Chapter Two

The Notion of Public Policy and its Role in International Commercial Arbitration

Public policy as a notion affects the enforcement of foreign arbitral awards in various ways, as the application of this notion may occur at different stages of the arbitration process. Initially the arbitral tribunal may find that it is imperative to apply public policy rules that might have a considerable consequence on the validity of their verdict.[1] Secondly the court in the country of origin, which has jurisdiction over the arbitration process, may refuse to assist the arbitration process or to recognise the validity of the arbitration agreement and the resulting award if it considers that the award violates its national public policy rules.[2] Finally if the award was considered as a foreign award, then the court where the enforcement is taking place may not recognise or enforce the award if it contradicts with public policy as conceived in that state.[3]

The final stage has a special significance. This is due to the nature of foreign arbitral awards in that they were rendered outside the scope of the states' supervision and therefore, courts may reinvestigate the validity of an arbitral award according to its conformity with the

1. It is a common thing to find public policy rules which cannot be contracted out of by the parties or which cannot be disregarded by the arbitrators. See, Chapter Three, p. 101.

2. See Chapter Four, p. 151.

3. See Chapter Five, p. 184; Chapter Six, p. 239.

mandatory rules in the state of enforcement. This may expose the award to a wide range of possible grounds on which the award will be nullified and set aside.

In this chapter, the study will firstly focus on the concept of public policy. Secondly the focus will be upon the traditional classification of public policy rules, both domestic and international, which deserves a careful analysis. Therefore, a distinction between the different forms of public policy will be drawn to illustrate the different applicable public policy rules to relationships that involve a foreign element. Finally, we will examine the development of the concept of international public policy, and the approach towards accepting the existence of international public policy rules, as distinct from domestic public policy rules.

I. The Notion of Public Policy

There are different terms used to give expression to this notion. The term public policy is used in the common law system[4], whereas the civil law system uses the French term ordre public.[5] When analysing the two terms one may recognise that the word public is mutual. It generally implies reference to the majority of a particular community. The other two words, policy and ordre are different, although they could arguably have a similar interpretation. The two terms may indicate that there are fundamental interests or essential values significantly important to the community, the public, which should be protected at all times. Many scholars distinguish between public policy and ordre public, as the latter has a wider application than the common law term public policy.[6] However, the general trend in international commercial arbitration is to use the two terms

4. For example, in England, the Arbitration Act 1996 uses the term public policy in Section 68(2)(g) and Section (103)(3).

5. For example, the literal translation of Article 53(2) of the Egyptian Law No. 27 of 1994, indicates that the Arabic text refers to 'order public'.

6. Julian Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards, Oceana Publications, Inc., Dobbs Ferry, N.Y, (1978), p. 401. He states that: "the Civil Law term 'ordre public' is generally given a wider application than the Common Law term 'Public Policy'"; ILA Report, London Conference (2000), op. cit., p. 10. It provides that: "… public policy, as understood in Common Law jurisdictions, might not cover all cases of procedural injustice"; Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," op. cit., p. 179; Nadelmann and Von Mehren, "Equivalencies in Treaties in the Conflicts Field," I5 AM. J. Comp. L. 195, 200 (1967); Richard A. Cole, op. cit., p. 375; 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. 71 at 72; Howard M. Holtzmann & Joseph E. Neuhaus, op. cit., p. 911.

interchangeably as they ultimately lead to the same meaning, and therefore they will be used interchangeably in this study.[7]

The rules that reflect the public policy interests mark the boundary line between those conducts which are permissible in a given community and those which are not. In the domain of contractual relations, public policy controls the will of the parties and supervises the limits of their autonomy, which may lead to nullify any agreement that violates public policy in order to protect the community from any injurious agreements.[8]

A. Definition of public policy

The notion of public policy is, in itself, ambiguous and therefore there is no definitive identification of this notion. Accordingly different national courts may vary in their decisions on matters that involve consideration of public policy.

Parke B. in Egerton v. Brownlow[9] stated that this ambiguity leads the court to confusion and uncertainty:
"Public policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience', or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion."

7. The same concept has been recognised in Lemenda Ltd. v. African Middle East Co. [1988] (Q.B.D.) 453, where Phillips J., referred to 'order public' in the Qatar Civil law. Phillips J stated that: "The reference in these articles to 'public order' is the equivalent of the more familiar English term public policy"; also see, Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," op. cit., p. 179; Van den Berg, op, cit., p. 359 He states that: "… as both terms are frequently used interchangeably, the term 'public policy' will be used with the understanding that it has the same meaning as the term 'order public'."

8. Hartwell Geoffrey illustrated the existence of certain categories of conducts that a community may not allow, and therefore are prohibited by public policy rules. He provides that: "Societies may decide that certain pacts should not exist, or that, if they are allowed to exist, it will not support them. Law will give effect to such matters of social or political policy. Thus, there are, in the various jurisdictions of the world, pacts that the state will allow to exist but will not enforce (gambling arrangements, for example) pacts that can be destroyed by intervention of the state (violable contracts) pacts that are not permitted in law to exist at all and the extreme category of pacts the formation of which is, of itself, an offence against the state." Geoffrey Beresford Hartwell, "The New York Convention of 1958: A Basis for a Supra National Code," Internet address: (http:www.hartwell.demon.co.uk/nyc_asa.htm) at p. 1.

9. Egerton v. Brownlow, (1853) 4 H. L. C. 1, p.123; also see, Fender v. ST. John-Mildmay. (1938) A.C., p. 10.

Lord Davey described this ambiguity as:[10]

"… a treacherous ground for legal decision…a very unstable and dangerous foundation on which to build until made safe by a decision."

Kekewich, J. mentioned in Davies v. Davies[11], the famous decision of Mr Justice Burrough J. in Richardson v. Mellish.[12] Kekewich, J. stated that:

"I cannot but regard the jarring opinions as exemplifying the well-known dictum of Mr. Justice Burrough in Richardson v. Mellish, that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you", public policy does not admit of definition and is not easily explained".

However, Lord Denning in Enderby Town Football Club Ltd. v. The Football Association Ltd[13] showed a more optimistic view of this notion:

"With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles."

Notwithstanding these difficulties various definitions have been formulated.

Mark A. Buchanan stated that:[14]

"Domestic public policy represents those local standards or rules that are not subject to alternation or derogation by the parties and stand as an outside limit to the parties freedom to contract."

Ashraf Al Rifaie[15] displayed several definitions contained in Arabic and French doctrines[16], including those of the French writer, Philippe

10. Janson v. Driefontein Consolidated Mines Ltd (1902) A.C. 484, 500, p. 507; also see, Janson v. Mines (1902) A. C. 484, 491, 497.

11. Davies v. Davies, (1887) Ch. D. 36., p.364.

12. Richardson v. Mellish (1824) 2 Bing. 228; [1824-34] All ER Rep. 258.

13. Enderby Town Football Club Ltd. v. The Football Association Ltd. (1971) Ch. 591, 606.

14. Mark A. Buchanan, "Public Policy and International Commercial Arbitration," 26 AM. Bus. L.J., (1988), p. 513; also see, John Y. Gotanda, "Awarding Punitive Damages in International Commercial Arbitration," 38 Harv. Int. L.J. 1, 1997, p. 102.

15. Ashraf Al Rifaie, op. cit., p 11.

16. Also see, Abdul Hamid El Ahdab, "General Introduction on Arbitration in Arab Countries," Int. Handbook on Comm. Arb., (1993), p. 12. He defines the concept of public policy according to Moslem Law as: "[it] is based on the respect of the general spirit of the Shari'a and its sources (the Koran and the Sunna, etc.) and on the principle that individuals must respect their clauses, unless they forbid what is authorised and authorise what is forbidden."

Malaurie.[17] These included almost twenty definitions of public policy given by several authors, leading to the conclusion that none of these definitions can give an accurate identification for this notion. Ashraf Al Rifaie then defines public policy as:[18]

"The body of rules that intends to protect the political, economic and moral standards of a state, by giving public interests the priority over private interests, without disregarding the private rights entirely."

Julian Lew initially observes that a totally comprehensive definition of public policy has never been proffered. However, he then goes on to state that:[19]

"It is clear that [it] reflects the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community. Naturally public policy differs according to the character and structure of the State or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception."

In the context of enforcement of an arbitral award, the English Court of Appeal in D.S.T. v Rakoih (1987) Sir John Donaldson MR stated that:[20]

"Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. ... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to

17. Philippe Malaurie: Les Contracts a L'order Public, Thesis, Paris, 1953, p. 69. Cited in Ashraf Al Rifaie, op. cit., p 16.

