 200; also see, Julia A. Martin, "The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution," 49 Stan. L. Rev. April, 1997, p. 917.

79. 35 U.S.C. S. 294 (1984) and 35 U.S.C. S. 135 (d) (1984); In California for example, Section 1297.16(p)-(q) of the Cal. Code Civ. Proc., provides wide protection for the integrity of international arbitration, including disputes arising from data or technology transfer and intellectual or industrial property, trademarks, patents, copyrights and software programs; see, Michael F. Hoellering, "New Opportunities for Patent Arbitration," N.Y.L.J. Dec. 16, 1982, p.1; also see Fritz Scherk v. Alberto-Culver Co. June 17, 1974 (U.S. no.4), in which the court distinguished between domestic relations and disputes which involve international relations. Cited in Van den Berg, op. cit., p. 362; also see, Redfern and Hunter, 2nd ed., op. cit., p. 143, (fn 65).

80. Also, in trademark disputes, a federal court held that the absence of an explicit statutory support for the arbitrability of trademark disputes does not indicate that the Congress' intent to preclude arbitration of trademarks claims. (Alexander Binzel Co. v. Nu-Teeys Co., No. 91 C. 209z, 1992 WL 26932 (ND III. 1992)). Similarly, in the copyright area, the Seventh Ciruit in Saturday EvPost Evening Co. v. Rumbleseat Press. Inc. 816 F 2d 1191 (7th Cir. 1987). The Court held that federal law does not forbid arbitration on the validity of copyright at least where that validity becomes an issue in the arbitration of a contract dispute; Kamakazi Music Corp. v. Robbins Music Corp., 684 F.2d 228 (2d Cir. 1982). The court held that: "the court had jurisdiction to order arbitration, and that public policy does not prohibit the submission of copyright infringement claims to arbitration"; See Joseph T. McLaughlin, "Arbitrability: Current Trends in the United States," 12 Arbitration International 2 (1996), p.135; Mladen Singer, op. cit., p. 23.

forcement of arbitral awards declaring the nullity of a patent and the cancellation of the corresponding patent entries in its Register.[81]

Increasingly, jurisdictions differentiate between disputes involving domestic relations, and those arising in the domain of international commercial relations. This distinction may lead national courts to recognise and enforce foreign arbitral awards even where a dispute raises the validity and/or ownership of intellectual property rights. Accordingly, the fact that intellectual property matters are very closely linked to public policy interests should not lead to undermine the importance of arbitration as a suitable means of resolving intellectual property disputes. One could point out several reasons for acknowledging foreign arbitral awards that involve intellectual property issues.

Firstly, national courts should recognise the nature of such disputes in that intellectual property disputes require quick resolution which is more efficient, less complicated, and less expensive than litigation.[82] Recognising the growing need for this type of intervention, the World Intellectual Property Organisation (WIPO)[83] established an Arbitration and Mediation Centre which among other things, specialises in resolving intellectual property disputes.[84]
Also, it is important to select arbitrators that have the knowledge and/or technical experience necessary for resolving complicated and High-Tec disputes which may improve the quality of decision-making in such cases.[85] Moreover, intellectual property disputes may

81. Decision of 15 December 1975. See Swiss R. Indus. Prop. & Copyright 36-38 (1976); Published in Schweizerische Mitteilungen uber Gewerblichen Rechtsschtz und Urheberrecht; also see, the information of the Swiss Patent and Trademark Office of 15 December 1975, published in the Swiss Patent, Design and Trade Marks Gazette (1976), p. 9; See Marc Blessing, op. cit., p. 200; The Swiss Federal Private International Law Statute of 1987, Article 177.1; also see, Robert Briner, "The Arbitrability of Intellectual Property Disputes with Particular Emphasis on the Situation in Switzerland," Arpad Bogsch, Preface, in Worldwide Forum on the Arbitration of Intellectual Property Disputes, WIPO ed., 1994, at 55, 56-66.

