

Transnational public policy in international arbitration

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**TRANSNATIONAL
PUBLIC POLICY
IN INTERNATIONAL
ARBITRATION**

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London

PhD

Abstract

Arbitration tribunals rely on public policy principles to exclude or determine the applicable law. At times, the notion of public policy will contain fundamental yardsticks recognised by the world community at large. In such cases public policy may be called transnational or truly international.

The thesis expounds the notion and content of transnational public policy as applied by international tribunals. This objective is met by exploring the method, functions and purpose of transnational public policy in international arbitration.

The opening chapter sheds light on the origins and concept of public policy and the different levels it has been applied by international tribunals and national courts. It suggests a criteria for the distinction between domestic, domestic-international, regional and transnational public policy.

The thesis then gives an in depth analysis of the origins and notion of transnational public policy. It suggests that international tribunals have relied on transnational public policy in their awards and proposes a method to determine its content and sources.

Such method is then applied to deduct the content of transnational public policy from decided arbitration awards. The thesis shows that transnational public policy can be relevant at three different stages in international arbitration. At the outset of the proceeding, where the arbitrators determine their jurisdiction; during the arbitration, where it controls the procedure applicable in the arbitration; or at the stage of drafting the final award, where it determines fundamental substantive rules relied upon by the tribunal.

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BIBLIOGRAPHY

Berg, A. van den *The New York Convention of 1958. Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation 1981)

Berg, A. van den (ed.), *International Arbitration and National Courts: The Never Ending Story* (Kluwer Law International, 2001)

Berg, A. van den(ed.), *International Dispute Resolution: Towards an International Arbitration Culture* (Kluwer 1998)

Berg, A. van den (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International 1999)

Berger, K., *International Economic Arbitration* (Kluwer Law and Taxation Publishers, 1993)

Berger, K., *The Creeping Codification of the Lex Mercatoria* (1999)

Bluntschli, M., *Le droit international codifié* (Guillaumin 1895)

Bonell, M., *The UNIDROIT Principles of International Law in Transnational Law in Commercial Legal Practice* (1999)

Borkowski, A., *Roman Law* (2d ed, Blackstone 1997)

Born, G., *International Commercial Arbitration in the United States* (Kluwer Law and Taxation, 1994)

Bos & Brownlie (ed), *Liber Amicorum for Lord Wilberforce* (Oxford 1987)

Brocher, Ch., *Cours de Droit International Privé suivant les principes consacrés par le droit positif français* (E. Thorin / Librairie H. Georg, Paris – Geneva 1882)

Brownlie, I., *Basic Documents in International Law* (4th Ed. Oxford 1995)

Brownlie, I., *Principles of Public International Law* (3rd ed., 1984)

Caenegem, R. van, *An Historical Introduction to Private Law* (Cambridge University Press 1992)

Carbonneau, T.(ed.), *Lex Mercatoria and Arbitration: a Discussion of the New Law Merchant* (2d revised ed, Kluwer and Juris Publishing 1998)

Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals* (1953)

Chukwumerije, O., *Choice of Law in International Commercial Arbitration* (Connecticut: Quorum Books, 1944)

- Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (Oceana 1984)
- David, R., *Arbitration in International Trade* (Kluwer 1985)
- De George, R., *Business Ethics* (Prentice-Hall 1995)
- De Ly, F., *International Business Law and Lex Mercatoria* (North-Holland 1992)
- Derains, Y. and Schwartz, E., *A Guide to the New ICC Rules of Arbitration 1998* (Kluwer 1998)
- Dezalay, Y. and Garth, B., *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, University of Chicago Press, 1996)
- Donaldson, T., *The Ethics of International Business* (Oxford University Press 1989)
- F. Dugdale, *Introduction to Legal Method* (3rd ed, Sweet and Maxwell 1990)
- El Ahdab, A., *Arbitration with the Arab Countries* (Kluwer Law and Taxation Publishers 1990)
- Elwes, R., *The Chief Works of B. Spinoza* (George Bell and Sons, London 1883)
- Fletcher, Mistelis and Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet and Maxwell 2001)
- Gaillard, E. and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999)
- Gaillard, E.(ed.), *Transnational Rules in International Commercial Arbitration* (ICC Publication No. 480/4)
- Goode, R. *New Developments in International and Consumer Law* (Hart Publishing, Oxford 1998)
- Hitt, W., *A Global Ethic* (Batelle Press, Ohio 1996)
- Hoffman, W., Kamm, J., Frederick, R. and Petry E.(eds.), *Emerging Global Business Ethics* (Quorum Books, 1994)
- Holland, J. and Webb, J., *Learning Legal Rules* (3rd ed., Blackstone Press Ltd, London 1996)
- Holtzmann, H., *Fact –finding by International Tribunals* (Transnational Publishers 1991)
- Holtzmann, H. and Neuhaus, J., *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers, Deventer - Boston, 1988)

- Horn, N.(ed), *Studies in Transnational Economic Law - Legal Problems of Codes of Conduct for Multinational Enterprises* Vol. 1 (Kluwer 1980)
- Jarrosso, C., *La notion d'arbitrage* (Librairie Generale de Droit et de Jurisprudence, Paris 1987)
- Jessup, P., *Transnational Law, Storrs Lectures on Jurisprudence* (Yale University Press 1956)
- Jitta, J., *La Méthode du droit international privé* (The Hague 1890)
- Kolb, R., *Théorie du ius cogens international* (Presses Universitaires de France, 2001)
- Lagarde, P., "Public Policy", *International Encyclopaedia of Comparative Law* (J. C. B. Mohr and Martinus Nijhoff Publishers 1994)
- Langen, E., *Transnational Commercial Law* (Sijthoff & Noordhoff 1973)
- Lew, J.(ed.), *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987)
- Lew, J., *Applicable Law in International Commercial Arbitration* (Oceana Publications 1978)
- Lew, J.(ed.), *The Immunity of Arbitrators* (Lloyd's of London Press 1990)
- Lew, Mistelis, Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)
- Malynes, G., *Lex Mercatoria: Of Arbitrators and their Awards* (Professional Books Limited, Abingdon, 1981)
- Mayer, P., *Droit International Privé* (6th ed., Montchrestien 1998)
- Minus, P. (ed.), *The Ethics of Business in a Global Economy* (Kluwer Academic Publishers 1993)
- Mohie-Eldin I. Alam-Eldin, *The New Commercial Code of Egypt* (Dar Elnahda El-Arabia, Cairo 1999)
- Nachmias, D. and Nachmias, C., *Research Methods* (Edward Arnold Publishers 1976)
- Nussbaum, M., *The Fragility of Goodness* (Cambridge University Press, 2001)
- Paton, H., *The Moral Law or Kant's Groundwork of the Methaphysic of Morals* (Hutchinson's University Library 1955)
- Paulsson, J.(ed.), *International Handbook on Commercial Arbitration* (Kluwer 1998)
- Paulsson, J., *Denial of Justice in International Law* (Cambridge University Press 2005)

- Pillet, A., *Principes de droit international privé* (Pedone / Allier Frères, Paris – Grenoble, 1903)
- Pillet, A., *Traité pratique de droit international privé* (J. Allier/Sirey, Grenoble – Paris 1923)
- Racine, J., *L'Arbitrage Commercial International et L'Ordre Public* (LGDJ, 1999)
- Ragazzi, M., *The Concept of International Obligations Erga Omnes* (Clarendon Press, Oxford University Press 1997)
- Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (3rd ed., Sweet & Maxwell 1999)
- Reinicke, W., *Global Public Policy: Governing Without Government?* (Brookings Institution Press 1998)
- Robert, J., *Le phénomène transnational* (Association Française d'Arbitrage, LGDJ 1988)
- Saleh, S., *Commercial Arbitration in the Arab Middle East* (Graham & Trotman, 1984)
- Sanders, P.(ed), *ICCA Congress series no 3 - Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law and Taxation Publishers 1987)
- Scelles, G. *Précis de droit des gens* (Recueil Sirey, Paris 1932)
- Schiffer, W., *The Legal Community of Mankind* (Columbia University Press, New York 1954)
- Schmitthoff, C.(ed), *The Sources of the Law of International Trade* (International Association of Legal Science 1964)
- Schmitthoff, C., *Commercial Law in a Changing Economic Climate* (2d ed, Sweet & Maxwell 1981)
- Spinoza, B., *Ethics* (Wordsworth 2001)
- Stein, P., *Legal Institutions – The Development of Dispute Settlement* (Butterworths 1984)
- Stott, D., *Legal Research* (Cavendish Publishing Ltd, London 1993)
- Teubner, G.(ed), *Global Law Without a State* (Aldershot 1997)
- Treitel, G., *The Law of Contract* (8th Ed. 1991)
- Twiss, S., *Comparative Religious Ethics* (Westview Press 2000)
- Volckart, O. and Mangels, A., *Has the Modern Lex Mercatoria Really Medieval Roots?* (Max-Planck Institut for Research into Economic Systems, Diskussionsbeitrag)

Wei-hsun Fu, C. and Spiegler, G., *Religious Issues and Interreligious Dialogues* (Greenwood Publishing Group 1989)

Wetter, G., *The International Arbitral Process* (Dobbs Ferry, 1979)

Wiener, J., *Globalization and the Harmonization of Law* (Pinter, London – New York 1999)

Wilson, A.(ed.), *World Scripture – A Comparative Anthology of Sacred Texts* (Paragon House Publishers 1995)

West, T. , *Plato's Apology of Socrates* (Cornell University Press 1979)

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<i>ICCA Congress series no 3</i>	P. Sanders (ed), <i>ICCA Congress series no 3, Comparative Arbitration Practice and Public Policy in Arbitration</i> (Kluwer1987)
<i>ICCA Congress Series no 8</i>	A. van den Berg (ed), <i>ICCA Congress Series no 8, International Dispute Resolution: Towards an International Arbitration Culture</i> (Kluwer 1998)
<i>ICCA Congress Series no 9</i>	A. van den Berg (ed.), <i>ICCA Congress Series no. 9 - Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention</i> (Kluwer Law International 1999)
<i>ICCA Congress Series no 10</i>	A. van den Berg (ed.), <i>ICCA Congress Series no 10 - International Arbitration and National Courts: The Never Ending Story</i> (Kluwer Law International 2001)
<i>Fouchard Gaillard Goldman</i>	E. Gaillard and J. Savage (eds.), <i>Fouchard Gaillard Goldman on International Commercial Arbitration</i> (Kluwer 1999)
<i>Redfern and Hunter (4th ed.)</i>	A. Redfern and M. Hunter, <i>Law and Practice of International Commercial Arbitration</i> (4 th ed., Sweet & Maxwell 2004)
<i>Lew, Mistelis, Kroll</i>	J. Lew, L. Mistelis, S. Kroll, <i>Comparative International Commercial Arbitration</i> (Kluwer 2003)
<i>Craig, Park and Paulsson, ICC Arbitration (3rd ed.)</i>	W. Craig, W. Park and J. Paulsson, <i>International Chamber of Commerce Arbitration</i> (3 rd ed., Oceana 2000)
<i>J. Lew, Applicable Law</i>	J. Lew, <i>Applicable Law in International Commercial Arbitration</i> (Oceana Publications 1978)
<i>A. van den Berg, The New York Convention</i>	A. van den Berg, <i>The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation</i> (Kluwer, Deventer et al. 1981)