18. Ibid., p 12. Likewise, the Egyptian courts provided a general definition for public policy. The Egyptian Court of Cassation defined public policy as: "… the rules that intends to fulfil the high interests of the state, whether it is political, moral, social or economical, and relates with the substantial and moral status of the community, where public interests has a prominence upon privet interests." Egyptian Court of Cassation, 17 of January 1979, Publication of Cassation Court decisions; also see, Abid al Razag al Sanhuri, Illustration of the Civil Law, 2ed, Dar al Nahdah al Arabiah (1964), p. 399. (in Arabic); Hussam-al Dean Fathi Nasif, National Law of the Judge and Deciding Private International Law Disputes, Dar al Nahdah al Arabia (1994), p. 459. (in Arabic) He defines public policy rules as: "the selected mandatory rules which cannot be disregarded by the agreement of individuals."

19. Julian Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards, op. cit., p. 532; also see, Egerton v. Brownlow (1853) 4 HLC 1. The House of Lords described public policy as: "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good"; see Cheshire and North, Private International Law (13th ed., Butterworths, 1999), p. 123, referring to "some moral, social or economic principle so sacrosanct ... as to require its maintenance at all costs and without exception."

20. Deutsche Schachtbau-und tiefbohrgesellscaft mbh v. Ras Al Khaimah National Oil Company [1987] 2 Lloyd's Rep. 246 at 254.

the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."

Accordingly, public policy rules play an important role in protecting the substantial rights and principles of the community, primarily because these principles have a political, moral, economic or social importance or because of any other public goals which relate to the justice and morality as conceived in a given community.[21] The rules that contain these rights are mandatory and should prevail over any other provision or rule.

All of the above then begs the following questions: what can be considered as a public policy rule in a given community? How can a court distinguish between public policy rules and other legal rules? How could a court decide that a specific rule has an important value for the public? In other words, are these public policy rules situated and identified in provisions of law, where a court can easily locate them and apply them accordingly?

It must first be considered whether there are rules of law that have a significant importance and are mandatory in their application. These are the mandatory rules, which exist in both statutory provisions and in common law rules.[22] It is necessary in this respect to examine the extent of the obligatory force of such mandatory rules. A mandatory rule could be restrictively fundamental to the public, and thus any agreement that violates such a rule will be considered as offensive to the policy of a given community and therefore must be void. Conversely, not every mandatory rule always constitutes fundamental principles as not every mandatory rule contains an essential value to the community. In this respect, it is necessary to decide when a mandatory rule forms part of public policy rules which represent the fundamental interests in a given community.[23] To achieve this

21. Public policy in this context represents the interest of the community and therefore must be distinguished from the policy of a particular government. See Egerton v. Earl Brownlow (1853) 4 H. L. C. 1, 148; 23 L. J. (Ch.) 348, per Lord Truro; Monkland v Jack Barclay Ltd (1951) 2 KB 252; (1951) 1 All ER 714; Regazzoni v. KG Sethia [1958] A.C. 301; [1957] 3 All E.R. 286; also see, Halsbury's Law of England, 4th ed., Lord Mackay of Clashfern, Butterworths, (1973), p. 844.

22. See William Holdsworth, History of English Law, 3ed., London: Methuen, (1922), p. 55. He states that: "… in fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them"; also see, Chitty on Contracts, The Common Law Library, Number 1. Twenty Sixth Ed. 1989. Vol. 1. p. 685.

23. It has been reported in Chitty on Contracts that the scope of public policy could be classified into five groups: "Firstly, objects which are illegal by common law or by legislation; secondly, objects injurious to good government

balance, an illustration of mandatory rules should take place in order to understand their limits and to be able to distinguish mandatory rules from public policy rules that embody the fundamental issues.

B. Mandatory rules and public policy

Mandatory rules are known as such, in the domain of statutory framework, to distinguish between the obligatory rules, which parties cannot derogate from by their agreement, and other rules, which are discretionary. The latter are known in civil law systems as supplementary, complementary or directory rules.[24] Supplementary rules are applicable whenever the parties neglect or do not organise some of the contractual conditions of their agreements. Supplementary rules thus complete the parties' consent if their consent was ambiguous or incomplete, with the priority given to the parties' consent, excluding what might contradict with the public policy. On the other hand, mandatory rules are applicable at all times and have priority over the parties' consent. Their function is to control the parties' autonomy, under the penalty of nullification of any agreement that violates or contradicts with such mandatory rules.

Usually neither provisions nor statutes contain separate lists for mandatory rules and for supplementary rules, but rather the distinction between the two types can be drawn from the way that they have been formulated. Mandatory rules always have an obligatory formula, providing an order to do or to forbid certain actions.[25] The reason why these mandatory rules have such obligatory force is due to the importance of the interests that these rules are designed to protect, which explains why mandatory rules are usually mixed with public policy rules.[26]

either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and, fifthly, objects economically against the public interest." The Common Law Library, Number 1. Chitty on Contracts, op. cit., para. 1134, p. 686. However, it has been added that this classification is not perfect; "This classification is adopted primarily for ease of exposition. Certain cases do not fit clearly into any of these five categories." Ibid., para. 1134, p. 686.

24. Abid al Hakeem Foudah, Nullification in Civil Law and Private Rules, Dar al Matboat al Gam'iah, (1993), p. 27. (in Arabic).

25. Abid al Hakeem Foudah, op. cit., p. 27.

26. Professor Mayer described mandatory rules as: "… a mandatory rule (loi de police) is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. To put it another way: mandatory rules of law are a matter of public policy (ordre public), and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws." P. Mayer, "Mandatory Rules of Law in International Arbitration." (1986) 2 Arbitration International, p. 274 at 275.

Okezie Chukwumerije[27] referred to the relationship between the concept of public policy and mandatory rules. He provided that mandatory rules embody the concept of public policy:

"…there is a close relationship between the concept of public policy and that of mandatory rules. Mandatory rules would include those aspects of public policy and rules of national law that are couched in an imperative manner because they embody the vital socio-economic policies of the state involved. These include currency and exchange regulations, boycotts and blockades, embargoes, and environmental protection laws."

One should consider however, that mandatory rules have a broader application than public policy and that "every public policy rule is mandatory, but not every mandatory rule forms part of public policy".[28] This can be recognised for example, in procedural rules, where several procedural rules are deemed mandatory although they do not form part of the public policy of the state.[29] Therefore the importance of the interests which such rules aim to protect should be established, owing to the fact that public policy embodies the most essential and fundamental interests in the community.[30]

Due to the ever-changing and developing nature of communities, and our understanding of what the term community represents it is entirely understandable that what is deemed appropriate for one community may not be appropriate to other communities.[31] This explains why public policy is a changeable notion[32], changing from

27. Okezie Chukwumerije, op. cit., p. 180.

28. See, ILA Report, London Conference (2000), op. cit., p. 18.

29. Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," op. cit., p. 177 at 183. He states that: "mandatory rules are not necessarily identical with public policy rules. Public policy requires further additional qualifications."

30. See, Fender v. ST. John-Mildmay, 1938, A.C. 1. This case is one of the cases where the notion of public policy was carefully analysed and illustrated; Lord Thankerton, in page 22, states that: "One of the constant principles of public policy in this country, which it is the duty of the Courts to maintain, is that of freedom of contract; but it is certain that there are some classes of contract, whose characteristics are such that their enforcement by the Courts is barred by a paramount principle of public policy. Generally, it may be stated that such prohibition is imposed in the interest of the safety of the State, or the economic or social well being of the State and its people as a whole. It is therefore necessary, when the enforcement of a contract is challenged, to ascertain the existence and exact limits of the principle of public policy contended for, and then to consider whether the particular contract falls within those limits."

31. In Davies v. Davies Kekewich, J. stated that: "one thing I take to be clear, and it is this - that public policy is a variable quantity; that it must vary and does vary with the habits, capacities, and opportunities of the public." Davies v. Davies, [1986] 1 F.L.R. 497; Ch. D. 36.1887, at p. 364.

32. See, Chitty on Contracts, op. cit., para. 1133, p. 685, "public policy is not immutable. .. Rules which rest on the foundation of public policy, not being rules which belong to the fixed customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce." See Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt (1893) 1 Ch. 630, 666; Multiservice Bookbinding Ltd. v. Marden (1979) Ch.D. 84. And vice-versa, a practice which was

place to place and from time to time.[33]

C. Public policy is a relative concept

Public policy rules vary according to that which the respective states may consider as fundamental.[34] By virtue of the fact that public policy represents the fundamental standards in a given community, such standards could only be applicable in the place in which they were made. Accordingly, if a public policy rule of a given state, was referred to or raised with the intention of application in another state, and was contrary to the public policy rules of the latter, 'host' state, then the application of this rule would not be granted.[35] Lord Kingsmill Moore J. clearly expressed this view in Peter Buchanan LD. and Macharg v. Mcvey:[36]

"In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum. Contracts valid according to what would normally be considered "the proper law" of the contract will not be enforced if in the view of the court they are tainted with immorality of one kind and another."

once permissible maybe prescribed. See, Esso Petroleum Co. Ltd. V. Harper's Garage (Stourport) Ltd. (1968) A.C. 269, 322-324, 333.