82. For example, the WIPO Arbitration Centre offers arbitral proceedings in accordance with Expedite Arbitration Rules, should make the arbitration even less expensive and faster. See Section III Article 14 which concerns the composition of the arbitral tribunal, Section IV Article 53 (b) which provides that oral hearings (if held) cannot exceed three days, except in exceptional circumstances.

83. WIPO is an intergovernmental organisation with 155 member states. See, World Intellectual Property Organisation (WIPO) Doc. 445(E) (1995).

84. In 1994 the WIPO founded the Arbitration and Mediation Center, based in Geneva - Switzerland, the Centre offers arbitration and mediation services for the resolution of international commercial disputes between private parties. Also, for this particular purpose, WIPO has enacted arbitration rules that are drafted according to the model of UNCITRAL Rules.

85. It is important that intellectual property disputes, which often involve complicated technical issues, are resolved by arbitrators who are knowledgeable of both the respective intellectual property laws and transfer technology. This is particularly important since judges of national courts are usually very knowledgeable about the intellectual property laws of their respective countries, but the technical questions in a dispute could be beyond their knowledge, whereas an arbitration tribunal which may consist of arbitrates from different legal backgrounds, could provide the parties with a diversity of knowledge and an understanding of different legal and cultural traditions. See, Najar, "The Inside View: Companies in Need of Arbitration," 12 Arbitration International 3 (1996), at p. 364.

involve sensitive issues such as, financial data, new product information, and marketing strategies, therefore resolving such disputes requires a certain confidentiality that could only be obtained by resorting to arbitration as opposed to the publicity of litigation.[86]

Secondly, one should recognise that prohibiting arbitrators from determining the validity of certain intellectual property issues should not include all disputes in this field. There are certain intellectual property issues that could exist independently of any registration proceedings. Therefore, a distinction should be made between intellectual property - such as patents and trademarks - whose grant is noted in public registers, and those other types of intellectual property which are not registered, either because they exist at the moment of creation, as with copyright or because they could be protected as confidential know-how.[87]

Finally, a national court in the country of enforcement must distinguish between national and international public policy, since using the national public policy of the state of enforcement as a barrier to arbitration in international disputes might lead to unacceptable results, particularly if the dispute had been held to be arbitrable under the law which the arbitral tribunal deemed applicable and/or according to the law of the seat of arbitration.[88] Such a critical situation may occur if the court deemed the dispute non-arbitrable because of domestic public policy, notwithstanding that the dispute had been held to be arbitrable on the basis of a law that is closely connected to the dispute, and which may also correspond to the parties' legitimate expectations.[89]

The application of a foreign arbitral award may be refused, in my view, if and when the award amounts to a violation of national fundamental interests that are so important that they need to be protected by public policy or by the limits imposed on the basis of pub-

86. It is important in intellectual property disputes that hearings and procedures be closed in order to protect the confidentiality of evidence and awards. Therefore, arbitral awards that involve technology information are usually not published, however, even if they are published, they usually do not contain the names of the parties or other elements that may disclose their identity. The importance of confidentiality in intellectual property and technology transfer disputes is considered in the WIPO Arbitration Rules, which contain an entire section dedicated to confidentiality. Section VII, Articles 73–76 of the WIPO Arbitration Rules; Section IV Article 52 of the WIPO Arbitration Rules; See Paulsson and Rawding, "The Trouble with Confidentiality" (1995) 11 Arbitration International, p. 303; Neill, "Confidentiality in Arbitration" 12 Arbitration International 3 (1996), at p. 287; Charles S. Baldwin, "Protecting Confidential and Proprietary Commercial Information in International Arbitration," 31 Tex. Int'l L.J. (1996), p. 451.