Institutions	
AAA	American Arbitration Association
AIA	Italian Arbitration Association
ASA	Swiss Arbitration Association
CAMCA	Commercial Arbitration and Mediation Centre for the Americas
CEPANI	Belgian Centre for Arbitration and Mediation
CIETAC	China International Economic and Trade Arbitration Commission
CPR Institute for Dispute Resolution	Center for Public Resources Institute for Dispute Resolution
CRCICA	Cairo Regional Centre For International Commercial Arbitration
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
EC	European Community
ECAFE	United Nations Economic Commission for Asia and the Far East
ECOSOC	United Nations Economic and Social Council
EDF	European Development Fund
EEC	European Economic Community
EU	European Union
GAFTA	Grain and Feed Trade Association
Geneva	Chamber of Commerce and Industry of Geneva Arbitration Centre
HKIAC	Hong Kong International Arbitration Centre
IACAC	Inter-American Commercial Arbitration Commission
IBA	International Bar Association
ICAC	Moscow International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICDR	American Arbitration Association International Center for Dispute Resolution
ICHEIC	International Commission on Holocaust Era Insurance Claims
ICSID	International Centre for the Settlement of Investment Disputes
JCAA	Japan Commercial Arbitration Association
Korea	Korean Commercial Arbitration Association
Kuala Lumpur	Kuala Lumpur Regional Centre for Arbitration
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitration Association
MERCOSUR	Common Market of the Southern Cone pursuant to the Treaty of Asunción of 26 March 1991
NAI	Netherlands Arbitration Institute
OECD	Organisation for Economic Co-operation and

Table of Abbreviations

	Development
OHADA	Organization for the Harmonization of Business Law in Africa
PCA	Permanent Court of Arbitration (The Hague)
SCC	Stockholm Chamber of Commerce Arbitration Institute
SIAC	Singapore International Arbitration Centre
UNCC	United Nations Compensation Commission
UNCITRAL	United Nations Commission for International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
Vienna	Austrian Federal Economic Chamber in Vienna
WIPO	World Intellectual Property Organisation
Zurich	Zurich Chamber of Commerce

Other Abbreviations

AC	Law Reports, House of Lords (Appeal Cases)
ADRLJ	Arbitration and Dispute Resolution Law Journal
All ER	All England Law Reports
ALR	Australian Law Reports
Am J Comp L	American Journal of Comparative Law
Am J Int'l L	American Journal of International Law
Am Rev Int'l Arb	American Review of International Arbitration
Ann IDI	Annuaire de l'Institut de droit international
Arb Int	Arbitration International
Arbitration	Arbitration, Journal of the Chartered Institute of Arbitrators
ASA Bulletin	Swiss Arbitration Association Bulletin
ATF	Arrêts du Tribunal Fédéral Suisse
Betriebs-Berater	Der Betriebs-Berater (German journal)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGE	Entscheidungen des schweizerischen Bundesgerichts
BGHZ	Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen
Boston U Int'l L J	Boston University International

Table of Abbreviations

	Law Journal
BT-Drs	Bundestags-Drucksache
CA	Court of Appeal of England and Wales
Case W Res J Int'l L	Case Western Reserve Journal of International Law
CC	Code civil, codice civile, civil code
CCI	Chamber of Commerce and Industry of the Russian Federation
CCP	Code of Civil Procedure
ChD	Chancery Division
CISG	United Nations Convention on the International Sale Goods
Clunet	Journal de droit international
Columbia J Transnat'l L	Columbia Journal of Transnational Law
Con LR	Construction Law Reports
CPR	Civil Procedure Rules (England)
Croat Arbit Yearb	Croatian Arbitration Yearbook
Disp Res J	Dispute Resolution Journal
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
ECR	Report of Cases before the Court of Justice of the European Communities
EDNY	Eastern District of New York
EHRR	European Human Rights Reports
ER	English Reports
European Convention	European Convention on International Commercial Arbitration 1961(Geneva).
European Comm HR	European Commission of Human Rights
European Ct HR	European Court of Human Rights
F 2d	The Federal Reporter Second Series
F 3d	The Federal Reporter Third Series
FAA	United States Federal Arbitration Act
F Supp	Federal Supplement
GDR	German Democratic Republic
Geo Wash J Int'l L & Eco	George Washington University Journal of International Law and Economics

HKHC	Hong Kong High Court
HKLJ	Hong Kong Law Journal
HL	House of Lords
IBA Rules	IBA Rules on the taking of Evidence in International Commercial Arbitration, 1999
ICC Bulletin	International Chamber of Commerce International Court of Arbitration Bulletin
ICLQ	International and Comparative Law Quarterly.
ICSID Rev-FILJ	ICSID Review – Foreign Investment Law Journal
IECL	International Encyclopedia of Comparative Law
INCOTERMS	ICC International Commercial Terms
Int ALR	International Arbitration Law Review
Int'l Bus Law	International Business Lawyer
Int'l Law	International Lawyer
ILM	International Legal Materials
ILR	International Law Reports
Iran-US CTR	Iran-US Claims Tribunal Reports
JBL	Journal of Business Law
J Int'l Arb	Journal of International Arbitration.
Journal des Tribunaux	(Belgian) Journal des Tribunaux
Juris-Classeur Proc Civ	Juris-Classeur (procedure civile)
Law & Policy in Int'l Bus	Law & Policy in International Business
Lloyd's Rep	Lloyd's Law Reports
Lloyd's MCLQ	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
Louisiana L Rev	Louisiana Law Review
Mealey's IAR	Mealey's International Arbitration Reports
Minn L Rev	Minnesota Law Review
Model Law	UNCITRAL Model Law on International Commercial Arbitration adopted 21 June 1985
NCPC	French Code of Civil Procedure (Nouveau Code de Procedure Civile)
Ned Jur	Nederlands Jurisprudentie
New L J	New Law Journal

Table of Abbreviations

New York Convention	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NJW	Neue Juristische Wochenschrift.
NSWLR	New South Wales Law Reports
NYAD	New York Appellate Division
NYLJ	New York Law Journal
NY L Sch J Int'l & Comp L	New York Law School Journal of International and Comparative Law
OJ	Official Journal of the European Communities
PIL	(Swiss) Private International Law
QBD	Queen's Bench Division
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RCADI	Recueil des Cours de l'Académie de Droit International de la Haye / Collected Courses of the Hague Academy of International Law
RDA/IBLJ	Revue de droit des affaires internationales / International Business Law Journal
Rev Arb	Revue de l'arbitrage
Rev crit dip	Revue critique de droit international privé
RHDI	Revue hellénique de droit international
Riv Arb	Rivista dell' Arbitrato
RIW	Recht der Internationalen Wirtschaft
Rome Convention	EC (Rome) Convention on the Law Applicable to Contractual Obligations 1980
RPS	Recht und Praxis der Schiedsgerichtsbarkeit
Rutgers L Rev	Rutgers Law Review
SchiedsVZ	Zeitschrift für Schiedsverfahren
S Ct	Supreme Court of the United States
SDNY	Southern District of New York
SLT	Scots Law Times Reports
Texas Int'l LJ	Texas International Law Journal
Tulane L Rev	Tulane Law Review
UCC	Uniform Commercial Code
U Cin L Rev	University of Cincinnati Law Review

Table of Abbreviations

UCP 500	Uniform Customs and Practices relating to Documentary Credits – ICC publication no 500
U Ill L Rev	University of Illinois Law Review
U Miami Inter-Am L Rev	University of Miami Inter- American Law Review
UNCITRAL Notes	UNCITRAL Notes on Organizing Arbitral Proceedings
UNTS	United Nations Treaty Series
Vanderbilt L Rev	Vanderbilt Law Review
WAMR	World Arbitration and Mediation Report
Washington Convention	Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965
WIPO Expedited Rules	WIPO Expedited Rules
WL	Westlaw
WLR	The Weekly Law Reports
WTAM	World Trade and Arbitration Materials
Yale LJ	Yale Law Journal
YBCA	Yearbook of Commercial Arbitration
ZPO	German Code of Civil Procedure (ZPO)

TABLE OF ARTICLES AND ESSAYS

Alcántara, J., "An International Panel of Maritime Arbitrators?", 11(4) *J Int'l Arb* 117 – 126 (1994)

Alfaro, C., "Who Should Determine Arbitrability? Arbitration in a Changing Economic and Political Environment", 12(4) *Arb Int* 415 - 428 (1996)

Alvarez, H., "To What Extent Do Arbitrators in International Cases Disregard the Bag and Baggage of National Systems?", *ICCA Congress Series no 8*

Ancel, J., "French Judicial Attitudes Toward International Arbitration", 9(2) *Arb Int* 121 - 130 (1993)

Ancel, J., "Measures Against Dilatory Tactics: The Cooperation Between Arbitrators and the Courts", *ICCA Congress Series No 9*

Arfazadeh, H., "Arbitrability Under the New York Convention: The Lex Fori Revisited", 17(1) *Arb Int* 73 - 87 (2001)

Art, J., "Challenge of Arbitrators: is an institutional decision final?" 2(3) *Arb Int* 261 - 265 (1986)

Baade, H., "The Legal Effect of Codes of Conduct for Multinational Enterprises", in Horn, N. (ed.), *Studies in Transnational Economic Law - Legal Problems of Codes of Conduct for Multinational Enterprises Vol 1* (Kluwer 1980)

Baptista, L. and Gomes, M., "Mercosur: décision du premier tribunal arbitral", 3 *Revue de Droit des Affaires Internationales* 353 - 357 (2000)

Baron, G., "Do the UNIDROIT Principles Form a New Lex Mercatoria?", 15 *Arb Int* 115 (1999)

Baron, P., Liniger, S., "A Second Look at Arbitrability," 19(1) *Arb Int* 27 - 54 (2003)

Berg, A. van den(ed.), "Arbitration of Investment Disputes: The First NAFTA Award - Introductory comments on the Ethyl Corporation Case", 16(3) *J Int'l Arb* 139 - 140 (1999)

Berg, A. van den, "Consolidated Commentary on New York Convention", VIII *YBCA* 351 – 351 (1983)

Berg, A. van den, "The New York Convention of 1958 – Its Intended Effects, Its Interpretation, Salient Problem Areas," *ASA Special Series No 9*

Berger, K., "The International Arbitrators' Application of Precedents", 9(4) *J Int'l Arb* 5 (1992)

Berger, K., "The New Law Merchant and the Global Market Place: A 21st Century View of Transnational Commercial Law", *Int ALR* 91-102 (2000)

- Berman H., and Kaufman, C., "The Law of International Commercial Transactions (*Lex Mercatoria*)" 19 *Harv Int LJ* 221 (1978)
- Bingham, LJ , "Reasons and Reasons for Reasons," 4(2) *Arb Int* 141 – 154 (1988)
- Bingham, LJ, "The Problem of Delay in Arbitration," 5(4) *Arb Int* 333 - 347 (1989)
- Bishop, D., "International Arbitration of Petroleum Disputes: The Development of a *Lex Petrolea*," XXIII *YBCA* 1131 - 1207 (1998)
- Blase, F., "Proposing a New Road Map for an Old Minefield", 20(3) *J Int'l Arb* 267 – 283 (2003)
- Blessing, M., "Choice of substantive law in international arbitration", 14(2) *J Int'l Arb* 39 - 66 (1997)
- Blessing, M., "Globalization (and Harmonization?) of Arbitration", 9(1) *J Int'l Arb* 79 - 90 (1992)
- Blessing, M., "Mandatory Rules of Law versus Party Autonomy in International Arbitration", 14(4) *J Int'l Arb* 23 - 40 (1997)
- Blessing, M., "Mandatory Rules of Law versus Party Autonomy in International Arbitration", 14(4) *J Int'l Arb* 23 – 40 (1997)
- Blessing, M., "The Law Applicable to the Arbitration Clause and Arbitrability", *ICCA Congress Series No 9*
- Blessing, M., "The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism", 5(2) *J Int'l Arb* 9 – 82 (1999)
- Bockstiegel, K., "Public Policy and Arbitrability: Summary on National Laws", *ICCA Congress series No 3*
- Bonell, M., *The UNIDROIT Principles of International Law in Transnational Law in Commercial Legal Practice* (1999)
- Bowden, P., "Transnational Rules in International Commercial Arbitration", ICC Publication No 480/4 (1993) at p. 247
- Branson, D., and Wallace, R., "Awarding Interest in International Arbitration: Establishing a Uniform Approach", 28(4) *Virg J Int'l L* 919-947 (1988)
- Briner, R., "Switzerland", in I. Paulsson, *ICCA International Handbook on Commercial Arbitration*, Supp 27 (Kluwer 1998)
- Broches, A., "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", 136 *Recueil des Cours* (1972)
- Brulard, Y. and Quintin, Y., "European Community Law and Arbitration – National Versus Community Public Policy", 18(5) *J Int'l Arb* 533 – 548 (2001)