33. Even in the same country, what can be permissible in one time may become illegal in other time. See, Davies v. Davies, op. cit., p. 397, Kekewich, J. provides that: "contracts which at one time were deemed - and I dare say justly deemed - to be contrary to public policy, at another time have been deemed to be consistent with public policy, and for the public benefit." For example, it was provided that in the nineteenth century Christianity was part of the law of England and that, accordingly, a contract to hire a hall for meeting to promote atheism was contrary to public policy but fifty years later this view was decisively rejected. See Nordenfelt v. Maxim Nordenfelt Guns and Ammunition co.(1894) AC 535, per Lord Watson p 553; Cheshire Fifoot & Furmston, Law of Contract 7th N. Z ed., p. 311; Bowman v. Secular Society (1917) Ac 406; 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."

34. See, Van den Berg, op. cit., p. 360. He provides that: "the reason why the concept of public policy is so difficult to grasp is that the degree of fundamentality of moral conviction or policy is conceived differently for every case in the various states"; also see, Halsbury's Law of England, 4th ed., op. cit., para 842; Redfern and Hunter, 2nd ed., op, cit., p.443, stating that: "the concept of public policy (or order public, in the civil law terminology) is general; but the actual requirements of public policy vary from one state to another."

35. Yves Derains, "Public Policy and the law Applicable to the Dispute in International Arbitration," International Council for Commercial Arbitration (ICCA) New York Arbitration Congress (1986), Pieter Sanders ed., pp. 227-228. He explained that: "In domestic law, public policy forms a set of rules that parties may not contract out of. In private international law, public policy known as 'international public policy' enables the judge to exclude the foreign law that would otherwise be applicable when it infringes on social or legal concepts considered to be essential in his legal system. In this connection it is known as overriding public policy"; to the same extent this has been explained by the Egyptian doctrines, see Ashraf al Rifaie, op. cit., p. 23; Ahmad Abid al Khreem Salamah, Summary in Private International Relations, 1 Ed, Dar al Nahdah al Arabiah, p. 225. (in Arabic); Article 28 of the Egyptian Civil Law.

36. Peter Buchanan LD. and Macharg v. Mcvey. [1955] A.C. 516 at p. 528.

Importantly, what could be termed a ‘conflict of international public policy rules’ will take place in deciding which public policy rules are to be applied in private international law relations. According to the traditional conflict of law theory, it has long been accepted that such circumstances are subject to the qualification that imperative laws of the forum may apply to a contract irrespective of the proper law of the contract.[37] Therefore, applying foreign laws in a given state will be determined according to its harmony with the public policy rules of that state. This opinion was given by Lord Justice Clerk Patton in Connal & Co. v. Loder:[38]

“Everybody knows that the fundamental principle upon which we introduce foreign law affecting the rights of contracts or otherwise, is only to the effect of introducing such law when it is not in direct contradiction to the principle upon which our law is governed.”

The following material explains the conflict of public policy rules, and the distinction between national public policy and international public policy.

II. The Conflict of Public Policy Rules

To understand the meaning of the conflict of public policy rules one should distinguish between the traditional conflict of laws, as it is known in private international law[39], and the conflict of public policy rules. Simply, a difference between the two concepts is that the conflict of public policy rules occurs after deciding the applicable law, illustrated in the following hypothetical example. A dispute arose in which different international elements were involved. If the parties did not agree on the applicable law, the court that had jurisdiction to adjudicate such a dispute would decide the applicable

37. Hussam-al Dean Fathi Nasif, op. cit., p. 454. He considers public policy in international private law as having an exclusion role which protect the community from foreign rules that may contradict with its system, he also describes the conflict of law rule, when it refers to apply a foreign legal system, as a step to the uncertainty which justifies the intervention of public policy in private international law; also see, Hisham Sadik, Conflict of Laws, Monsha’at al Ma’arif, Alexandria (1993), p. 29, (in Arabic); Okezie Chukwumerije, op. cit., p. 180.

38. Connal & Co. v. Loder (1868), 6 M. 1095; also see, Okezie Chukwumerije, op. cit., p. 181.

39. J. G. Collier, Conflict of Law. 2nd ed., Cambridge University (1987), p. 3. He defines the English conflict of law rules as: “a body of rules whose purpose is to assist an English court in deciding a foreign element.”; also see, Pierre Lalive, “Transnational (or Truly International) Public Policy ..” op. cit., p. 260. He defines private international law as: “… a branch of the law which is based on a fundamental distinction between ‘domestic’ situation and ‘international’ situations (i.e., those which include one or more foreign elements sufficiently relevant to call for a particular treatment and the intervention of the private international law of the State.).”

law according to the conflict of law rules or that which it may find as an appropriate or proper law to be applied to the dispute.[40] The hitherto chosen applicable law, in accordance with the conflict of law rules, may include what could be deemed a violation of the public policy of the forum or the public policy of a third country. In other words, a conflict of public policy rules indicates that a relationship involving two different public policy rules, each of which belongs to a different legal system, should be determined by the courts or arbitral tribunals by choosing the applicable public policy rules, favouring one over the other.

The problem that arises from the conflict of public policy rules can be viewed from the perspective of the role of public policy in private international law. Generally, when a private international law rule permits the application of a foreign law rule, it does not give a green light to apply the foreign law regardless of the effect of applying that law in the state.[41] Public policy here intervenes in order to exclude the application of the foreign rule that the 'choice of law rules' refers to as having jurisdiction to be applied.[42]

To decide the applicable public policy rules in private international law relations, it is necessary, first of all, to distinguish between the role of public policy in domestic and private international law relations, drawing attention to the trend towards the development of international public policy rules, which will be discussed in the following sections.

A. International and domestic public policy

In domestic relations, national courts apply domestic public policy since the effect of such relations will only take place in their territory, where they have the responsibility of maintaining and protecting the public policy of the community from being violated by private

40. There are different factors that have to be taken into consideration in this respect; the nature of the dispute that it involves international relationships, the will of the parties that they can choose the applicable procedural and substantive law; and finally, the involvement of different laws, where different laws may relate to the case which posses a foreign element. For the question of who decides the applicable law in international commercial arbitration, see Chapter Three, at p. 104.

41. See for example, Article 28 of the Egyptian Civil Law, it provides that: "The provisions of a foreign law determined by virtue of the preceding provisions shall not be applicable if those provisions contravene the public order or morality in Egypt."

42. Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 262.

agreements.[43] In relations that have an international dimension, where foreign elements may be involved, such as in the conflict of laws or in the enforcement of foreign awards, the court of the forum may also resort to apply the domestic public policy rules in order to protect the national fundamental issues of the state from being violated by foreign elements.[44] The following section will illustrate the role of domestic public policy in private international relations.

B. The role of domestic public policy in private international law

National courts are bound by the public policy rules of a state since such national public policy rules are designed and intended to be applicable by the court as part of their legal system. A national court may, therefore apply national public policy rules to all disputes that fall within the scope of the court's jurisdiction, regardless of the proper law of the contract.[45] Accordingly, a court may nullify a foreign contract, disregard a foreign law[46], or set aside a foreign award by virtue of its contradiction with the national public policy rules.

The flexible nature of the concept of public policy has previously been noted. It is this flexibility that makes it hard to discern the limitations to applying domestic public policy rules to private international law relations. This could be illustrated by viewing four different examples. In these examples it will be presumed that the English courts are the courts that have the jurisdiction to decide the applicable public policy rules.
Example One: It should be noted in this hypothetical example, that the applicable law to a given contract is the English law and the place where the contract will be performed is in England. The contract here is closely connected to one state, particularly that the

43. Yves Derains, op. cit., p. 235. He defines domestic public policy as "… a set of rules within a given legal system which parties cannot contract out of."

44. Albert A. Ehrenzweig, Private International Law, Oceana Publications, Inc. (1967), p. 153. He states that: "… all through the history of conflicts law, public policy has been used to limit a potentially all-embracing autonomy of the parties."

45. See Okezie Chukwumerije, op. cit., p. 181. He states that: "The court system is one of the vehicles through which a society expresses and protects those fundamental values that underlie its social fabric; thus national courts generally apply imperative rules that invariably represent the essential values of their societies, even in cases where the forum's law does not govern the contract."