87. Julia A. Martin, op. cit., p. 91; Rene David, op. cit., p. 188.

88. Marc Blessing, op. cit., p. 195.

89. See Yves Derains, op. cit., p. 234.

lic policy in international affairs. However, if the subject matter of the award concerns intellectual property matters, for example, if the award determines questions that concern the validity of a patent or a trademark, then it would be advisable to ascertain first whether the particular issue is arbitrable in the country where enforcement might take place.[90]

### *C. Trade Restrictions*

There is a specific public interest in prohibiting certain contractual practices that could damage the economic policy of the state, for example, agreements which violate the exchange control laws or which provide for the payment of obligations in gold.[91] The rationale behind prohibiting such agreements rests on the assumption that the interest at stake is so strongly driven by economic policy, since such restrictions aim to prevent the depreciation of the national currency of the state.[92] However, for practical necessity, many countries have accepted to enforcing such clauses as long as they relate to international commercial agreements.[93]

This was the view of the United States' courts in Konkar Indomitable Corp. v. Fritzen Schiffsagentur and Bereederungs-GmbH.[94] The court found that the "gold clause", a federal statutory economic provision which explicitly stated that as a matter of public policy, it could not form as the basis for a successful public policy challenge to a foreign arbitral award, since enforcing such clauses does not "involve the United States' most basic notions of morality and justice." Moreover, the court established that the policy of encouraging international arbitration must prevail over domestic economic concerns.[95]

90. This could be made during the arbitration proceedings, as the tribunal could stay the proceedings until the court of law in the country where the particular intellectual property right was granted decides the issue and, after that, to continue with the arbitration. See, Roberto Ceccon, op. cit., p.75. He states that: "if during arbitration proceedings, questions arise which, pursuant to law, cannot be decided by arbitration, (i.e. matters regarding the validity of patent or violation of copyright, etc.) .. arbitrators must suspend the proceedings (under Article 819 0f the Italian Code of Civil Procedure (CPC)) until the day when one of the parties notifies the arbitrators of the final and binding award."

91. For example, it is reported that payments of obligations in gold is prohibited in Egypt by a decree of 1935, which prohibit payments in gold in national and international transactions as this violates public policy in Egypt. See Muhammad Kamal Fahmy, The Essence of Private International Law, 2ed (1985) (no publisher), p. 512; See Ashraf al Rifaie, op. cit., p.12.

92. Dennis Lloyd, op. cit., p 12.

93. Ibid., p. 12. The writer states that the English law recognises the validity of gold clauses in inter¬national contracts; also see, Feist v. Sco. Belge d'Electricite [1934] A.C. 161; King v. International Trustee etc. [1937] A.C. 500.

94. Konkar Indomitable Corp. v. Fritzen Schiffsagentur and Bereederungs-GmbH, No. 80 Civ. 3230 (S.D.N.Y., 1 May 1981); Cited by, Christopher B. Kuner, op. cit., p. 77.

95. Also see the Swiss Federal Supreme Court decision in Inter Maritime Management SA -v- Russin & Iiecchi, 9 January 1995, reprinted in (1997) XXII Yearbook 789. The court decided that the substantive public policy is not necessarily violated where the foreign provision is contrary to a mandatory provision of its national law; ILA Report, London Conference (2000), op. cit., p.18.

A similar example is a decision of the French Court of Cassation in "Messageries Maritimes".[96] Whilst the award was contrary to Canadian law, which forbids gold clauses without distinguishing between internal and international payments[97], the French Court of Cassation examined the validity of the agreement under the French law of [25] June [1928], which considers gold clauses valid. The court declared that parties are entitled to agree for the payments of their obligations in gold, even if this may contradict the mandatory rules of a municipal law governing their contract.[98]

In the latter example, the court examined the enforceability of a foreign arbitral award according to its validity under foreign mandatory rules and the decision may indicate that the test in determining the validity of a foreign arbitral award should be based upon its compliance with the national mandatory rules of the state of enforcement. In other words, if the award does not violate the national economic interests of the state, and there was no substantial connection between the subject matter of the dispute and the country of enforcement, then there should be no rational basis to refuse the enforcement of the arbitral award. However, relying on this test alone could be problematical. For example, this may damage the commercial relationships between the country of enforcement and the country whose national economy is at stake.