Brunner, C., "Note - Federal Supreme Court, 28 April 2000 - Public Policy as a Ground for Setting Aside International Arbitral Awards", 18(3) *ASA Bull* 566 – 581 (2000)

Bryne-Sutton, Q., "Arbitration and Mediation in Art-Related Disputes", 14(4) *Arb Int* 447 - 456 (1998)

Buchanan, M., "Public Policy and International Commercial Arbitration", 26 *Am Bus Law J* 511 (1988)

Burger, D., "Transnational Public Policy as a Factor in Choice of Law Analysis", 5 *N Y L Sch J Int'l & Comp L* 367(1984)

Cadiet, L., "La renonciation à se prévaloir des irrégularités de la procédure arbitral", 1 *Rev Arb* 3 – 38 (1996)

Capatina, O., "Romania", in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* (Suppl. 26, Kluwer 1998)

Carbonneau, T.(ed.), *Lex Mercatoria and Arbitration: a Discussion of the New Law Merchant* (2d revised ed, Kluwer and Juris Publishing 1998)

Chen, L., "Some Reflections on International Commercial Arbitration in China", 13(2) *J Int'l Arb* 121 - 162 (1996)

Chukwumerije, O., "International Law and Article 42 of the ICSID Convention", *J Int'l Arb* 14(3) 79 – 102 (1997)

Cordes, A., "The Search for a Medieval Lex Mercatoria, 5 *Oxford U Comp L Forum* (2003)

Cremades, B., "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration," 14(2) *Arb Int* 157 - 172 (1998)

Crivellaro, A., "Note – Award of 7 December 2001 in Case No 10623", 21(1) *ASA Bull* 60 - 81 (2003)

Currie, B., "Notes on Methods and Objectives in the Conflict of Laws", in *Selected Essays on the Conflict of Laws* (Durham, N.C. 1963)

Currie, B., "On the displacement of the law of the forum", in *Selected Essays on the Conflict of Laws* (Duke University Press, Durham 1963)

De Hoogh, A., "The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective", 42 *Aust J of Public and Int'l Law* 183-214 (1991)

De Ly, F., *International Business Law and Lex Mercatoria* (North-Holland 1992)

Derains, I., "Public Policy and the Law Applicable to the Dispute in International Arbitration," *ICCA Congress series no 3*

Derains, Y., "Le statut des usages du commerce international devant les juridictions arbitrales", *Rev Arb* 122 - 145 (1973)

Derains, Y., "Les tendances de la jurisprudence arbitrale internationale", *Clunet* 829 (1993)

Deshpande, V., "International Commercial Arbitration: Uniformity of Jurisdiction", 5(2) *J Int'l Arb* 115 -130 (1988)

Dimolitsa, A., "Separability and Kompetenz-Kompetenz", *ICCA Congress series No 9*

Dimolitsa, A., *et al*, "Arbitration Agreements and Foreign Investments: The Greek State between Contractual Commitment and Sovereign Intervention", 5(4) *J Int'l Arb* 17 – 66 (1988)

Donahey, S., "Defending the Arbitration against Sabotage", 13(1) *J Int'l Arb* 93 - 110 (1996)

Dossou, R., "OHADA Arbitration: Historic Background and Objectives", *XI International Conference of Bar Associations*, Ouagadougou, 9-14 December 1996

Ebb, L., "Reflections on the Indian Enforcement of the GE/Renusagar Award," 10(2) *Arb Int* 141 - 162 (1994)

Ee, J. van, "Mercosur Arbitration: A New Regime", 4(2) *Int'l ALR* 55 - 65 (2001)

El Ahdab, A., *Arbitration with the Arab Countries* (Kluwer Law and Taxation Publishers 1990)

El-Ahdab, A., "Arbitration in Saudi Arabia under the New Arbitration Act", 3(3) *J Int'l Arb* 27 - 56 (1986)

El-Ahdab, A., "Enforcing Foreign Awards in the Middle East", *Commercial Law in the Middle East* 323 - 336 (Hilary Lewis & Chibli Mallat 1995)

Enterria, J., "The role of Public Policy in International Commercial Arbitration", 21 *L & Pol'y Int'l Business* 389 (1989-90)

Evrigenis, D., "Regards sur la doctrine contemporaine de droit international privé", 2 *Multitudo Legum Ius Unum* 269 – 284 (1973)

Fedozzi, P., "Quelques considérations sur l'idée d'ordre public international", *Clunet* 69 – 78 (1897)

Fischer-Zernin V., and Junker, A., "Arbitration and Mediation: Synthesis or Antithesis?", 5(1) *J Int'l Arb* 21 - 40 (1988)

Fortier, Y., "The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration - "A Few Plain Rules and a Few Strong Instincts", in *ICCA Congress Series no 9*

Fortier, Y., "The New, New Lex Mercatoria, or, Back To The Future", 17(2) *Arb Int* 121-128 (2001)

Freeman, A., "Lex mercatoria: its emergence and acceptance as a legal basis for the resolution of international disputes", IX *ADRLJ* 289 (1997)

Gaillard, E., "A Foreign View of the New Swiss Law on International Arbitration", 4(1) *Arb Int* 25 - 31 (1988)

Gaillard, E., "L'interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international (le principe de l'estoppel dans quelques sentences arbitrales)", *Rev Arb* 241 (1985)

Gaillard, E., "Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules", 10 *ICSID Rev - FILJ* 208 (1995)

Gaillard, E., "Transnational Law: A Legal System or a Method of Decision Making?", 17(1) *Arb Int* 59-72 (2001)

Goldman, B., "Le lex mercatoria dans les contrats et l'arbitrage internationaux; realites et perspectives", 106 *Clunet* 475 (1979)

Goldman, B., "The applicable law: general principles of law", in Lew, J. (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987)

Goldman, B., "Les conflits des lois dans l'arbitrage international de droit privé", II *Recueil des Cours* 352 (1963)

Goode, R., "The Role of the Lex Loci Arbitri in International Commercial Arbitration," 17(1) *Arb Int* 19 - 40 (2001)

Goode, R., "Usage and Its Reception in Transnational Commercial Law", 46 *ICLQ* 35 (1997)

Griffin, P., "Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings", 17(2) *J Int'l Arb* 19-30 (2000)

Grigera Naón, H., "Public Policy and International Commercial Arbitration: The Argentine Perspective", 3(2) *J Int'l Arb* 7-28 (1986)

Hanotiau, B., "Complex Multicontract-Multiparty Arbitration", *Arb Int* 369 (1998)

Hanotiau, B., "Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues", 18(3) *J Int'l Arb* 253 - 360 (2001)

Hanotiau, B., "The Law Applicable to Arbitrability", *ICCA Congress Series No 9*

Hanotiau, B., "What Law Governs the Issue of Arbitrability", 12(4) *Arb Int* 391 - 403 (1996)

Hausmaninger, C., "Civil Liability of Arbitrators—Comparative Analysis and Proposals for Reform," 7 *J Int'l Arb* 7 (1990)

Henkin, L., "Act of State Today: Recollections in Tranquility", 6 *Colum J Transnat'l L* 175 (1967) at p. 178

Herrmann, G., "UNCITRAL adopts Model Law on International Commercial Arbitration," 2(1) *Arb Int* 2 - 10 (1986)

Herrmann, G., "The 1958 New York Convention: Its Objectives and Its Future," *ICCA Congress Series No 9*

Higgins, R., "The Taking of Property by the State: Recent Developments in International Law", III *Recueil des Cours* 176 - 305 (1982)

Hochstrasser, D., "Choice of Law and "Foreign" Mandatory Rules in International Arbitration", 11(1) *J Int'l Arb* 57 - 86 (1994)

Holtzmann, H. and Donovan, D., "United States", Paulsson, J.(ed.), *International Handbook on Commercial Arbitration* (1999), Suppl 28

Holtzmann, H., *et al*, "Hypothetical Case for Use in a Comparative Study of Arbitration Practice in Various Legal Systems", *ICCA Congress series No 3*

Holtzmann, H., "United States", in Paulsson, J.(ed.), *ICCA International Handbook on Commercial Arbitration*, Suppl. 13, November (Kluwer 1992)

Horvath, G., "The Duty of the Tribunal to Render an Enforceable Award", 18(2) *J Int'l Arb* 135 – 158 (2001)

Howell, D., "Issue Estoppel Arising out of Foreign Interlocutory Court Proceedings in International Arbitration", 20(2) *J Int'l Arb* 153 - 168 (2003)

Houtte, H. van, "From a National to a European Public Policy", in J. Nafziger and S. Symeonides (eds.), *Law and Justice in a Multistate World: Essays in Honour of Arthur T. von Mehren* (Transnational Publishers 2002)

Houtte, H. van, "Parallel Proceedings Before State Courts and Arbitration Tribunals. Is There a Transnational *lis pendens* Exception in Arbitration or Jurisdiction Conventions?," P. Karrer (ed.), *Arbitral Tribunals or State Courts Who Must Defer to Whom? Conference in Zurich of January 28, 2001* (ASA Special Series No 15, 2001)

Hu, L., "Enforcement of the International Commercial Arbitration Award in the People's Republic of China", 16(4) *J Int'l Arb* 1 – 40 (1999)

Hunter, M., "Arbitration procedure in England: past, present and future", 1(1) *Arb Int* 82 -102 (1985)

Hunter, M., "Publication of Arbitration Awards and Lex Mercatoria", 54 *Arbitration* 55 (1988)

Hunter, M., Conde-e-Silva, G., "Transnational Public Policy and its Application in Investment Arbitrations", 4(3) *J W I* 368 (2003)

Hwang M., and Chan, A., "Enforcement of Foreign Arbitral Awards – The Perspective of Common Law Countries", *ICCA Congress Series no 10*

Jaili, M., "Amman Arab Convention on Commercial Arbitration", 7 *J Int'l Arb* 139 - 146 (1990)

Jessup, P., "Transnational Law", in *Storrs Lectures on Jurisprudence* (Yale University Press 1956)

Junker, J., "The Public Policy Defense to the Recognition and Enforcement of Foreign Arbitral Awards", 7 *Calif West Int L J* (1977)

Kahn, P., "Contrats d'Etat et nationalisation", 109(4) *Clunet* 844 - 868 (1982)

Karrer, P.(ed.), *Arbitral Tribunals or State Courts Who Must Defer to Whom? Conference in Zurich of January 28, 2001* (ASA Special Series No 15, 2001)