46. Hussam-al Dean Fathi Nasif, op. cit., p. 460. He states that: "Public policy in private international law could be used in a negative sense. It could provide the national courts with a legitimate reason to change the jurisdiction of the applicable foreign law by permitting the court to disregard the jurisdiction of the foreign rule that the conflict of law rule indicates points to, and replace it with its national law"; Albert A. Ehrenzweig, op. cit., p. 154. He states that:

contract will be performed and will take its effect in England. The applicable public policy rules in this example should be the domestic English public policy rules, as conceived by the English community according to their traditions and interests. Therefore, an English court may nullify the contract if it finds that it violates the English public policy rules, even if the same contract would be considered as valid in other countries.[47]

Example Two: In this example, one can take as given that the law of the contract was English law, but the contract will be performed in another country. Courts should consider that a foreign element is involved here, which requires consideration of the validity of the agreement according to the public policy rules of the country in which performance of the agreement will take place.[48] Also, one should consider that the agreement is governed by English law, and therefore, courts should simultaneously consider the application of English public policy rules, assuming this is possible.[49] This conclusion was reached by Chitty on Contracts when he stated that:[50] "English courts will not enforce a contract where performance of that contract is forbidden by the law of the place where it must be performed. This proposition is undoubtedly correct where English law is the proper law governing the contract, but there does not appear to be any overriding requirement of English public policy rendering such contacts unenforceable where they are governed by a foreign system of law and are not regarded as illegal under that system."

Likewise, in Lemenda Trading Co. Ltd. V. Africa Middle East Petroleum Co. Ltd., Phillips J. stated that:[51]

"each country ignores its choice-of-law rules whenever the difference between the foreign applicable rule from its own internal rule seems sufficiently offensive to justify an exception from the general rule of choice."

47. As was previously stated, communities differ in their policies, as some countries permit some actions such as gambling, and yet others prohibit such dealings and consider this as a violation of public policy. If we also take for example, that in some Islamic Countries polygamous marriage is valid, yet this will be considered as against public policy and morality in other countries.

48. In Soleimany v Soleimany [1998] 3 WLR 811 the Court of Appeal refused to enforce an award of the Beth Din on the grounds of public policy. The decision could be explained on the basis that the act was illegal in the place of performance.

49. The application of the foreign public policy rules will depend on the courts knowledge of the foreign rules and the legal system of that state, in addition to what evidence of such rules the parties may provide to the court.

50. Chitty on Contracts, op. cit., p. 703; see Ralli Brothers v. Compania Naviera Sota y Aznar [1920] 2 K. B. 287; Grell v Levy (1864) 16 C.B. (N.S.) 73; also see, Dicey and Morris, The Conflict of Laws (11th ed.), London: Stevens, (1987), p. 1214; J. G. Collier, op. cit., p. 373.

51. Lemenda Trading Co. Ltd. v. Africa Middle East Petroleum Co. Ltd.(1988) 2 W. L. R. 735; Q. B. (1988), p. 448, p459.

"English courts would not enforce an English law contract which falls to be performed abroad where: (1) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality; (2) 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 such a situation international comity combines with English domestic policy to militate against enforcement".

Example Three: In this example, according to a choice of law made by the parties, or the conflict of law rules upon which the court found that the contract is governed by a foreign law and the agreement will be performed in England. According to this example, it will be expected from the court to consider the application of the public policy rules of the law of the contract (the foreign law, which the conflict of law rules refers to), in addition to the English public policy rules, but the latter would be considered in a less restrictive manner. Cheshire Fifoot and Furmston illustrate such a situation, with the same view, providing that:[52]

"The substance of the obligation - the essential validity of the contract - must be governed by what is called the "proper law", i.e. in effect the law of the country with which the transaction is most closely connected. Nevertheless, the rights of the parties as fixed by the proper law, if put in suit in England, are subject in general to the English doctrine of public policy. If the contract, though valid by the foreign law, is repugnant to what has been called the stringent domestic policy of England, it cannot be enforced in England. This, however, does not mean that each individual rule comprised in the comprehensive doctrine of public policy applies to a foreign contract. That doctrine strikes at acts which vary greatly in their degree of turpitude."

One should bear in mind here that determining when to consider the application of public policy rules of a foreign law will be difficult to put into practice, since this will depend on the circumstances of each individual case. Prior to determining this issue, a competent court should give due consideration to all relevant circumstances, such as: the fact that the transaction has a close connection with the foreign

52. Fifoot and Furmston, The Law of Contract:, 11th ed., p. 370; the same was determined in Lemenda Ltd. v. African Middle East Co.[1988] (Q.B.D.), p.460.

country, the law of which has been violated; that such foreign law is mandatory or has vital importance to that country, and that the aim of such foreign law is to protect a serious interest for that state.[53]

One must consider two possibilities when applying a foreign law according to the preceding example:

1. The court may find the contract unenforceable due to illegality under the public policy rules of the applicable foreign law. The contract will then, not be enforceable in England unless the degree of illegality under the proper law is one that the English court refuses to recognise because, for example, performance of the transaction imposes an unfair discrimination upon one or both of the contracting parties.[54]
2. The court may recognise that the contract is valid by its applicable foreign law, but that it fails to comply with an English regulatory statute rendering similar domestic contracts void or unenforceable and accordingly may[55], or may not, elect to enforce the agreement.[56]

It is thought that the principle is that such agreements should be enforced, unless the social policy expressed in the English statute is of such fundamental importance that it must be applied even to a transaction with foreign elements or that the contract, or its breach, has a substantial link to national interests.[57]

The principle which can be deduced from such a situation, is that courts should recognise the effect of such a contract, as long as it is legal under the applicable foreign law and should to some extent, enforce such a contract, as long as it does not violate vital interests, morality and justice as conceived by the national law of the court.

53. See, Chitty on Contracs, op. cit., para 1154, (Illegality and Foreign Law), p. 700.

54. See Kahler v. Midland Bank Ltd. (1950) A. C. 24; Zivnostenska Banka National Corporation v. Frankman (1950) A. C. 57; MacKender v. Felda A.G. (1967) 2 Q. B. 590, 601.

55. Quarrier v. Colston (1842) 1 Ph. 147; Saxby v. Fulton (1909) 2 K. B. 208; Sayers v. International Drilling Co. (1971) 1 W. L. R. 1176.

56. Leroux v. Brown (1852) 12 C. B. 801; English v. Donnelly, 1958 S. C. 494; Brodin v. A/R Seljan, 1973 S. L. T. 198; Peter Buchanan LD. and Macharg v. Mcvey. (1955) A.C. p. 528, in which the court hold that: "In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum. Contracts valid according to what would normally be considered the proper law of the contract will not be enforced if in the view of the court they are tainted with immorality of one kind and another"; also see, Rousillon v. Rousillon (1880), 14 Ch.D., p 351. The court based its decision on equity, provided that: "If an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English Court will not enforce it."

57. Mitsubishi Corpn v. Alafouzos (1988)1 FTLR 47; (1988) 1 Lloyd's Rep 191. In which it was alleged that the contract is illegal under some foreign law, the test was based on whether or not the contract would be legal when applying the English public policy.

Example Four: Finally, the contract may be governed by a foreign law, and will be performed in a foreign country. The contract here does not relate to England, except that English courts have the jurisdiction to decide the dispute. Primarily, it can be said here that there is no reason to apply English public policy rules, so long as this contract will not effect the English community. The important question here is: what if the foreign contract, intended to be performed in a foreign country, was contrary to the public policy of England? This question was considered by Wright J. in Kaufman v. Gerson[58], where the same was raised:

"The question to be determined in this case, as it stands at present, is whether the courts of this country ought to enforce a contract made, and intended to be performed in, a foreign country, and according to the laws of that country, the contract being valid and enforceable according to those laws, but such that, if it were an English contract, the courts of this country would refuse to enforce it on grounds of public policy or of undue influence."

In this regard, Wright J. reviewed several cases where the same point was raised.[59] He then decided to consider principles of public policy and morality as conceived by the English Community. Therefore, the contract will be void if it on any ground could not be validly made in England and consequently could not be performed there.[60]

The above example also begs a further question, if it is considered that the contract violates neither the law of the contract nor English law, but violates the public policy of a third country. The question then will be; would the court in such a case recognise or enforce the contract?