Therefore, it is important to consider that there are several reasons that may drive a national court to apply, or at least to take into consideration, the economic mandatory rules of a foreign state. For example, in a case involving the comity of states, where a court may consider the importance of applying foreign mandatory rules in cases involving a foreign element, because not to do so would constitute a disregard of the interest (whether economic or other) of another state.[99] This was the view in Soleimany v. Soleimany[100], the parties

96. Messageries Maritimes, decided on 21 June 1950, R. 1950. 609. Cited by Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 274.

97. The Gold Clauses Act of 1937 of Canada. Article 6 provides that: "Every gold clause obligation is hereby declared to be contrary to public policy and no such provision shall hereafter be contained in, or made in respect of, any obligation". Article 2 illustrates the meaning of a gold clause: "The expression ' ' in this Act means any obligation heretofore or hereafter incurred (including any such obligation which has, at the date of the commencement of this Act, matured) which purports to give to the creditor a right to require payment in gold or in gold coin or in an amount of money measured thereby, and includes any such obligation of the Government of Canada or of any province."

98. See Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 274 54 . He regards this decision instrumental in creating a rule of "substantive private international law specific to international payments and different from the rule of French law applicable to domestic payments. This new rule was that of the validity of gold clauses in international contracts"; also see, New Brunswick RY. CO. v. British and French Trust Corporation. (H.L.(E.)) 1939, A.C. P 16.

99. J. G. Collier, op. cit., p. 379.

100. Soleimany v. Soleimany, Court of Appeal, February 19, 1998. Reported in [1998] 3 W.L.R. 811; [1998] C.L.C. 779.

acknowledged that the goods (Persian carpets) were to be imported into a foreign country, contrary to the revenue law and export controls of Iran. The Court of Appeal considered the violation of a foreign law as a violation of public policy in England. It held that:

"… where a foreign arbitration award was made pursuant to a valid arbitration agreement, but was based on a contract which was illegal under the law of a friendly foreign state, where that law governed the contract or the contract was to be performed in that state, the English court would not enforce that award on the grounds of public policy." [101]

The Soleimany case shows that enforcement of a foreign arbitral award can be refused if it violates the economic public policy rules of the state that has a close connection to the subject matter of the dispute.[102] However, such a connection may not in itself constitute a sufficient reason to refuse the enforcement of a foreign arbitral award. It is important to examine, whether or not the links are such that the public interest of that country is capable of being affected by the enforcement of the award.[103]

The question that arises here is thus, what is the connection between the public policy in the country of enforcement and the mandatory rules that are designed to protect the economic policy of a foreign state?

Generally, there are several factors which may drive a national court to consider the mandatory rules of a foreign state. For example, great damage might be done to the economy of a foreign state, particularly if the parties intended to circumvent the mandatory rules of that state by choice of a foreign law or forum. Justice and comity of nations require to apply the mandatory rules which are designed to protect the interest of that state, which in certain circumstances deserve to prevail over the parties' interests.[104] Also, this could be based upon the notion of reciprocity, in the sense of "do as you would done by".[105]

101. See also, Foster v. Driscoll.(1929) 1 K. B. p. 522, in which Sankey L.J. held that: "To sum up, in my view an English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally."

102. In determining the connection between the subject matter of the dispute and a given State, it might be necessary to take account of the law governing the arbitration agreement. This could be established, for example, if that law is considered to be the law which should govern the subject matter of the dispute in the absence of a choice of law by the parties.