Kathigamar, N., "Who is Afraid of Shari'a? - Islamic Law and International Commercial Arbitration" 59(2) *Arbitration* 125 - 131 (1993)

Kegel, G., "The Crisis of Conflict of Laws", 112 *Recueil des Cours* 91-268 (1964)

Kessedjian, C., "Principe de la contradiction et arbitrage", *Rev Arb* 382 (1995)

Koch, C., "The Sixteenth ICCA Congress - May 12-15, 2002, London", 19(6) *J Int'l Arb* 609 - 620 (2002)

Komuro, N., "The WTO Dispute Settlement Mechanism Coverage and Procedures of the WTO Understanding", 12(3) *J Int'l Arb* 81 - 161 (1995)

Kreindler, R., "Aspects of Illegality in the Formation and Performance of Contracts", 6(1) *Int ALR* 1 - 24 (2003)

Kuner, C., "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention", 7(4) *J Int'l Arb* 71-92 (1990)

Lagarde, P., "Public Policy", *International Encyclopaedia of Comparative Law* (J. C. B. Mohr and Martinus Nijhoff Publishers 1994)

Lalive, P., "Transnational (or truly international) public policy", *ICCA Congress series no 3*

Lalive, P., "Un grand arbitrage pétrolier entre un Gouvernement et deux sociétés privées étrangères", 17 *ILM* 3-37 (1978)

Lando, O., "The Lex Mercatoria in International Commercial Arbitration", 34 *ICLQ* 747 (1985)

Lazareff, S., "Mandatory Extraterritorial Application of National Law", 11(2) *Arb Int* 137 - 150 (1995)

Leurent, B., "Views on the UNCC and its Adjudication of Contractual Claims," 17(1) *J Int'l Arb* 133 - 138 (2000)

Lew, J., "Determination of Arbitrators' Jurisdiction and the Public Policy Limitation on That Jurisdiction", in Lew, J.(ed.), *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987)

Lew, J., "The Law Applicable to the Form and Substance of the Arbitration Clause", *ICCA Congress Series no 9*

Lew, J., "The recognition and enforcement of arbitration agreements and awards in the Middle East", 1(2) *Arb Int* 161 – 178 (1985)

Liebscher, C., "European Public Policy – A Black Box?", 17(3) *J Int'l Arb* 73 -88 (2000)

Liebscher, C., "European Public Policy – A Black Box?", 17(3) *J Int'l Arb* 73 -88 (2000)

Liebscher, C., "European Public Policy After Eco Swiss", 10(1) *Am Rev Int'l Arb* 81 - 94 (1999)

Liebscher, C., "European Public Policy and the Austrian Supreme Court", 16(3) *Arb Int* 357 – 366 (2000)

Lörcher, G., "Enforceability of Agreed Awards in Foreign Jurisdictions," 17(3) *Arb Int* 275 – 286 (2001)

Lowenfeld, A., "Lex Mercatoria: An Arbitrator's View" 6 *Arb Int* 133 (1990)

MacGibbon, I., "Estoppel in International Law," 7 *Int'l & Comp L Q* 468 - 479 (1958)

Mancini, P., "De l'utilité de rendre obligatoires pour tous les Etats, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de règles générales du Droit international privé, pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles", *Clunet* 221 – 239 and 285 – 304 (1874)

Maniruzzaman, A., "International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts:An Overview", 7(3) *J Int'l Arb* 53 - 64 (1990)

Maniruzzaman, A., "State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law," 9(4) *J Int'l Arb* 141 - 172 (1992)

Maniruzzaman, A., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration", 14 *Am U Int'l L Rev* 657 (1999)

Mantilla-Serrano, F., "Towards a Transnational Procedural Public Policy," 24(1) *Arb Int* 333 – 353 (2004)

Matray, L., "Arbitrage et Ordre Public Transnational", in *The Art of Arbitration - Liber Amicorum P. Sanders* (Kluwer Law and Taxation 1982)

Matray, L., "Embargo and Prohibition of Performance," in K. Böckstiegel (ed.), *Acts of State and Arbitration* (Carl Heymanns Verlag KG 1997)

Mayer, P., "La règle morale dans l'arbitrage international", in *Etudes Offertes à P. Bellet* (Paris 1991)

- Mayer, P., "Mandatory rules of laws in international arbitration", 2 *Arb Int* 274 (1986)
- Mayer, P., "Reflections on the International Arbitrator's Duty to Apply the Law – The 2000 Freshfields Lecture", 17(3) *Arb Int* 235 (2001)
- Mayer, P., Sheppard, A., "Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", 19(2) *Arb Int'l* 249 – 263 (2003)
- Mayer, P., Sheppard, A., "Recommendations of the International Law Association on Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards: Presentation", XXIX *YBCA* 339 - 345 (2004)
- McClellan, A., "Commercial Arbitration and European Community Law", 5(1) *Arb Int* 68 - 79 (1989)
- McConaughay, P., "Reviving the "Public Law Taboo" in International Conflict of Laws", 35 *Stan J Int'l L* 255 (1999)
- McLaughlin, J., "Arbitration and Developing Countries", *Int'l Lawyer* 211 (1979)
- Mernissi, M., "Identifying and Applying the Law Governing the Arbitration Procedure," *ICCA Congress series no 9*
- Miller, D., "Public Policy in International Commercial Arbitration in Australia", 9(2) *Arb Int* 167 - 196 (1993)
- Mistelis, L., "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law", in Fletcher, Mistelis and Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet and Maxwell 2001)
- Mistelis, L., "Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards", International Law Association - London Conference (2000), 2(4) *International Law Forum* 248-253 (2000)
- Mistelis, L., "Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform", 34(3) *The International Lawyer* 1055 (Fall 2000)
- Moitry, J., "Arbitrage International et Droit de la Concurrence: Vers un Ordre Public de la Lex Mercatoria", 1 *Rev Arb* 3 (1989)
- Moitry, J., "L'arbitre international et l'obligation de boycottage imposée par un Etat," 118 *Clunet* 349 (1991)
- Moitry, J., "Right to a Fair Trial and the European Convention on Human Rights: Some Remarks on the République de Guinée Case", 6(2) *J Int'l Arb* 115 – 122 (1989)
- Momcinovic, H., "Unconstitutional Acts and Arbitration", 3 *Croatian Arb Yb* 191-200 (1996)
- Mourre, A., "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator", 22(1) *Arb Int* 95 - 118 (2006)

Mourre, A., Brozolo, L., "Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back", 23(2) *J Int'l Arb* 171 – 188 (2006)

Mustill, Lord, "Contemporary Problems in International Commercial Arbitration: A Response", 17 *Int'l Bus Law* 161 (1989)

Mustill, Lord, "The New Lex Mercatoria – the First Twenty-five Years", Bos & Brownlie (ed), *Liber Amicorum for Lord Wilberforce* (Oxford 1987)

Naon, G., "Public Policy and International Commercial Arbitration: An Argentine View", *ICCA Congress Series no 3*

Nariman, F., "India", in Paulsson, J.(ed.), *International Handbook on Commercial Arbitration*, Suppl. 14 (April 1993)

Nottage, L., "The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery", 16 *Arb Int* 53 (2000)

Oetiker, C., "The Principle of Lis Pendens in International Arbitration", 18(2) *Arb Int* 137 - 146 (2002)

Park, W., "Judicial Controls in the Arbitral Process", 5(3) *Arb Int* 230 - 274 (1989)

Park, W., "The Arbitrability Dicta in First Options v Kaplan : What Sort of Kompetenz - Kompetenz Has Crossed the Atlantic?", 12(2) *Arb Int* 137 – 160 (1996)

Partasides, C., "The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration", 18(2) *Arb Int* 147 - 164 (2002)

Paulsson, I., "Towards Minimum Standards of Enforcement: Feasibility of a Model Law", *ICCA Congress Series no 9*

Paulsson, J., (ed.), "General Introduction on Arbitration in Arab Countries", in *International Handbook on International Commercial Arbitration* (Kluwer suppl. 15 Aug. 1993)

Paulsson, J., "Le lex mercatoria dans l'arbitrage CCI", *Rev Arb* 55 (1990)

Perloff, S., "The Ties That Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration", 13 *U Pa J Int'l Bus L* 323 (1992-3)

Quilling, M., "The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: A North-South Perspective", 11 *GA J Int'l & Comp L* 635 (1981)

Quiroga, M., "Globalizacion, Deslocalizacion y Arbitraje Privado Internacional: Utopia o Realidad de un Orden Publico Transnacional?," *Revista de Corte Espanola de Arbitraje* 83 (2000)

Racine, J., "L'ordre concurrentiel et les droits de l'homme", *Mélanges en l'honneur d'Antoine Pirovano* (Frison-Roche 2003)

Raeschke-Kessler, H., "The New German Arbitration Act," 14(1) *Arb Int* 47 - 56 (1998)

- Recchia, G. , “L’arbitrato in materia di opere pubbliche e norme costituzionali”, 6(3) *Rivista dell’Arbitrato* 504 - 512 (1996)
- Reichert, D., “Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and International Arbitration”, 8(3) *Arb Int* 237 - 256 (1992)
- Reinicke, W., “Global Public Policy”, 76(6) *Foreign Affairs* 127 (1997)
- Rensmann, T., “Anational Arbitral Awards”, 15(2) *J Int’l Arb* 37-66 (1998)
- Rivkin, D., “Enforceability of Arbitral Awards based on Lex Mercatoria”, 9 *Arb Int* 67 (1993)
- Roebuck, D., “The Myth of Judicial Jealousy”, 10(4) *Arb Int* 395-406 (1994)
- Rosell, J., “Illicit Commissions and International Arbitration: The Question of Proof,” 15(4) *Arb Int* 329 - 348 (1999)
- Roth, M., “False Testimony at International Arbitration Hearings”, 11(1) *J In’l Arb* 5 - 42 (1994)
- Sacerdoti, G., “Embargo irakeno, effetti sui contratti in corso ed efficacia delle clausole per arbitrato internazionale”, 3 *Riv dell’Arb* 361 - 379 (1993)
- Saleh, S., *Commercial Arbitration in the Arab Middle East* (Graham & Trotman, 1984)
- Sanders, P., “Code of Conduct and Sources of Law”, in *Le droit des rlations economique internationales, Etudes offertes a B. Goldman* (1982)
- Sanders, P., “L’ autonomie de la clause compromissoire”, *Hommage à F. Eisemann* (1978)
- Sandrock, O., “How Much Freedom Should an International Arbitrator Enjoy? The Desire from Freedom from Law v. The Promotion of International Arbitration”, 3 *Am Rev Int’l Arb* 30 (1992)
- Sands, P., “Environmental Impact Assessment”, in *Principles of International Environmental Law* (Manchester University Press 1995), Vol. 1
- Saville, M., “The Origin of the New English Arbitration Act 1996: Reconciling Speed with Justice in the Decision-making Process”, 13(3) *Arb Int* 237 - 252 (1997)
- Schlesinger, R., “Research on the General Principles of Law Recognized by Civilized Nations”, 51 *AJIL* (1957)
- Schlosser, P., “Arbitration and the European Public Policy”, in *Arbitration and European Law – Reports of the International Colloquium of CEPANI April 25, 1997* (Bruylant, Brussels 1997)
- Schmitthoff, C., “International Business law: A New Law Merchant”, 2 *Current Law and Social Problems* 129 (1961)