One should bear in mind that it is not expected of a court to be knowledgeable of the various legal systems of different states. In the light of this, a court may not refuse to enforce such a contract except in the case where there is an obvious violation to the public policy of that third country, for example, performance of the contract

58. Kaufman v. Gerson (1903) 2 K. B., p 114.

59. re Missouri Steamship Co.(1888) 42 Ch. D. 321, p. 325.; Santos v. Illidge (1859-60) 6 C. B. (N.S.)., p. 841; Quarrier v. Colston(1842) 1 Ph. 147.; Robinson v. Bland (1760) 1 W. Bl., p. 256.; Grell v. Levy (1864) 16 C. B. (N.S.)., p. 73.

60. According to this example, the contract can be invalidated, only if the contract violates the cardinal interests, justice or morality of the English community. also see, Sharif v. Azad (1967) 1 Q. B. 605; Mansouri v. singh 1986 1. W. L. R. 1393; United City Merchants (Investments) Ltd. v. Royal Bank of Canada (1983) A. C. 168, 188-191; Rossano v. Manufacturers' Life Assurance Co. (1963) 2 Q. B. 352; Libyan Arab Foreign Bank v. Bankers Trust Co. (1988) 1 LIoyd's L. Rep. 259, 268-269; See Dicey and Morris, The Conflict of Laws (11th ed.), p. 1466.

would involve a criminal breach of the foreign law. This was the case in De Wutz v. Hendricks[61], which involved a loan in support of Greek rebels against their Turkish government.[62] Also, of relevance here is the well-known decision in Regazonni v. KC Sethia Ltd.[63] Although the contract was perfectly legal with regard to the English proper law, it was considered null and void according to Indian law which prohibited the trade of jute with South Africa, following the apartheid measures imposed on Indians. The court considered that the agreement violated the laws of a friendly country. Parker L.J. provided that:

"…if two people knowingly agree together to break the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement."

The preceding four examples demonstrate the application of national public policy rules by courts to contractual relations that involve a foreign element. One should recognise here the difficult situation for national courts when they are confronted with a question of deciding the validity of an international contract by striking a balance between their national public policy and the public policy rules of a foreign country. This is further complicated by the previously stated notion that courts are not expected to have knowledge of all of the public policy rules of different legal systems.

This situation will be more difficult for arbitral tribunals when deciding an international commercial dispute because arbitrators do not have a lex fori as national judges do and they are not obliged to apply the 'conflict of law rules' of the forum. Moreover, arbitrators cannot establish a decision on the degree of disparity between the possible injurious effect of applying a foreign law and the public policy of the forum.[64] Clearly this situation is unacceptable and therefore it has been proposed that in certain cases that involve a conflict between public policy rules of several legal systems, courts and arbitral tribunals could resort to a new notion of public

61. De Wutz v. Hendricks (1842) 2 Bing. 314.

62. The plaintiff, in order to raise a loan, deposited with the defendant certain papers. The loan fell through and the purpose of the transaction, which encompassed overthrowing a friendly government, prevented the plaintiff recovering the papers. Also see, Foster v. Driscoll (1929) 1 K. B., p. 470 C.A; Toprak Mahsullri Ofisi v. Finagrain Compagnie Commercial Agricole et Financiere S. A. (1979) 2 Lloyd's Rep. 98, p. 106.

63. Regazonni v. KC Sethia Ltd. 1958 A.C. 301; [1957] 3 All E.R. 286.

64. Further explanation of this matter will follow in the next chapter at p. 141.

policy. This notion is intended to assure a "minimum standard of protection" by applying international public policy rules that have been developed in the domain of international commercial relations. This notion will be further examined in the following sections.

III. The Development of International Public Policy Rules

The concept of a body of international public policy rules is highly contentious. Some writers wholly deny the existence of international public policy rules unless such rules exist within the context of national law.[65] However, by acknowledging the recent developments of international commerce and the wide adherence of states to international commercial treaties, one should recognise that an international commercial community has emerged and must be distinguished from the plurality of different communities. The notion of international public policy is thus constituted upon a collection of fundamental legal principles related to all or at least which covers the most fundamental notions of equity and justice. This is mainly due to the development of international commerce, which has led to a degree of co-operation between members of the international community. To develop a modern environment for international commercial relationships it was necessary to establish public policy rules suiting the needs of the international commercial community and thereby avoid the confusion caused by the existence of variable national public policy rules such as different trade prohibitions.

Achieving such harmony is possible by reducing the applicability of national public policy rules in international transactions, as compared to their wider use in domestic relations.[66] Also, this is achievable by seeking to find mutual principles of justice and morality[67] common

65. Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., pp. 277,278; also see Horacio A. Grigera Naon, "Public Policy and International Commercial Arbitration: An Argentine view. Comparative Arbitration practice and Public Policy in International Arbitration," Pieter Sanders ed., Kluwer Law and Taxation (1987), p. 336; also see, Hussam-al Dean Fathi Nasif, op. cit., p. 462; Aktham A. EI-Khoul, "The Enforcement of International Arbitral Awards," 2 Journal of Arab Arbitration (2000), p. 10 at 19. In his opinion; "International public policy rules express the major and basic values of a defined country and not those of all countries. They are the national concept of national values for international dealings, of what is fair and acceptable and what is not so by a certain country."

66. Van den Berg, op. cit., p.360. He states that: "According to this distinction what is considered to apply to public policy in domestic relations does not necessarily apply to public policy in international relations;" Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," op. cit., p. 188; Christopher B. Kuner, op. cit., p. 79.

67. Courts for instance, cannot entertain a contract for the sale of slaves at present time. This is merely an example of the kinds of contracts that cannot be enforced around the world, as it is internationally prohibited by the various

to the majority of countries.[68] It could be argued in this respect, as is the central subject of exploration in this research, that if a domestic public policy rule conflicts with the international public policy rules, then international public policy should prevail. However, despite these propositions, the notion remains at heart problematic due to the sheer diversity of fundamental issues between states, such as the different beliefs, traditions, economic policies and political trends, which may interrupt the approach towards establishing a new concept of international public policy. Recognising this problem, Alan Redfern and Martin Hunter, state that: [69]

"…there are bound to be practices which some states will regard as contrary to the international public policy interest, and other states will not. Agreements in restraint of competition, for example, which are the subject of punitive regulation in some parts of the world (for instance, in the U.S and the European Community) are treated with indifference elsewhere. Problems abound in formulating the concept of international public policy, but they do not vitiate the desire or need for a workable definition of it."

It is widely recognised that international public policy serves the international community by its potential to play exactly the same role as domestic public policy in national relations[70], although the difficulties that may arise in developing such rules have also been recognised most notably by Okezie Chukwumerije. He demonstrated that:[71]

"… while the public policy of a state embodies the moral and ethical philosophy of the state, transnational public policy performs the same role for the international business community."

Human Rights Conventions, and by the various legal systems around the world. See Article 4 of the Universal Declaration of Human Rights: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."

68. Okezie Chukwumerije, op. cit., p.191. He states that: "Like the concept of public policy in national law, the concept of transnational public policy presupposes the existence of "a certain community and of certain fundamental values. Unlike national public policy, the relevant community here is not a national community but the international community"; Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 277, stating that: "international public policy aimed at safeguarding principles common to all civilised nations"; Ahmed S. El-Kosheri, "Extent and Nature of Private International Law," Legal and Economy Journal, 1 ed., (1968), p. 128; Abu Zaid Redwan, op. cit., p. 119. He provides that: "There are modern rules which govern international commercial relationships, the source of these rules does not come from national laws but from the international commercial customs and modern means of international transactions"; Hussam-al Dean Fathi Nasif, op. cit., p. 487. He states that: "some legal systems, such as, those in the 'Arabic countries' share principles that acquire their origin from the same source, which may institute, at least, a minimum level of interconnection and therefore, an international level of public policy between these states."

69. Redfern and Hunter, 2nd ed., op. cit., p.445.

70. Abu Zaid Redwan, op. cit., p. 119.

71. Okezie Chukwumerije, op. cit., p. 191.

He went on to define international public policy thus:[72]

"Transnational public policy represents the fundamental values, the basic ethical standards, and the enduring moral consensus of the international community. Its principles are derived from "the fundamental rules of national law, the principles of universal justice, jus cogens in public international law and the public policy accepted in a generality of nations."

Van den Berg referred to the fundamental rules of natural law, the principles of universal justice, in public international law and the general principles of morality accepted by civilised nations.[73]

Klaus Berger mentioned that international public policy rules have been developed within the general principles of law[74] and that these international principles are agreed by the majority of states reminding us to keep in our mind that while there may be difficulties, this must not frustrate the acceptance of the existence of such rules. He stated that:[75]

"The fact that a majority of nations might disagree with these views need not necessarily negate their importance in shaping international public policy."