103. A.J.E Jaffy, op. cit., p. 16.

104. Ibid., pp. 7 and 15; also see, Ralli Brothers v. Compania Naviera Sota y Aznar [1920] 2 K.B. 287.

105. J. G. Collier, op. cit., p. 379.

It is in the interest of the country of enforcement to consider the economic policy of other states, otherwise it will risk the possibility of being treated in the same manner.[106] Moreover, this could be justified if there are mutual economic interests between the state of enforcement and the state whose public interests are most likely to be affected by enforcing the arbitral award. This is particularly the case if the two countries are parties to an international commercial treaty.[107] For example, an award may not be enforced by the English courts if it has the effect of enforcing an unlawful agreement violating the mandatory competition rules of the EC Treaty[108], for instance, agreements that restrict free competition between the member states.[109] This is the case under Article 81 of the EC competition rules (formerly Article 85 of the Treaty of Rome 1957)[110] and Article 82 (formerly Article 86).[111] Article 81 prohibits anti-competitive agreements which may have a considerable effect on trade between member states and which prevent, restrict or distort competition within the common market.[112] Such agreements or decisions are declared to be "automatically void under Article 81 (2), subject either to express exemption being given under Article 81 (3) or to falling within one of the block exemptions issued by the Commission[113], in which case exemption is automatic.

106. Richard A. Cole, op. cit., p. 380. The writer states that the fear of retaliation for non-enforcement is one of the reasons which made the court in Parsons & Whittemore Overseas Co construe the public policy defence so narrowly (the most basic notions of morality and justice). See, Parsons and Whittemore Overseas Co. Inc. v. Societe Generale du l'Industrie du Papier (RAKTA) (1974) 508 F 2d 969 at p. 975.

107. Pierre Lalive, "Transnational (or Truly International) Public Policy...", op. cit., p. 268; Andrej Bolfek, "Application of European Community Competition Law in Arbitration Proceedings from the Aspect of Public Policy," 7 Croat. Arbit. Yearb. (2000), p. 141; Christoph Liebscher, "Arbitral & Judicial Decision: European Public policy After ECO SWISS," 10 Am. Rev. Int'l Arb. (1999), p. 73- 78.

108. BRT v. SABMA ( Case 127/73 [1974] ECR 51; also see, ILA Report, London Conference (2000), op. cit., p. 20. The report states that: "In 1998, the Austrian Supreme Court reached a similar conclusion on the sta¬tus of European Community Law. It held that any provision of European Community Law, which is directly applicable in the Member States, is - according to its supremacy - automatically part of Austrian national public policy. Therefore, in its opinion, an arbitral award which was in conflict with any directly applicable community law could be quashed." The decision con¬cerns Articles 81 and 82 EC (ex Arts. 85 and 86). 3 Ob. 115/95, dated 23 February 1998, reported in (1999) Review. Arbitration, p. 385.

109. The Competition Law is designed to control and regulate the freedom of trade between the Member States, it is therefore based on public policy considerations that could constitute an effective ground to refuse the enforcement of an arbitral award under Article V (2)(b) of the New York Convention. In Eco Swiss China Time Ltd. v. Benetton International NV, Court of Justice of the European Union, I June 1999, C-126/97, ECR I-3055, [1999]; [1999] 2 All ER (Comm) 44; reprinted in 14(6) Int'l Arb. Rep., B-1 (June 1999); 1999 Rev. Arb. 631. The European Court of Justice found that the provisions of Article 85 (Article 81 of the Amsterdam Treaty) constituted fundamental provisions essential for the accomplishment of tasks entrusted to the Community and for the functioning of the internal market. Accordingly, they were to be regarded as a matter of public policy within the meaning of the New York Convention; See, Andrej Bolfek, op. cit., p.141; also see, ILA Report, London Conference (2000), op. cit., p.19. The report states that: "The European Court of Justice has elevated this rule to the level of international public policy (at least within Member States)."

110. The Treaty of Rome was amended by the Treaty of Amsterdam, dated 2 October 1997.

111. Article 82 prohibits the abuse of a dominant position insofar as it may affect trade between member states.

112. Julian DM Lew, "Determination of Arbitrators' Jurisdiction…," op. cit., p. 79.

113. The Commission can grant individual or group exemptions from this prohibition if there are overriding countervailing benefits such as an improvement in efficiency or the promotion of research and development.