Schmitthoff, C., "The Law of International Trade", in *Commercial Law in a Changing Economic Climate* (2d ed, Sweet & Maxwell 1981), 18-33

Schwebel, S. and Lahne, M., "Public Policy and Arbitral Procedure", *ICCA Congress series No 3*

Shaleva, V., "The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia", 19(1) *Arb Int* 67 – 94 (2003)

Sheppard, A., "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", 19(2) *Arb Int* 217 - 248 (2003)

Shihata, I. and Parra, A., "Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention", 9(2) *ICSID Rev – FILJ* 183-213 (1994)

Shyllon, F., "The recovery of cultural objects by African States through the UNESCO and UNIDROIT Conventions and the role of arbitration", 2 *Unif L Rev* 219 – 241 (2000)

Sidorsky, E., "Cultural Property Disputes and the Draft UNIDROIT Convention Possible Applications of International Arbitration", 4(4) *Am Rev Int'l Arb* 475 - 518 (1993)

Sperduti, G., "Norme di applicazione necessaria e ordine pubblico", *RCDIPP* 469 – 490 (1976)

Spinoza, B., "Tractatus Theologico-Politicus – Treatise on Religion and Politics", in R. Elwes, *The Chief Works of B. Spinoza* (George Bell and Sons, London 1883)

Staughton, LJ, "Common Law and Civil Law Procedures: Which is the More Inquisitorial? A Common Lawyer's Response," 5(4) *Arb Int* 351 - 356 (1989)

Stoecker, C., "The Lex Mercatoria": To What Extent does it Exist?" 7(1) *J Int'l Arb* 101 (1990)

Straus, L., "On Plato's Apology of Socrates and Crito", in Strauss, *Studies in Platonic Philosophy* (University of Chicago Press, 1984)

Sturzenegger, M., "ICSID Arbitration and Annulment for Failure to State Reasons: The Decision of the Ad Hoc Committee in Maritime International Nominees Establishment v. The Republic of Guinea," 9(4) *J Int'l Arb* 173 – 198 (1992)

Tashiro, K., "Conciliation or Mediation during the Arbitral Process - A Japanese View", 12(2) *J Int'l Arb* 119 – 134 (1995)

Thayer, P., "Comparative Law and the Law Merchant", 6 *Brooklyn LR* 139 (1936)

Veeder, J., "The 2001 Goff Lecture - The lawyer's Duty to Arbitrate in Good Faith", 18(4) *Arb Int* 431 – 451 (2002)

Werner, J., "Application of Competition Laws by Arbitrators - The Step Too Far," *J Int'l Arb* 12(1) 21 – 26 (1995)

Wetter, J., Gillis, J., "Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No 1110", 10(3) *Arb Int* 277 - 294 (1994)

Wilkinson, V., "The New Lex Mercatoria Reality or Academic Fantasy?" 12(2) *J Int'l Arb* 103-118 (1995)

Wortmann, B., "Choice of Law by Arbitrators: The Applicable Conflict of Laws System", 14(2) *Arb Int* 97 - 114 (1998)

Yassen, A., "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", 151 *Hague Recueil* (1976 III)

Yu, H. and Molife, P., "The Impact of National Law Elements on International Commercial Arbitration," 4(1) *Int'l ALR* 17 - 23 (2001)

TABLE OF AUTHORITIES

INTERNATIONAL AWARDS

AAA ICDR, Award No 1569 of 3 August 1981, *Pollux Marine Agencies Inc v Louis Dreyfus Corp*, 1(1) Maritime Arbitration Award Digest 19-20 (1981)

AAA ICDR, Award of 24 August 1978, *Revere Copper & Brass Inc v Overseas Private Investment Corp*, 17 ILM 1321-1383 (1978)

Ad hoc, *Air France v Kéba Mbaye et al*, 18(1) ASA Bull 116 – 143 (2000)

Ad hoc, *Aminoil v The Government of Kuwait*, 21 ILM 976 - 1053 (1982), 109 Clunet 869-909 (1982)

Ad hoc, Award of 12 April 1977, *Libyan American Oil Co (LIAMCO) v Libya*, Rev Arb 132-191 (1980), VI YBCA 89 – 118 (1981)

Ad hoc, Award of 15 March 1963, *Sapphire International Petroleum v NIOC*, 35 ILR 136 – 186 (1967)

Ad hoc, Award of 17 November 1994, *Banque Arabe et Internationale D'Investissement (France) et al v Inter-Arab Investment Guarantee Corporation (Kuwait)*, XXI YBCA 13 - 39 (1996)

Ad hoc, Award of 19 January 1977, *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic*, 104 Clunet 350-389 (1977)

Ad hoc, Award of 19 March 1987, *Buyer v Seller*, XIX YBCA 44 - 47 (1994)

Ad hoc, Award of 25 February 1978, *Flour Mill v Insurer*, VI YBCA 121 - 124 (1981)

Ad hoc, Award of 28 June 1995, *S v Z*, ASA Bull 742 (1995)

Ad hoc, Award of 5 February 1988, *Wintershall AG v Qatar*, XV YBCA 30 - 53 (1990)

Ad hoc, Award of April 1982, *Company Z and others (Republic of Xanadu) v State Organization ABC (Republic of Utopia)*, VIII YBCA 94 (1983)

Ad hoc, Award on Re-opening of 1 August 1974, *British Petroleum Co (Libya) Ltd v Libya*, 53 ILR 297-388 (1979)

Ad hoc, Challenge Decision of 11 January 1995, *Country X v Company Q*, XXII YBCA 227 - 242 (1997)

Ad hoc, Challenge Decision of 15 April 1993, *Contractor v State Agency*, XXII YBCA 222 – 226 (1997)

Ad hoc, *Erich Benteler KE and Another v Belgium*, X YBCA 37-38 (1985)

Ad hoc, Interim Award of 26 September 1999 and Final Award of 16 October 1999, *Himpurna California Energy Ltd v Republic of Indonesia*, XXV YBCA 11 – 432 (2000)

Ad hoc, Investments Centre Awards of 27 October 1989 and 30 June 1990, *Biloune v Ghana*, XIX YBCA 11 - 32 (1994)

Ad hoc, Preliminary Award of 14 January 1982, *Elf Aquitaine Iran v Nat'l Iranian Oil Co*, XI YBCA 97 – 104 (1986)

Ad hoc, Arbitral Award on Jurisdiction of September 25 1983, *Amco Asia Corp v Indonesia*, 23 ILM 351-383 (1984)

Ad hoc, *Hotel Monaco v Joint Venture Co.*, XXI YBCA 54 – 78 (1996)

Ad hoc, *United States v Great Britain*, 3 UNRIAA 1767 (1937) at p. 1790

Arbitral Tribunal of the Commission of Grain-Merchants Rotterdam, *Nederlandse Jurisprudentie* (22 August 1972), 435 *Netherlands Law Reports* (1973)

Arbitration Court of the Bulgarian Chamber of Commerce and Industry Case No 60/1980, Award of 1 October 1980, *Bulgarian creditor v German debtor*, IV Arbitration Practice 151 - 162 (1987)

Cairo Regional Centre for International Commercial Arbitration, Award of 4 June 1990, case no. 12/1989, *Awards of the Cairo Regional Centre for International Commercial Arbitration* (Kluwer 2000)

ICSID Case No ARB/93/1, Award of 21 February 1997, *American Manufacturing & Trading, Inc v Zaire*, 12(4) Mealey's IAR A-1 - A-20 (1997)

Chamber of National and International Arbitration of Milan Case No 1398, Final Award of 18 March 1999, *Licensee v Licensor*, XXV YBCA 382 – 387 (2000)

Chamber of National and International Arbitration of Milan, 20 July 1992, *Subcontractor v Contractor*, Int'l Const L Rev 201 (1993)

CIETAC, *Paklito Investment Ltd v Klochner East Asia Ltd*, unreported, New Gazette, March 1993, 20

CIETAC, Award of 27 February 1993, *Award on Dispute concerning Delivery of Bread Improving Tablets*, 74 CIETAC awards 304-308 (1993)

CIETAC, Award 4 May 1996, *Award on Quality Dispute of Laser Processing Machine System*, 94 CIETAC Awards 563-570 (1996)

CIETAC, Award of 16 December 1990, *Award on Dispute over Barter Trade for Manufacturing Equipment for Iron Wire with Electroplating Zinc*, 61 CIETAC awards 338-346 (1990)

CIETAC, Award of 7 March 1990, *Award on Dispute over Quality of Frozen Crabs and Salt Shrimp*, 26 CIETAC awards 133-139 (1990)

CIETAC, Award of 14 July 1990, *Award on Dispute concerning Payment for Diesel-Engine Water-Pumps*, 38 CIETAC Awards 214-219 (1990)

Court of Arbitration Attached to the Chamber of Foreign Trade, Case No 12, Award of 1974, I YBCA 127 - 127 (1976)

Court of Arbitration in Poland, Case No 69/86, Award of 18 May 1987, *Foreign Trade Enterprise v Employer*, XIV YBCA 183 - 186 (1989)

Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award No 33 of 30 September 1993, *Agent v Seller*, XXIII YBCA 113 – 127 (1998)

CRCICA Case No 27/1992, Award of 15 May 1993, *Company v Public Sector Company*, Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration 193 - 196 (2000)

Geneva Chamber of Commerce and Industry (CCIG), Interim Award of 27 August 1999, *A v B*, 19(2) ASA Bull 265 - 275 (2001)

Geneva Chamber of Commerce and Industry Case No 130, Decision of 10 February 2000, *X v Y and others*, 18(2) ASA Bull 303 - 306 (2000)

ICC Case No 1110, Award of 15 January 1963, *Argentine Engineer v British Company*, 3 Arb Int 282 - 294 (1994)

ICC Award No 3493 of 16 February 1983, *SPP (Middle East) Ltd v Arab Republic of Egypt*, IX YBCA 111 - 123 (1984)

ICC award No 3916, *Clunet* 930 (1984)

ICC Award of 1984, 2(1) *J Int'l Arb* 75 - 78 (1985)

ICC Award of 1989, *K Ltd v M SA*, ASA Bull 216 (1993)

ICC Award of 1993, *Lunik v Soliman*, ASA Bull 210 and 442 (1998)

ICC Case 1399, Award of 14 April 1966, unpublished

ICC Case 3779, Award of 13 August 1981, *Seller v Buyer*, IX YBCA 124 - 130 (1984)

ICC Case 3916, *Iranian party v Greek party*, *Clunet* 930 (1984)

ICC Case of 1982, *Dow Chemical France et al v Isover Saint Gobain*, IX YBCA 131 (1984)

ICC Case No 1512, Second Preliminary Award of 14 January 1970, *Indian cement Company v Indian cement Company*, V YBCA 174 - 176 (1980)

ICC Case No 1526, Award of 1968, *Clunet* 1915 (1974)

ICC Case No 1803, Award of 1972, *Sté des Grands Travaux de Marseille v E Pakistan Industrial Dev Corp*, V YBCA 177 - 185 (1980)

ICC Case No 2521, Award of 1975, *JDI* 997 (1976)

ICC Case No 2730, *Clunet* 914 (1984)

ICC Case No 3242, *Clunet* 968 (1982)

ICC Case No 3267, Final Award of 28 March 1984, *Construction Company v Member of Consortium*, XII YBCA 87 – 96 (1987)

ICC Case No 3493, Award 16 February 1983, *SPP (Middle East) Ltd v Egypt*, IX YBCA 111 - 123 (1984) at pp. 115 – 116