Lord Denning in The Hollandia case[76], highlighted the importance of applying unified public policy rules in international trade stating that:

"… there is a higher public policy to be considered and that is the public policy which demands that, in international trade, all goods carried by sea should be subject to uniform rules governing the rights and liabilities - and the limitation of liability - of the parties. They should not vary according to the particular country or place in which the dispute is tried out. So many persons are concerned down the chain - buyers and sellers, bankers and insurers, endorsees and consignees - that each should know what the rules are - without having to go by the small print in any particular bill of lading…".

72. Ibid., p.192.

73. Van den Berg, op. cit., p. 361.

74. Klaus Peter Berger, op. cit., p. 673; also see, Berthold Goldman, Lex Mercatoria, Kluwer Law and Taxation Publishers, Deventer, The Netherlands, (1986), at 115. He provides an explanation of the general principles of law as those principles that are common to all, or to a large majority of national legal systems. The general principles of law are determined by conducting a survey of various national laws to determine those common principles.

75. Klaus Peter Berger, op. cit., p. 673.

76. Owners of Cargo on Board the Morviken v Owners of the Hollandia (The Hollandia and the Morviken), [1982] Q. B. 872, at p. 884; [1983] 1 A.C. 565; [1982] 3 W.L.R. 1111.

Lord Denning continues:

"This public policy applies not only to contracts of carriage of goods by sea, but also to carriage by air, where again there is a statute which overrides other stipulations[77], in short, it applies to all international transport."

Alan Redfern and Martin Hunter also provide that:[78]

"International public policy would not concern itself with matters of form, or of purely domestic nature. It would look to the broader public interest of honesty and fair dealing."

It can be argued that, whilst still contentious, there are various indications showing how the notion of international public policy has become increasingly acceptable, developing into a true international public policy rule.[79] This can also be viewed through the development of international conventions and statutes that relate to the enforcement of foreign arbitral awards.

A. Public policy in international conventions

International conventions play an important role in unifying the rules of different contracting states, to treat the same issue similarly within the contracting states and accordingly, reduce the differences between different legal systems.[80] This has been the intention in conventions concerning international economic and commercial rules, in addition to other conventions concerning the enforcement of foreign judicial and arbitral awards.

Rules aiming to prevent the violation of public policy are explicitly provided in almost all international commercial conventions, in order to provide the member states with a method with which to protect their national, fundamental interests against potential violations of

77. See Corocraft v. Pan American Airways Inc. [1969] 1 Q.B., p. 616.

78. Redfern and Hunter, 2nd ed., op. cit., p. 445.

79. See Christoph Liebscher, "European Public Policy- A Black Box?," 17:3 J.Int.Arb. (2000), p. 73 at 74.

80. Julian Lew, Applicable Law in International Commercial Arbitration, op. cit., p. 443. He states that: "… the individual purpose of the uniform laws is to establish internationally accepted rules to regulate the various aspects of the commercial relations to which they relate."

their public policy.[81] Some of these conventions combined the notion of public policy with other principles such as good morals, religious and fundamental principles of law. For example, Article 30(a) of the Riyadh Arab Convention on Judicial Co-operation provides that:[82]

"… the recognition of a judgement may be refused in the following cases: (a) if it is contrary to the provisions of the Moslem Shari'a[83] or the Constitution or the public policy or good morals of the signatory State where enforcement is sought".

The Geneva Convention of 1927 provides in Article 1 (c), a ground to refuse the recognition and enforcement of foreign arbitral awards by stating that:

"(c) … the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon."

Accordingly, the Geneva Convention referred to the principles of the law of the country in which the enforcement of the foreign award is sought. This indicates that the trend in the Geneva Convention is towards applying the domestic public policy rules of the state where enforcement will take place. It clearly used the term public policy in addition to the 'principles of law of the state', as an indication to apply the national legal system of the country where the enforcement will take place.

However, the New York Convention used another formula, in Article

V (2)(b) the Convention provides that:

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition or enforcement is sought finds that:

(a) The recognition or enforcement of the award would be contrary to the public policy of that country."

81. See, Van den Berg, op. cit., p. 360. He provides that: "A public policy provision can be found in almost every international convention or treaty relating to these matters. Its function is basically to be the guardian of the 'fundamental moral convictions or policies of the forum'."

82. Riyadh Arab Convention on Judicial Co-operation, signed on 6 April 1983; in force October 1985. Intl. Handbook on Comm. Arb. Suppl. 11. January 1990. Annex 1-2; also see, Abdul Hamid El Ahdab, "General Introduction on Arbitration in Arab Countries," op. cit., p. 23.

83. In Muslim Shari'a rules, the concept of public policy is based on the respect of the general spirit of the Shari'a and its sources (the Koran and the Sunna, etc.) and on the principle that "individuals" must respect their clauses, unless they forbid what is authorised or authorised what is forbidden by Shari'a rules. See Abdul Hamid El- Ahdab, "General Introduction on Arbitration…", op. cit., p. 14; also Abdul Hamid El-Ahdab, "Enforcement of Arbitral Awards in the Arab Countries," I 1 Arb.Int., (1995), p. 169; Mohamed I.M. Aboul-Enein, "Liberal Trends in Islamic Law (Shari'a) on Peaceful Settlement of Disputes," 2 Journal of Arab Arbitration (2000), p. 1 at 6.

The New York Convention evades using the phrase “principles of law” as used in the Geneva Convention. Van den Berg considered this difference as an indication that the New York Convention refers to international public policy as distinct from domestic public policy.[84] He established his assumption on the discussion, which followed the ECOSOC Draft Convention of 1955, which provided that: “clearly incompatible with public policy or with fundamental principles”.[85] The Working Party No. 3, however, proposed to limit it to public policy alone, considering that “the provision should not be given a broad interpretation”.[86] Van Den Berg continues that this limitation was accepted by the conference, which moreover, rejected a Brazilian proposal to re-introduce “fundamental principles of law”.[87]

More clarification is required with regard to the phrase “contrary to the public policy of that country” as used in the New York Convention, since reference to “that country” at the end of article V (2)(b) may lead to different interpretations. It may refer to the country where enforcement is taking place or to the country(ies) with which the dispute has the closest connection. It is also unclear whether this formula refers to the domestic public policy of a particular country or to international public policy rules. Therefore, it would have been preferable if the New York Convention had used the term international public policy or at least the term “public policy” alone[88], leaving the interpretation of this article to the courts of each state. This would have provided an open invitation to courts to develop international public policy rules according to the needs emanating from the development of international commercial relations. Ultimately, this could serve to drive the courts to apply less restrictive public policy rules in the domain of international commercial arbitration.

84. Van den Berg, op. cit., p. 361. He states that: “the new formula of public policy ground, clearly reflect the convention’s intention to base this ground on the restrictive notion of international public policy.”

85. Statement of the chairman of working party no. 3, UN DOC E/CONF. 26/ SR.17; also see, Rene David, op. cit., p.400. He states that: “The draft of ECOSOC referred to ‘the fundamental principles of the law’. It was considered in the New York Convention that such adjunction were unnecessary.”

86. Statement of the chairman of Working Party no.3, UN. DOC E/CONF.26/SR.17; Van Den Berg, op. cit., p. 361.

87. Ibid., p. 362; UN DOC E/CONF.26/SR.17.

88. Examples can be found in international conventions that use the term “public policy” alone, without giving any indication to the country where the enforcement will take place. For example, Article 35 of the Amman Arab Convention on Commercial Arbitration which provides that: “… the Supreme Court of each contracting state must give leave to enforce awards of the arbitral tribunal. Leave may only be refused if this award is contrary to public policy.” Amman Arab Convention on Commercial Arbitration, signed 14 April 1987, Intl. Handbook on comm. Arb. Suppl.. 11, January 1990. Annex 2-1.

In deliberations over the Model Law handling of the matter, this proposition (giving preference to the notion of international public policy or just public policy) was not employed (while not explicitly rejected) due to a lack of consensus on the working party and that the term was thought to lack precision.[89] The Model Law, in keeping with the New York Convention refers to 'public policy of this state'.[90] However, the debate remains open and in agreement with the here stated position, Redfern and Hunter argue that the Model Law conclusion "underestimated" the trend towards favouring the term international public policy in commercial relations.[91]

International commercial conventions cannot ignore the need of international commercial relations. There is an implied duty on such conventions to support the application of the concept of international public policy rules rather than relying on traditional rules of domestic public policy. This approach would effect the development of international arbitration as a reliable way to resolve international commercial disputes, and the integrity of international arbitral awards.

B. Statutory and judicial trends towards international public policy

The trend towards applying international public policy is rapidly growing.[92] As countries become more interested in attracting arbitration, the application of the notion of international public policy has become more acceptable either in the legislative text or in court decisions.