Only the EC Commission is competent to grant such exemptions.[114] It follows that arbitrators under Article 81 (3) are precluded from exercising any jurisdiction in deciding, for example, that an exemption would be justified pursuant to Article 81 (3).[115]

Further restrictions on the powers of arbitrators under the EC Treaty are imposed by Article 234 of the EC competition rules (formerly Article 177 of the Treaty of Rome), which allows for reference to be made to the European Court of Justice for ruling on questions of interpretation of the Treaty by any court or tribunal of a Member State.[116] Arbitrators are not considered to be a court or tribunal for the purpose of such a reference; thus a reference cannot be made directly by an arbitrator.[117]

The relevant interests referred to in Articles 81 and 234 of the EC competition rules are designed to protect communal interests between the EC member states, which compel the member states to respect such community rules in the field of the common commercial policy.
However, most national laws now permit disputes involving competition law and antitrust matters to be arbitrated.[118] This trend is the clearest in the United States. In the famous Mitsubishi case[119] the United Supreme Court distinguished between domestic public

114. See Regulation 17. To facilitate the granting of exemptions under Article 85 (3), the EC Commission has issued several block exemptions, for example, see Regulation No. 1983/83, which concerns Categories of Exclusive Distribution Agreements; Regulation No. 184/ 83, which concerns Categories of Exclusive Purchase Agreements. See Julian DM Lew, 'Determination of Arbitrators' Jurisdiction ..," op. cit., p. 79; John Beechey, "Arbitrability of Antitrust/Competition Law Issues- Common Law," 12 Arbitration International No. 2 (1996), p. 197 at 180.

115. However, an arbitrator is not precluded from deciding that a contract does not violate Article 81, but if he recognises that the contract violates Article 81, then he cannot refer the matter to the EC Commission for exemption under Article 81 (3). See, Karl-Heinz Bockstiegel, op. cit., p. 192; Julian DM Lew, "Determination of Arbitrators' Jurisdiction," op. cit., p. 81; also see, Gemeente Almelo v. Energiebedrijf Ijsselmij NV (Case No 393/92) (1995)XX ICCA Yearbook Cmm. Arb, p. 187; [1994] I ECR 1477. (a decision of the European Court of justice on a reference from the Netherlands; V. V. Veeder, "English Arbitration Act of 1996, op. cit., p. 66.

116. Bulk Oil (Zug) AG v. Sun International Ltd [1983] 2 Lloyd's Rep 587; [1984] 1 W.L.R. 147 (C.A.); 2 C..M.L.R. 91 (High Court).

117. See, European Court of Justice, Case No. 102/81, March 23, 1982; Nordsee Deutsche Hochseefischerei Nordstern GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co, and Friedrich Busse Hochseefischerei Nordstern AG & Co [1982] E.C.R 1095. The ECJ noted that parties are not free to create exceptions to EEC law, which must be observed in its entirety throughout the Member States with compliance to be ensured by arbitral tribunals under supervision by the ordinary courts. See, Andrej Bolfek, op. cit., p. 141; Eco Swiss China Time Ltd. v. Benetton International NV, 14(6) Int'l Arb. Rep., B-1 (June 1999); 1999 Rev. Arb. 631; Christoph Liebscher, op. cit., p. 81; John Beechey, op. cit., 181; Redfern and Hunter, 2nd ed., op. cit., p. 141. Fn 55.

118. Russell on the Law of Arbitration accept arbitrability, but finds it necessary to inform the Commission. Russell on the Law of Arbitration (19th ed 1979), op. cit., p. 417; also see Redfern and Hunter, 2nd ed., op. cit., p. 142.

119. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985). Also reported in, International Commercial Arbitration, Cases, Materials and Notes on the Resolution of International Business Disputes', (1997) The Foundation Press, INC, p. 313; Prior to the Mitsubishi case, the general rule was that antitrust disputes were not subject to arbitration. See the Second Circuit decision in American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F2d 821, 827-28 (2d Cir. 1968).

policy and the narrower concept of international public policy, the court declared that there are no public policy reasons prohibiting the arbitration of antitrust disputes in the context of international agreements.[120]

It seems that the field of arbitrable matters is expanding markedly, and countries are racing to allow arbitration in nearly all matters. Courts of many countries have concluded that not all of their respective prohibitive or proscriptive laws are relevant when considering whether or not to enforce a foreign award. Both judicial and arbitral practice revealed that the intervention of public policy should be based upon an analysis of the interests served and a rational observation of the requirements of international commercial relations.[121] This is both logical and inevitable, as economic interest drives the state in order to compete in the international market and to encourage trade in their territories. Courts are therefore called upon to strike a balance between the interests of promoting international investments and the public's interest in protecting the national economic policy. Also, courts have to be aware of the effects of their decision, since determining the validity of a foreign arbitral award according to national economic mandatory rules might lead to adverse effects, especially since national courts' decisions that involve international commercial arbitration are carefully monitored by the international arbitration community.[122] A decision that does not recognise the development of international commercial relations and the requirements of the international community of merchants might thus jeopardise the reputation of the state of enforcement as a suitable business forum. A bad reputation therefore could be costly to the economic interest of the state.

Moreover, courts must not ignore the fact that social or economic conditions may change and make a commercial practice expedient which formerly was considered to run counter to the rules of commerce. As has been mentioned in chapter two[123], the notion of public

120. The court relied on the Supreme Court's decision in Scherk v. Alberto- Culver Co. (417 US 506). The question in Scherk was whether to allow the arbitration of a securities issue in an international contract despite federal statutes prohibiting the waiver of a right to trial in a securities case. The Court recognised the importance of arbitration clauses to achieve certainty in international transactions. See Hakan Berglin, op. cit., p. 172; See, Lawrence W. Newman & Michael Burrows, "Arbitration of Antitrust Disputes," New York Journal (may 1998); Joseph T. McLaughlin, op. cit., p.133; John Beechey, op. cit., p. 183.

121. In Fotochrome Inc. v. Copal Co., 517 F.2d 512 (2d Cir. 1979). The court stated that: "Inter¬national commerce has grown too large and the world too small for American courts to disregard the law of nations, even in favor of the Bankruptcy Act". Cited in Hakan Berglin, op. cit., p. 170; also in Bermen v. Zapata Offshore Co., The U.S. Supreme Court evidenced its attitude that: "We cannot have trade and commerce in world markets and international waters exclusively on our terms." Bremen v. Zapata Offshore Co.407 U.S. 1 (1972) at 9; Richard A. Cole, op. cit., p. 376.

122. See Klaus Peter Berger, op. cit., p. 653.

123. See, Chapter Two, at p. 69.

policy is not immutable. It may change from place to place and from time to time. Therefore, contracts which at one time were deemed to be contrary to public policy, could at another time be considered to be consistent with public policy, and for the public benefit.[124] Courts cannot remain permanently oblivious of such changes, therefore they must recognise that public policy and public morals which are designed to protect the national economic policy in a purely domestic context need not always have the same effect in the external sphere. Therefore, there should be difference of intensity in the application of the notion of public policy to international commercial relations, for example, by recognising that such relations require the application of principles which accord with modern needs, such as, the lex mercataria, the usages of international trade and the general principles which are generally recognised by the international community of merchants.

However, the situation has to be considered as essentially different when the mandatory domestic rule reflects a fundamental legal value, the protection of which is necessary in safeguarding certain core community objectives, where in such situations the public policy defence should prevail. Therefore, to invoke public policy an award must at least violate the stringent and most imperative economic interests that would effect the economic status of the country of enforcement.[125]

124. Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," op cit., p. 180. He states that: "national public policies have changed over the years, influenced by a number of factors such as national developments in the political and legal system the involvement of the national economy in international trade, political decisions such as the promotion of foreign investment, or international developments."

125. This could be achieved if courts adopt the Parsons & Whittemore Overseas Co. guide¬line of the "most basic notions of morality and justice." See, Parsons and Whittemore Overseas Co. Inc. v. Societe Generale du l'Industrie du Papier (RAKTA) (1974) 508 F 2d 969 at p. 975.