ICC Case No 3572, Final Award of 1982, *Deutsche Schachtbau- und Tiefbohr GmbH v Rakoil*, XIV YBCA 111 - 121 (1989)

ICC Case No 3779 of 1981, IX YBCA 124 – 130 (1984)

ICC Case No 3896, Award on jurisdiction of 30 April 1982, *Framatome S.A. v Atomic Energy Organization of Iraq (AEOI)*, 111 *Clunet* 58 (1984)

ICC Case No 3913, Award of 1981, *Clunet* 920 (1984), Collection of ICC Arbitral Awards 1974-85, 497,

ICC Case No 3913, *Clunet* 920 (1984), *Collection of ICC Arbitral Awards* 1974-85, 497

ICC Case No 3916 of 1982, *Iranian party v Greek party*, 111 *JDI* 930 (1984), *Clunet* 930 (1984)

ICC Case No 4131, Interim Award of 1982, *Dow Chemical France et al v Isover Saint Gobain*, IX YBCA 131 (1984)

ICC Case No 4145 of 1984, Collection of ICC Arbitral Awards 1974-85, 559

ICC Case No 4145, Second Interim Award, *Establishment v Construction Company*, 112 *Clunet* 985 (1985)

ICC Case No 4237, Award of 1984, *X Corporation v Y SA*, X YBCA 52 - 60 (1985), 1(4) *J Int'l Arb* 371 - 374 (1984)

ICC Case No 4367, Interim Award of 16 November 1984, *Supplier v Buyer*, XI YBCA 134 – 139 (1986) at p. 138

ICC Case No 4381, Award of 1986, *Clunet* 1102 (1986)

ICC Case No 4402, Partial Award of 17 March 1983, *Bahamian Company and Luxemburg Company v French Company et al*, IX YBCA 138 - 141 (1984)

ICC Case No 4629, Final Award of 1989, *European Contractor v Middle Eastern Contractor*, XVIII YBCA 11 - 33 (1993)

ICC Case No 4695, Interim Award of November 1984, XI YBCA 149 - 158 (1986) at p. 157

ICC Case No 4975, Final Award of 1988, *Main contractor v Subcontractor*, XIV YBCA 122 - 136 (1989)

ICC Case No 5103, Award of 1988, *JDI* 1206 (1988)

ICC Case No 5294, Final Award of 22 February 1988, *Danish firm v Egyptian firm*, XIV YBCA 137 - 145 (1989)

ICC Case No 5622 of 1988, *Hilmarton v Omnium Traitment*, ASA Bull 247 (1993), Rev arb 327 (1993), Riv Dell' Arbitrato 773 (1992), XIX YBCA 105 (1994)

ICC Case No 5622, Final Award of 1988, *Broker v Contractor*, XIX YBCA 105 - 123 (1994)

ICC Case No 5649, Final Award of 1987, *Bank v Company*, Clunet 1054-1060 (1987)

ICC Case No 6149, Interim Award of 1990, *Seller v Buyer*, XX YBCA 41 - 57 (1995)

ICC Case No 6230, Final Award of 1990, *Subcontractor v Main Contractor*, XVII YBCA 164 - 177 (1992)

ICC Case No 6233, Final Award of 1992, *Owner of Company v State*, XX YBCA 58 - 61

ICC Case No 6248, Final Award of 1990, *Consultant v Contractor*, XIX YBCA 124 - 140 (1994)

ICC Case No 6268, Final Award of 18 May 1990, *Seller v Buyer*, XVI YBCA 119 - 126 (1991)

ICC Case No 6320, Final Award of 1992, *Owner v Contractor*, XX YBCA 62 - 96 (1995)

ICC Case No 6329, 6(1) ICC Bull 59 (1992)

ICC Case No 6363, Final Award of 1991, *Licensor v Licencee*, XVII YBCA 186 - 211 (1992)

ICC Case No 6401 of 1991, *Westinghouse and Burns & Roe v National Power Company and the Republic of the Philippines*, Mealey's IAR B - 1 (1992)

ICC Case No 6474 of 1992, Partial award on Jurisdiction and Admissibility, *Supplier (European country) v Republic of X*, XXV YBCA 279 - 311 (2000)

ICC Case No 6497 of 1994, *Consultant v Contractor*, XXIVa YBCA 71 - 79 (1999)

ICC Case No 6500 (1992), 119 Clunet 1015 (1992)

ICC Case No 6573, Final Award of 1991, *Seller v Carrier*, XX YBCA 110 - 125 (1995)

ICC Case No 6719 of 1991, *Collection of ICC Arbitral Awards 1991-1995* (ICC 1997)

ICC Case No 6998, Final Award of 1994, *Hotel v Joint Venture*, XXI YBCA 54 - 78 (1996)

ICC Case No 7047 of 1994, *Westacre v Jugoinport*, ASA Bull 301 (1995)

ICC Case No 7146, Partial Award of 1992, XXVI YBCA 119 - 129 (2001)

ICC Case No 7263, Interim Award of 1994, *Ministry of Defence (Country X) v Contractor (US)*, XXII YBCA 92 - 106 (1997)

ICC Case No 7314, Final Award of 1995, *Manufacturer v Licensor*, XXIII YBCA 49 - 65 (1998)

ICC Case No 7453, Final Award of 1994, *Agent (US) v Principal (Germany) and Managing director of principal (Germany)*, XXII YBCA 107 - 124 (1997)

ICC Case No 7528, Partial Award of 1993, *Sub-contractor v Contractor*, XXII YBCA 125 - 131 (1997)

ICC Case No 7626, Final Award of 1995, *Technical know-how buyer v Engineer seller*, XXII YBCA 132 - 148 (1997)

ICC Case No 7639, Final Award of 1994, *Sponsor v Contractor*, XXIII YBCA 66 - 79 (1998)

ICC Case No 7929, Interim Award of 1995, *Manufacturer & Subsidiary v Building supplier*, XXV YBCA 312 - 323 (2000)

ICC Case No 8385 (1995), 124 *Clunet* 1061 (1997)

ICC Case No 8420, Partial Award of 1996, XXV YBCA 11 - 432 (2000)

ICC Case No 8423, Final Award of 1994, *Portuguese Company v French parent Company and French subsidiary*, XXVI YBCA 153 - 166 (2001)

ICC Case No 8891 of 1998, *Clunet* 1076 (2000)

ICC Case No 8938 of 1996, Final Award, *Exclusive Agent (Belgium) v Manufacturer (France)*, XXIVa YBCA 174 - 181 (1999)

ICC Case No 8938, Final Award of 1996, *Exclusive Agent v Manufacturer*, XXIVa YBCA 174 - 181 (1999)

ICC Case No 9302 of 1998, *Manufacturer D v Agent S*, XXVIII YBCA 54 - 67 (2003)

ICC Case No 9333 of 1998, Final Award, *X v Company L*, 19(4) ASA Bull 757 - 780 (2001)

- ICC Case No 99130, Award of 18 April 2000, 4 *Rev Arb* 1019 – 1020 (2002)
- ICC Case No 10623, Award of 7 December 2001, *S v State X*, 21(1) *ASA Bull* 82 – 111 (2003)
- ICSID *Ad Hoc* Committee, Decision of 3 July 2002, *Compañía de Aguas del Aconquija S A and Vivendi Universal v Argentine Republic*, 41 *ILM* 933 (2002)
- ICSID Annulment Decision of 3 May 1985, *Klöckner Industrie-Anlagen GmbH v Cameroon*, XI *YBCA* 162 - 184 (1986)
- ICSID Case No ARB(AF)87/3, Award of 27 June 1990, *Asian Agricultural Products v Republic of Sri Lanka*, 6 *ICSID Rev - FILJ* 526 (1991)
- ICSID Case No ARB(AF)/97/1, Award of 30 August 2000, *Metalclad v Mexico*, 16(1) *ICSID Rev-FILJ* 165-202 (2001)
- ICSID Case No ARB(AF)/97/2, Award of 1 November 1999, *Robert Azinian, et al v The Government of the United Mexican States*, 14(1) *ICSID Rev - FILJ* 538-575 (1999)
- ICSID Case No ARB(AF)/98/2, Award of 2 June 2000, *Waste Management Inc v The United Mexican States*, 15(1) *ICSID Rev-FILJ* 211-240 (2000)
- ICSID Case No ARB/81/8, Final Award of 5 June 1990, *Amco Asia Corp v Indonesia*, XVII *YBCA* 73 – 105 (1992)
- ICSID Case No ARB/82/1, *Société Ouest-Africaine des Bétons Industriels v Senegal*, 6(1) *ICSID Rev – FILJ* 46-48 (1991)
- ICSID Case No ARB/84/3, Award of 20 May 1992, *SPP (Middle East) Ltd v Egypt*, 32 *ILM* 933-1038 (1993)
- ICSID Case No ARB/87/3, Final Award of 27 June 1990, *Asian Agricultural Products Ltd v Sri Lanka*, 30 *ILM* 580 - 627 (1991), 2 *ICSID Rev - FILJ* 526-573 (1991)
- ICSID Case No ARB/95/3, Award of 10 February 1999, *Goetz v The Republic of Burundi*, 15(2) *ICSID Rev - FILJ* 457 - 527 (2000)
- ICSID Case No ARB/97/4, Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction of 1 December 2000, *Ceskoslovenska Obchodni Banka, A S v Slovak Republic*, 15(2) *ICSID Rev -FILJ* 544-557 (2000)
- ICSID Case No ARB/99/6, Award of 12 April 2002, *Middle East Cement Shipping and Handling Co v Republic of Egypt*, 18 *ICSID Rev - FILJ* 602 (2003)
- ICSID Final Award of 31 March 1986, *Liberian Eastern Timber Corp v Liberia*, 26 *ILM* 647-679 (1987)
- ICSID, 23 June 2001, *Alex Genin Eastern Credit Limited, Inc and AS Baltoil v Republic of Estonia*, unpublished

ICSID, 29 May 2003, *Tecnicas Medioambientales TECMED S A v Mexico*, 43(1) ILM 113 – 195 (2004)

ICSID, 3 July 2002, *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, 41 ILM 933 (2002)

ICSID, *AGIP v Congo*, XXI ILM 726-739 (1982), 71(1) Rev Crit Droit Int'l Privé 92-105 (1982)

ICSID, Annulment Proceedings of 28 January 2002, *Wena Hotels Limited v Arab Republic of Egypt*, 41 ILM 933 (2002)

ICSID, Award 8 December 2000, *Wena Hotels Limited v Arab Republic of Egypt*, 41 ILM 896 (2002)

ICSID, Award of 11 October 2002, *Mondev International Ltd v United States of America*, 2 ILM 85 (2003), 6 ICSID Rep 192 (2004), 125 ILR 110 (2004)

ICSID, Award of 13 November 2000, *Emilio Agustín Maffezini v The Kingdom of Spain*, www.worldbank.org

ICSID, Award of 26 June 2003, *Loewen v United States*, 42(4) ILM 811(2003)

ICSID Case No ARB/03/4, *Empresas Lucchetti SA and Lucchetti Perú SA v Republic of Peru*, 2005 WL 756797

ICSID, Case No ARB/82/1, Jurisdictional Decision of 1 August 1984, *Société Ouest-Africaine des Bétons Industriels v Senegal*, 6(1) ICSID Rev – FILJ 46-48 (1991)

ICSID, Final Award of 31 March 1986, *Liberian Eastern Timber Corp v Liberia*, 26 ILM 647 - 679 (1987)

Iran –US Claims Tribunal, Award No 298-317-1, *Sola Tiles Inc v Islamic Republic of Iran*, 14