The first use of the term international public policy in a statute was in the French Code of Civil Procedure, as Article 1502.5 of the civil

89. It has been reported that: "During the deliberations of the Model Law the UN Secretariat suggested, in conformity with a trend in recent case law, to use the restricted term of international public policy as a ground for setting aside and refusing enforcement. The Working Group ultimately rejected this proposal because its underlying idea was deemed to be 'not generally accepted' and, above all, the term 'international public policy' was said to lack the necessary precision, (UN Doc. A/CN.9/WG.2/WP.35, para.30). There was thus no outright rejection of the principle and its application depends on the doctrine prevailing in the country that has adopted the Model Law." Redfern and Hunter, 2nd ed., op. cit., p. 443.

90. Article 36(1)(b)(ii) of the Model Law provides that: "the recognition and enforcement of the award would be contrary to the public policy of this state."

91. Redfern and Hunter, 2nd ed., op. cit., p. 443. The authors here added that: "It seems that the Working Group's evaluation of the current status of international doctrine underestimated the driving force of the trend towards a restricted notion of public policy"; also see, Klaus Peter Berger, op. cit., p. 671.

92. Redfern and Hunter, 2nd ed., op. cit., p. 445. The writers provide that: "…there is nothing new, so far as arbitration is concerned, in differentiating between national and international policy; indeed it is a consistent theme, to be found in the legislation and judicial decisions of many countries."

code provides:[93]

"An appeal against a decision granting recognition or enforcement of an award may be brought …If the recognition or enforcement is contrary to international public policy."

Likewise, this approach was followed by other countries, such as Lebanon[94], Algeria[95], Portugal[96], Tunis[97], Romania[98] and Italy.[99] This statutory trend in fact, recognised two types of public policy: "national public policy", which may be concerned with truly domestic considerations; and "international public policy", which leads to a more restricted use of national public policy rules. Moreover, this trend will provide courts with a statutory rule that would be considered part of their national legal system. This in turn will lead to the application of public policy rules in a less restrictive fashion and to a greater understanding of international commercial relations, particularly in cases concerning the morals and obligations of the international community.[100]

However, this approach towards using the term international public policy in statutory provisions, is not yet recognised by all legal systems. Nevertheless, this does not mean that other legal systems wholly disregard the application of international public policy rules.

93. Article 1502.5, 7 .B. Com. ARB. 281- 82(1982); John Y. Gotanda, op. cit., p. 102; Redfern and Hunter, 2nd ed., op. cit., p.445, stating that: "The concept of 'international public policy' (order public International) has been devolved by French jurists and is embodied in the New French Code of Civil Procedure. This Code allows an international arbitral award to be set aside if the recognition or execution is contrary to international public policy"; Klaus Peter Berger, op. cit., p. 670, stating that: "The French Decree on International Arbitration of 1981 was the first modern law to adopt this terminology as ground for setting aside international awards and refusing recognition and enforcement."

94. The Lebanon's New Code of Civil Procedure Article 814 (Leb.), reprinted in Adel Nassar, "International Arbitration in Lebanon," 10 Arb.Int., (1994), p. 295, 301. He provides that: "Arbitral awards are recognised and enforceable if… they are not manifestly contrary to international public policy."

95. Article 458 bis 23(h) of Decree No. 83.09 (1993).

96. Article 1096(f) of the Code of Civil Procedure (1986).

97. Article 8l. II of the Tunisian Arbitration Code (1993), makes reference to "public policy as understood in private international law", Tunisian Arbitration Code (1993), Law No. 93-42, Annex I- 1, Int. Handbook on Comm. Arb. Suppl. 18 September 1994.

98. Articles 168(2) and 174 of Law 105/1992 on the Settlement of Private International Law Relations, which provide that enforcement will be refused if the award "violates the public policy of Romanian private international law", Capatina, "Romania", Handbook, Suppl. 21, Aug. 1996, p. 49, in which the author states that "public policy is understood here as the public policy of private international law, which is narrower than domestic public policy."

99. The Italian approach has been illustrated by, Rubino Sammartano, M., "New international Arbitration Legislation in Italy," 11 J.Int. Aeb., p. 77, at 85 (Sept. 1994). The wrtiter summurised the changes in the Italian international arbitration law which took place in 1994. He provides that arbitral awards will be enforced if there is no "conflict between the award and Italian international public policy"; John Y. Gotanda, op. cit., p.102.

100. John Y. Gotanda, op. cit., p. 102.

Pierre Lalive illustrates the courts' practice in this regard:[101]

"In an increasing number of cases, a national judge, although a state organ having the function to state and apply the law of a particular state and to ensure the respect of its fundamental principles (in particular by means of the traditional concept of external public policy) has not hesitated to recognize and give effect to a wider notion, more international or perhaps supranational, of public policy, based on the vital interests not only of the national community to which the judge belongs but also of a broader, regional or universal, international community."

For example, while the English Act of 1996 did not use the term international public policy[102], this does not mean that English courts do not recognise the application of this notion. There is evidence proving that English courts have applied the notion 'international public policy' for the enforcement of international awards. The jurisprudence of the English courts restricts the application of national public policy in the context of international commercial disputes.[103] This is a longstanding principle. As early as 1889, in re Missouri Steamship Company[104], 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". Also in Foster v. Driscoll[105] the court nullified a contract by stating that: "not because it was illegal here but as a matter of public policy based on international comity ... and would be contrary to our obligation of international comity as now understood and recognised, and therefore would offend against our notions of public morality."

In Soleimany v. Soleimany[106] the court applied international public policy considerations. It viewed both the violation of a foreign law, and of the concept of international dealings, as a violation of public

101. Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 286.

102. Section 103(3) of the 1996 Act, provides that: "Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award."

103. See, V. V. Veeder, op. cit., p. 66; This was also illustrated in Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyd's Rep 223; Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Company [1987] 2 Lloyd's Rep., p 246.

104. re Missouri Steamship Company. (C.A.) (1889), 42 Ch.D, p. 336.

105. Foster v. Driscoll. (1929) 1 K. B., p. 496 at p.510.

policy. In this case the parties 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 parties, both Iranian Jews, signed an arbitration agreement providing for arbitration to take place before the Beth Din in accordance with Jewish law. The Beth Din recognised that the carpets had been exported illegally, but regarded that fact as irrelevant since such illegality would have no effect on the rights of the parties under Jewish law. The court 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." [107]

These cases illustrate that, notwithstanding the absence of a direct reference in English law to the application of international public policy, the application of international public policy norms by the courts has been acknowledged practice for some time.

The same approach is followed by the Egyptian courts, since the Egyptian arbitration law of 1994 does not refer to international public policy, Article 58 (2)(b) refers to public policy in the Arab Republic of Egypt.[108] However, the case law reveals that the concept of international public policy is not unusual to the Egyptian doctrines and in courts' jurisprudence.[109] Discussing this point, Hussam-al Dean Fathi Nasif [110] stated that "a national judge must not misuse public policy in private international law to disregard the applicable foreign law, particularly when he uses that to justify his

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

107. Also see, 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."; Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd. Court, (Q.B.D. (Comm Ct)) Commercial Court, December 19, 1997. Reported in. [1998] 3 W.L.R. 770; [1998] 4 All E.R. 570; [1998] 2 Lloyd's Rep. 111; [1998] C.L.C. 409.

108. Article 58 provides in sub-section (2): "The application to obtain leave for enforcement of the arbitral award shall not be granted except after having ascertained the following, (b) that it does not violate the public policy in the Arab Republic of Egypt."

109. Ibrahim Ahmmad Ibrahim, op. cit., p. 333; Moneer Abed al Majeed, Arbitration in International Commercial Disputes, Dar al Mabo'at al Gam'iah, (1995), p. 280. (in Arabic).

110. Hussam-al Dean Fathi Nasif, op. cit., p. 467.

confusion and unfamiliarity with the foreign law, otherwise this will hinder private international relations". The Court of Cassation, on April 5th 1967, took the view that, it was necessary to consider the application of international public policy, taking into consideration the fact that the application of public policy in private international relations would be found on principles substantially different to those contained within the relevant Egyptian law. Recognising the potential for this violating the interests of the state, the court provided that:[111]

"According to Article 28 of the civil law, it is not allowed to exclude the application of an applicable foreign law unless it is contrary to the Egyptian public policy and morality or it contradicts with the state constitution or a public essential interest of the community. However, a court must consider the application of international public policy in that if the difference between the foreign law and the Egyptian public policy rules is not substantial, then the court should not consider that difference as leading to a violation of national public policy."