Iran-US Claims Tribunal, CTR 223 234 (1987)

Iran-US Claims Tribunal Case No 46, Order of Chamber Three of 26 July 1991, *Ebrahimi v Iran*, XVII YBCA 382 - 388 (1992)

Iran-US Claims Tribunal Case No 832, Award No 580-832-3 of 23 April 1997, *David v Iran, Selected Iran-US Claims Tribunal Awards*, 8

Iran-US Claims Tribunal Case No A27, Full Tribunal Award No 586-A27-1 of 5 June 1998, *Iran-United States Claims Tribunal: Selected Awards*, 30

Iran-US Claims Tribunal Case No B36 DEC 126-B36-2, Decision of 17 March 1997, *The United States of America v Iran*, XXIII YBCA 473 - 474 (1998)

Iran-US Claims Tribunal Case Nos 842, 843 and 844, Chamber One Award No 581-842/843/844-1 of 22 May 1997, *Iran-United States Claims Tribunal: Selected Awards*, 66

Iran-US Claims Tribunal Chamber One Award No 314-24-1 in Case No 24, concerning the Statement of K. Ameli of 20 August 1987, available at *Iran-United States Claims Tribunal: Selected Awards*

Iran-US Claims Tribunal Award No 323-409-1 of 2 November 1987, *Harris Int'l Telecommunications, Inc v Iran*, 17 Iran-US CTR 31, 57

Iran-US Claims Tribunal Case No 164, Chamber Three Award No 570-164-3 of 15 May 1996, *Iran-United States Claims Tribunal: Selected Awards*, 99

Iran-US Claims Tribunal Case No 34 (206-34-1), Award of 3 December 1985, *First Travel Corp v Iran*, XII YBCA 257 - 262 (1987)

Iran-US Claims Tribunal Case No 357, Award No 473-357-1 of 12 March 1990, *Time International v National Iranian Oil Co and Ahwaz Pipe Mill Co ATTI*, Iran-US Claims Tribunal Selected Awards, 15

Iran-US Claims Tribunal Case No 389, Chamber Two Final Award No 579-389-2 of 20 March 1997, *Westinghouse Electric Corporation v Iran Air Force*, Iran-United States Claims Tribunal: Selected Awards, 21

Iran-US Claims Tribunal Case No 43, Award of 8 October 1986, *Oil Field of Texas Inc v Iran*, XII YBCA 287 - 291 (1987)

Iran-US Claims Tribunal Case No 828, Chamber One Award No. 522-828-1 of 21 October 1991, *General Petrochemicals Corp v Karkhanejat Towlidi*, *Iran-United States Claims Tribunal: Selected Awards*, 24

Iran-US Claims Tribunal Case No A15(IV)/A24-FT, Full Tribunal Partial Award of 28 December 1998, unpublished

Iran-US Claims Tribunal Case No DEC 126-B36-2, Decision of 17 March 1997, XXIII YBCA 473 - 474 (1998)

Iran-US Claims Tribunal Case Nos 815, 816, 817 (593-815/816/817-2) Partial Award of 30 June 1999 and Final Award of 28 November 2000, *Sabet v Iran*, XXVI YBCA 606 - 664 (2001)

Iran-US Claims Tribunal, Award No 315-115-3 of 10 September 1987, *Reliance Group, Inc v Iran*, 16 Iran-US CTR 257, 259

Iran-US Claims Tribunal, Award No 535-354-1 of 16 Oct. 1992, *Plicoflex Inc v Islamic Republic of Iran et al*, 1 Iran-US CTR 384, 385

Iran-US Claims Tribunal, Award No 548-367-2 of 28 June 1993, *Kaysons International Corporation v Government of the Islamic Republic of Iran et al*, 1 Iran-US CTR 384, 385

Iran-US Claims Tribunal, Decision No DEC 87-11045-1 of 7 July 1989, *International Tel & Tel Corp v Iran*, 22 Iran-US CTR 213;

Iran-US Claims Tribunal, Award No 133-340-3 of 11 June 1984, *Cal-Main Foods, Inc v Iran*, 6 Iran-US CTR 52, 60.

Iran-US Claims Tribunal, Decision No. 26-200-1 of 16 September 1983, *Henry Morris and The Government of the Islamic Republic of Iran*, IX YBCA 283 - 284 (1984)

Iran-US Claims Tribunal, Award on Agreed Terms for Claims of Less Than \$250,000, *United States v Iran*, XVI YBCA 282 - 285 (1991)

Iran-US Claims Tribunal Case No 941, Chamber Three Award No 528-941-3 of 6 March 1992, *Iran-United States Claims Tribunal: Selected Awards*, 32

Iran-US Claims Tribunal, Decision No 30-149-1 of 12 January 1984, *Mark Dallal and The Islamic Republic of Iran*, X YBCA 305 - 305 (1985)

Italian Arbitration Association, Case No 76/98, Award of 24 November 1999, *Exclusive distributor v Principal*, XXV YBCA 368 - 381(2000)

Japan Shipping Exchange, Award of 2 August 1979, *Charterer v Shipowner*, X YBCA 85 – 88 (1985)

Mexico-US Claims Commission, *Cuculla Case*, 3 Int Arb 2873 (1868); the *Salvador Commercial Co Arbitration*, USFR 838 (1902) at p. 866

Milan Chamber of Arbitration Case No 1398, Award of 18 March 1999, *Licensee v Licensor*, XXV YBCA 382 – 387 (2000)

NAFTA, Decision of 28 November 1997 and Award of 24 June 1998, *Ethyl Corp v The Government of Canada*, 16(3) J Int'l Arb 149 - 150 (1999)

NAI Case No 1694, Interim Award of 12 December 1996, *Producer v Construction Company*, XXIII YBCA 97 - 112 (1998)

Paris Arbitration Chamber, 8 March 1996, *Agent (Austria) v Principal (Egypt)*, XXII YBCA 28 (1997)

Russian Maritime Arbitration Commission Case No 24/1984, Award of 16 April 1985, XIV YBCA 209 – 212 (1989)

Society of Maritime Arbitrators Case No 2972, Award of 26 April 1993, *Nordic American Shipping A/S v Bayoil USA Inc*, XX YBCA 126 - 132 (1995)

Society Of Maritime Arbitrators, Award No 2014 of 13 September 1984, *Unitramp v Koal Industries*, XI YBCA 202 - 202 (1986)

Society of Maritime Arbitrators, Award No 2642 of 28 March 1990, *Triumph Tankers Ltd v Kerr McGee Refining Corp*, XVIII 112 - 123 (1993)

Society of Maritime Arbitrators, Award No 2699 of 23 August 1990, *Trade & Transport, Inc v Valero Refining Co, Inc*, XVIII YBCA 124 – 134 (1993)

Tribunal for Bank of International Settlements, Award of 22 November 2002, *Dr Horst Reineccius v Bank for International Settlements*, www.pca-cpa.org

WIPO Case No D2000-0044, Decision of 16 March 2000, *Educational Testing Service v TOEFL*, XXVII YBCA 201 - 208 (2002)

WIPO Case No D99-0001, Panel Decision of 14 January 2000, *World Wrestling Federation Entertainment, Inc v Michael Bosman*, XXVII YBCA 189 - 193 (2002)

Zurich Chamber of Commerce, Preliminary Award of 25 November 1994, XXII YBCA 211 - 221 (1997)

Zurich Chamber of Commerce Case No 415, Award of 20 November 2001, 20(3) *ASA Bull* 467 – 472 (2002)

COURT DECISIONS

Australia

Eisenwerk Hensel Bayreuth v Australian Granites Limited, 14 Mealey's IAR C-1 - C-6 (1999) (Court of Appeal)

Austria

Oberster Gerichtshof, 20 October 1993 / 23 February 1998, *Kajo-Erzeugnisse Essenzen GmbH v DO Zdravilisce Ra-denska*, 105 Österreichische Juristen-zeitung 513, XXIVa YBCA 919 (1999), Rev Arb 419 (1998), XX YBCA 1051 (1995) and Rev Arb 385 (1999)

Belgium

Brussels Court of Appeal, 6 December 2000, *Sarl Génie Mécanique zaïrois et crts v s a A I G Europe et crts*, unpublished

Brussels Court of Appeal, 6 December 2000, *Génie Mécanique zaïrois et crts Sarl v AIG Europe et crts Sa*, *Journal des Tribunaux* 572 (2001)

Supreme Court, 25 October 1979, *Journal des Tribunaux* (1980)

Bermuda

Sojuznefteexport v Joc Oil Ltd, XV YBCA 384 - 435 (1990) at p. 398 (Court of Appeal of Bermuda, 7 July 1989)

Canada

Blanchard v Control Data Canada Ltd, [1984] 2 SCR 476

Quintette Coal Limited v Nippon Steel Corp et al, (1991) 1 Western Weekly Reports, 219 (British Columbia Court of Appeal)

Corporacion Transnacional de Inversiones SA de CV v STET International (1999) 45 O R (3d) 183 (Ont S C J), affirmed (2000) 49 OR (3d) 414 (Ont CA) (3 May 2001 - Supreme Court of Canada)

Schreter v Gasmac Inc (1992) 7 OR (3d) 608, 89 DLR (4th) 365

Silverberg v Hooper, [1990] JE 90-437 (SC)

Air France v Kéba Mbaye et al, 18(1) ASA Bull 116 – 143 (2000) (Supreme Court of Québec, 15 February 2000)

Zittler v Sport Maska Inc, 1985 CA 386

China

Supreme People's Court, 16 August 2000, *CNIEC Henan Corporation v Liaoning Bohai Nonferrous Metals I/E*, 4 Int ALR N-11 (2001)

Cyprus

Supreme Court, 28 April 1999, *The Attorney General of the Republic of Kenya v Bank für Arbeit und Wirtschaft AG*, XXV YBCA 692 - 709 (2000)

EC

Case C-190/89, 25 July 1991, *Marc Rich & Co A G v Società Italiana Impianti P A*, Official Journal C 220, 23 August 1990, p. 5- 7, 3 Arb Int'l 251-257 (1991), XVII YBCA 233 - 278 (1992) at p. 246 – 247

European Court of Justice, 1 June 1999, C 126/97, *Eco Swiss Time Ltd v Benetton International NV* [1999] ECR I 3055, [1999] 2 All ER (Comm) 44, 14(6) Mealey's IAR B-1(1999), XXIVa YBCA 629 (1999)

England

Abouloff v Oppenheimer & Co (1882) 10 QBD 295

ASM Shipping Limited of India v TTMI Limited of England [2005] All ER(D) 271

Arenson v Arenson, [1977] AC 405 (HL 1974)

Bremer Handelsgesellschaft MBH v Ets Soules et Cie & Anthony G Scott, 2(2) J Int'l Arb 77 - 81 (1985) (11 October 1984 - Queen's Bench Division (Commercial Court))

BTP Tioxide Ltd v Pioneer Shipping Ltd, VII YBCA 179 - 188 (1982)

Czarnikow Ltd v Rolimpex [1979] AC 351

Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v R'As al Khaimah National Oil Co [1987] 3 WLR 1023, YBCA XIII (1988), 522 (CA and HL)

Egerton v Brownlow (1853) 4 HLC 1

Fender v St John-Mildway [1938] 1 AC 23, [1937] 3 All ER 402

Fowler v Merrill Lynch (1985) X YBCA 499 - 503 at p. 499 (QBD (Commercial Court), 10 June 1982)