Reference to international public policy in international commercial arbitration was clearly emphasised in Arabic Continental Navigation v. Arabic Gulf Contractors.[112]

The Egyptian Court of Cassation demonstrated the apparent approach of the Egyptian courts by differentiating between the application of public policy in international and in domestic relations. This case relates to the requirement to nominate the arbitrators in the arbitration agreement (before the legislation of 1994), in accordance with Article 502(3) of the Procedures Law No. 13 of 1968.[113] Pursuant to a charter agreement the plaintiff, Arabic Continental Navigation, claimed for the revocation of the contract by the defendant. The defendant replied by asking the court to refer the dispute to arbitration as agreed in the charter agreement. The court decided to reject this petition as it considered the agreement to arbitrate null and void, because it did not contain the names of the arbitrators in accordance with the conditions cited in Article 502(3) of the Procedures Law No. 13 of 1968. Therefore, it was considered contrary to Egyptian public policy.[114] The appeal court confirmed

111. The court of Cassation on April 5. 1967, the Collection of the Cassation Decisions (Civil department) s 18 1967, p. 79.

112. Cassation Court, Decision No. 714/ 47 k, the Collection of Cassation's Decisions. 26 April 1982. Vol. 32, p. 422.

113. The requirement of nominating the arbitrators in the arbitration agreement will be handled in more details later in Chapter Five, see p. 232.

114. Article 58(2) of that Procedures Law No. 13 of 1968 which refers to the public policy of the Republic.

this decision. Then the Court of Cassation dismissed the appeal on the ground that:

"… it is not reasonable to apply the Egyptian law on international arbitration where the applicable law was the English law and England is the country where the arbitration should take place."

The court held further that:

"… as the charter agreement revealed, any dispute will be settled by arbitration in London. Therefore, the law applicable to the arbitration shall be the English law, and accordingly, it is not convenient to nullify the agreement to arbitrate by applying Article 502(3) of the Egyptian procedural law and to exclude the application of a foreign law, due to Article 28 of the Civil Law. The exclusion of a foreign law can only occur if that law violates the essential issues of social, political, or moral attitude in Egypt and relates at the same time with the maximum interests of the community. Therefore, it is not sufficient if it merely contradicts a mandatory rule. Thus, Article 502(3) of the procedural law does not apply, as it does not represent a public policy rule of international relations."

The same result was reached in Egypt Insurance Co. v. Alexandria agency for navigation.[115]

Similarly, the international trend towards applying the notion of international public policy has been clearly accepted as evidenced by the decisions of the courts in several different states. Mention should be made of some significant decisions that have been considered by writers who provided examples from different countries following this trend. For example, the Court for Civil Justice in the Canton of Geneva clearly drew a distinction between domestic and international public policy in a decision on September 17, 1976. The Federal Tribunal, in a case where the Geneva Convention was applicable declared that:[116]

"The purport of the exception based on ordre public is narrower when the matter involved is the execution of foreign arbitral awards than when it is the execution of foreign judgements. The exequatur to a foreign arbitral award shall only be refused when a fundamental principle of the Swiss legal order has been violated, so that our sense of justice is intolerably offended … An appeal to ordre public ought

115. Decision no 1259/49,13 June 1983, Collection of Cassation's Decisions. Vol. 34, p.1416.

116. Trib. Cant. Geneva, Sept. 17, 1976, Sem. Jur. 1977, 505 Yearbook IV (1979), 311. Cited in, Rene David. op. cit., p. 400.

not to serve as an instrument for the avoidance of the application of International Conventions which have been signed by Switzerland and which are therefore part of Swiss law. The result of such a manipulation would eventually amount to a refusal to apply Swiss law. In a word, recourse to public policy ought not to be employed to violate a Convention, whose purport is precisely to take into account the existence of different laws and to co-ordinate different legal systems."

However, inconsistency of the application of international public policy was most evident in the Swiss Supreme Courts severe rejection of the notion of ordre public international, wherein it provided that:[117]

"It concerns rather a formula proposed by certain authors, who do not, however, give it a precise and unambiguous meaning. It cannot be ascertained how this ordre public international would limit the application of the foreign law more, or in another manner, than Swiss public order does."

The latter decision was heavily criticised and described as a "true horror case" since it does not reflect the true Swiss judiciary practice.[118]

In conclusion, there is growing international awareness of the notion of international public policy that is distinct from the notion of national public policy.[119] Recognition of the importance of this distinction can be found in the following doctrines:

John Gotanda stated that:[120]

"Unlike domestic public policy, which includes all of the imperative rules of the state in which enforcement is sought, international public policy encompasses only those basic notions of morality and justice accepted by civilised countries."

117. Societe des Grands Travaux de Marseille (SGTM) v. People's Republic of Bangladesh and the Bangladesh industrial Development Corporation (BIDC), Swiss Tribunal Federal, May 5, 1976, Arrets du Tribunal Federal 102 la 574, summarised in yearbook Vol. 5(1980) p. 217. Cited in, Van den Berg, op. cit., p.361, fn. 344.

118. Klaus Peter Berger, op. cit., p. 675.

119. Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 286. He provides here that: "it is no longer rare today that the courts of the forum take into consideration, in international economic relations, basic requirements of solidarity and of 'comity'. When performing this often delicate, not to say political, function, the judge of the forum, of course within the well-understood limits of its international public policy, accepts the task of protecting a common international public policy."

120. John Y. Gotanda, op. cit., p. 102.

Bockstiegel[121] illustrates the development of a "truly international public policy":

"[as]… comprised only of the common denominators in values and standards of the international community, despite the fact that many of these obviously differ from the public policy of individual member states."

Sever provides that:[122]

"… transnational public policy essentially refers to a system of rules and principles, including standards, norms and customs, that are accepted and commonly followed by the world community."

Buchanan provides that:[123]

"The concept of transnational public policy, a much debated notion itself, is said to represent the existence of an international consensus a universal standard or accepted norms of conduct that must always apply."

Gary Born further states that:[124]

"While the traditional concept of international public policy is still based upon domestic public policy, transnational public policy originates in substantive norms derived from international sources and not from domestic ones thus making it truly international."

Julian D.M Lew[125] refers to common principles of international public policy rules by stating that:

"This doctrine of international public policy includes an abhorrence of slavery, racial, religious and sexual discrimination, kidnapping, murder, piracy, terrorism; opposes any effort to subvert or evade the imperative laws of a sovereign state; upholds fundamental human rights (as declared in the U.N. Universal Declaration on Human Rights) and the basic standards of honesty and bona fides; and endorses certain rules and practices contained in the major and widely accepted uniform laws and international codes of practice."

121. Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," op. cit., p. 180.

122. R. Sever, "The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?," 65 TUL.L.REV. (1991), p. 1661.

123. Mark A. Buchanan, op. cit., p. 514.

124. Gary B. Born, International Commercial Arbitration in the United States, (1994), p. 538-539.

125. Julian D.M Lew, Applicable Law in International Commercial Arbitration, op. cit., p. 534-535.

The development of these rules was been described by Pierre Lalive: [126]

".. it is interesting to observe how judicial practice, in its recent evolution, has gradually broadened its horizons, from the sole taking into consideration of the public policy of the forum to that of the public policy of a foreign state, then of the public policy common to several States, and finally of a public policy more and more international".

All the above evidence suggests that international commercial relations should be subject to international public policy rules. In order to achieve this the application of domestic public policy rules must be restricted while at the same time the international public policy rules and moralities of the international community must be applied. It is also necessary to distinguish between the two concepts of public policy, according to their purpose[127]: while domestic public policy rules serve the interests of the community in a given state, international public policy defends the interests of the international community, such as; drug smuggling, bribery, slavery, racial, religious and sexual discrimination, kidnapping, murder, piracy, terrorism; fundamental human rights, and environmental issues etc.

To avoid any potential conflict in deciding public policy issues, all parties should be familiar with the public policy of the countries to which their agreement relates. Each party should respect the public policy of the country that might relate to the contract, whether because the contract will be performed in that country or because the law of that country is the applicable law. The application of public policy rules should be considered throughout the different stages of international arbitration.[128] The next chapters of the study will explore the applicability of public policy (whether national or international) in each of the successive stages of the arbitration process and enforcement of the award; during the arbitration proceedings to examine the arbitral tribunal's duty to respect and apply public policy, then the court of the forum, if it was asked to set the award aside and finally the court where the award will be enforced as a foreign award.

126. Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 260.

127. This distinction will occur repeatedly in the rest of the topics of this research.

128. As has been stated above, the application of public policy rules in arbitration may occur at different stages. However, in international commercial arbitration the problem is to decide which public policy rules are to be applied.