Hussmann Ltd v Ahmed Pharaon, [2003] EWCA Civ 266

Interdesco SA v Nullifire Ltd [1992] 1 Lloyd's Rep 180

Kuwait Airways Corp v Iraqi Airways Co [2002] 2 A C 883, 2002 W L 819941 (HL), [2002] 3 All ER 209, [2002] 2 WLR 1353, [2002] 1 All ER (Comm) 843

Minmetals Germany GmbH v Ferco Steel Ltd, [1999] 1 All ER (Comm)
Profilati Italia SRL v Paine Webber Inc & anr [2001] 1 Lloyd's Rep 715

Regazonni v K C Sethia (1944) Ltd [1958] AC 301

Richardson v Melish (1824) Bing 228, [1824-1834] All ER 258

Soleimany v Soleimany (1999) 3 All ER 847

The Angelic Grace [1995] 1 Lloyds Rep 87

Tongyuan International Trading Group v Uni-Clan Limited, XXVI YBCA (2001) 886 – 892, at p. 892 (QBD Commercial Court 2001)

Vervaeke v Smith [1983] AC 145, [1982] 2 All ER 144

Westacre Investments, Inc v Jugoinport - SDPR Holding, (1999) XXIVa YBCA 753 – 776

France

Cour d'appel Paris, 14 February 1985, *Société Tuvomon v Société Amaltex*, Rev Arb 325 (1987)

Cour d'appel Paris, 14 March 1989, *Murgue Seigle v Coflexip*, Rev Arb 355 (1991)

Cour d'appel Paris, 27 October 1994, *LTDC v Sté Reynolds*, 4 Rev Arb 709 - 713 (1994)

Cour d'appel Paris, 14 June 2001, *Cargill France v SA Tradigrain* Rev Arb 805 - 810 (2001)

Cour de Cassation, 21 May 1997, *Renault v V 2000 (formerly Jaguar France)*, Rev Arb 537 (1997)

Cour d'appel Versailles, 2 October 1989, *Société Grands Moulins de Strasbourg v Cie Continentale* Rev Arb 115 - 121 (1990)

Cour d'appel Paris, 16 January 2003, *Société des télécommunications internationales du Cameroun (Intelcam) v SA France Télécom*, 1 Rev Arb (2003)

Cour d'Appel Paris, 30 September 1993, *Euro'n Gas Turbines SA v Westman Int'l Ltd*, Rev Arb 359-371 (1994)

Cour de Cassation, 11 December 2001, *GRMA v Brasoil*, 1 Rev Arb 201 - 201 (2002)

Cour de Cassation, 14 December 1983, *Epoux Convert v Société Droga*, Rev Arb 483 (1984) 484

Cour de Cassation, 14 June 2000, *Inter-Arab Investment Guarantee Corporation - IAIGC v Banque Arabe et Internationale d'Investissements*, 15(10) Mealey's IAR B-1 - B-2 (2000), XXVI YBCA 270 -272 (2001)

Cour de Cassation, 15 February 1988, *Société Grands Moulins de Strasbourg c/ Cie Continentale France*, Rev Arb 115 (1990)

Cour de Cassation, 19 December 1995, *Sté Westman International Ltd v Sté European Gaz Turbines*, Rev Arb 49 (1996)

Cour de Cassation, 22 October 1991, *Compania Valenciana de Cementos Portland SA v Primary Coal Inc*, Rev crit dip 113 (1992)

Cour de Cassation, 25 May 1992, *Fougerolle SA v Procofrance SA*, Rev crit droit int'l privé 699-701 (1992), Clunet 974-975 (1992), Rev Arb 91-93 (1993)

Cour de Cassation, 9 December 1981, *Fougerolle v Banque du Proche-Orient*, 109 Clunet 935 (1982)

Cour de Cassation, 9 October 1984, *Pabalk Ticaret Limited Sirketi v Norsolor SA*, 112 Clunet 679 (1985), 24 ILM 360 (1985)

Cour d'appel Paris, 29 May 1992, *Consorts Rouny v SA Holding*, 1992 Rtd Com 588

Cour d'appel, 12 July 1984, *RAE v Southern Pacific Properties Ltd and Southern Pacific Properties (Middle East)*, Clunet (1985)

Cour d'appel, 29 March 1991 *Sté Ganz v Sté nat'le des Chemins de fer tunisiens*, Rev Arb 478 - 480 (1991)

Cour d'appel Paris, 27 October 1994, *Lebanese Traders, Distributors & Consultants v Reynolds*, Rev Arb 709 (1994)

Tribunal de Grande Instance Paris, 28 March 1984, Rev Arb 142 (1985)

Tribunal de Grande Instance Paris, 28 October 1988, *Drexel Burnham Lambert Ltd v Philipp Brothers*, and 29 June 1989, *Philipp Brothers v Drexel*, Rev Arb 497 (1990)

Germany

Bundesgerichtshof, 26 April 1990, XXI YBCA 532 - 534 (1996)

BGH, 14.5.1992 – III ZR 169/90, *NJW* 1992

Bundesgerichtshof, 15 May 1986, *NJW* 3027 – 3028 (1986)

Bundesgerichtshof, 18 January 1990, XVII YBCA 503 (1992)

Bundesgerichtshof, 23 April 1959, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* 30/12, 94

Federal Court of Justice, *BGHZ*, 22, 162, 167

Kammergericht Berlin, 15 October 1999, 3 *Int ALR* N-30 (2000), 1 *RPS* 13 (2000)

Oberlandesgericht Hamburg, 26 January 1989, XVII YBCA 491 – 499 (1992)

Oberlandesgericht Hamburg, 30 July 1998, XXV YBCA 714 – 716 (2000)

Supreme Court, 22 June 1982, *G H v E K*, 59 *BGHZ* 82

Supreme Court, 8 May 1985, *RIW* 653 (1985), *Clunet* 914 - 930 (1984)

Supreme Court, *Jur W* 1927, 2288, BGH, 22 June 1972, *BGHZ* 59

HK SAR

China Nanhai Oil Corp v Gee Tai Holdings Co Ltd, (1995) XX YBCA 671 – 680 (High Court of Hong Kong 1994)

JJ Agro Industries Ltd v Texuna Int'l Ltd (12 August 1992 - Supreme Court of Hong Kong, High Court), XVIII YBCA 396 - 402 (1993)

Hebei Imp & Exp Corp v Polytek Engineering Comp Ltd, (1999) 14(2) Mealey's IAR G-1 - G-15, [1999] XXIVa YBCA 652 – 677 (Court of Final Appeal, 9 February 1999)

Medison Co Ltd v Victor (Far East) Ltd, 15(5) Mealey's IAR J-1 - J-3 (2000), XXVI YBCA 774 – 779 (2001) (High Court 8 April 2000)

Lucky-Goldstar International (HK) Limited v Ng Moo Kee Engineering Limited [1993] 2 Hong Kong Law Reports 73 (HKLR), XX YBCA 280 (1995)

Fung Sang Trading v Kai Sun Sea Products Ltd, XVII YBCA 289 - 304 (1992) at p. 298 (Hong Kong High Court 29 October 1991)

International Court of Justice

Barcelona Traction, 1970 ICJ Reports 3 at p. 32

Case concerning the Arbitral Award made by the King of Spain on December 23, 1906, ICJ 192 (1960)

North Sea Continental Shelf, ICJ Reports 49 (1969)
Nottebohm Case, ICJ 111 (1953)

Legality of the Threat or Use of Nuclear Weapons, Decision of 8 July 1996,
WL 939337 (1996), ICJ 226 (1996)

India

Brace Transport Corp Monrovia v Orient Middle East Lines, (1996) XXI YBCA 552
-556 (Supreme Court of India Civil Appeals No. 5438-39, 10 December 1993)

Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly, AIR 1986
SC 1571

Fuerst Day Lawson Ltd v Jindal Exports Ltd, (1999) 1 Arb Law Rep, 571-589, (1999)
XXIVa YBCA 688 – 695 (Delhi High Court, 19 February 1999)

Bawn Laboratories Limited v Fittydent International GmbH, 2 Arbitration Law
Reporter 64-71 (2000) (Delhi High Court, 23 July 1999)

Owners, etc "Baltic Confidence" v State Trading Company of India, et al (2002)
XXVII YBCA 478 – 481

Italy

Corte di Appello Milan, *Alarcia Castells v Hengstenberge e Procuratore generale
presso la Corte di appello di Milano*, XIX RDIPP (1983)

Corte di appello Bari, 2 November 1993, no 811, *Société Arabe des Engrais
Phosphates et Azotes (SAEPA) and Société Industrielle d'Acide Phosphorique et
d'Engrais (SIAPE) v Gemanco srl*, XXII YBCA 737 (1997)

Corte di Appello di Venezia, decision of 21 May 1976, III YBCA 277 (1978);

Corte di Appello Milan, 24 March 1998, *Virgilio De Agostini, et al v Milloil SpA, et
al*, XXV 734 – 750 (2000)

Corte di Appello of Milan, December 1992, *Allsop Automatic Inc v Tecnoski snc*, 30
Rivista di diritto internazionale privato e processuale 873-874 (1994), XXII YBCA
725 – 726 (1997)

Corte di Cassazione, 17 May 1995, *ICEC v Italchimica et al*, XXIII YBCA 719 - 722
(1998)

Corte di Cassazione, 8 February 1982, *Fratelli Damiano s n c v August Topfer & Co.*,
XVIII Rivista di diritto internazionale privato e processuale (1983) pp. 329 - 438,
extracts in IX YBCA 418 - 420 (1984)

Corte di Cassazione, 9 May 1996, *SAEPA and SIAPE v Gemanco srl*, XXII YBCA
737 (1997)

Court of Appeal Genoa, 7 May 1994, *Fincantieri-Cantieri Navali Ital SpA v Iraq*,
4(3) Rivista dell'arbitrato 505-513 (1994)

Corte di Cassazione, *Alarcia Castells v Hengstenberge e Procuratore generale presso la Corte di appello di Milano*, XIX RDIPP (1983)

Tribunal of Turin, 25 March 1982, *Repubblica dell' Ecuador – Casa della cultura ecuadoriana v Danusso*, 18 RDIPP 625 (1982)

Luxembourg

Cour d'Appel, 28 January 1999, *Sovereign Participations International SA v Chadmore Developments Ltd*, XXIVa YBCA 714 - 723 (1999)

Cour Superieure de Justice, 24 November 1993, *Kersa Holding Company Luxembourg v Infancourtage and Famajuk Invesment and Isny*, XXI YBCA 617 (1996)

Netherlands

Court of Appeal, 14 July 1995, *Sneek Hardhout Import BV v Karl Schlüter KG*, XXI YBCA 643 - 648 (1996)

Permanent Court of Justice

Serbian Loans Judgment of 1929, Series A, Nos. 20/21, p. 41

Chorzow, PCIJ Series A, No 17, at 47.

Singapore

Hainan Machinery Imp & Exp Corp v Donald & McArthy Pte Ltd, XXII YBCA 771 – 779 (1997) (High Court, 29 September 1995)

South Africa

Benidai Trading Co Ltd v Gouws & Gouws Ltd, 3 South African Law Reports 1021 (1977) (Supreme Court)

Spain

Tribunal Supremo 5 May 1998, *ETS Louis Zanatta v Pillanet*, XXVII YBCA 540 - 542 (2002)

Tribunal Supremo, 17 February 1998, *Unión de Cooperativas Agrícolas Epis-Centre v La Palentina SA*, XXVII YBCA 533 – 539 (2002) at p. 538

Switzerland

Bundesgericht , 28 March 2001, *WI Beverly Overseas SA v Privredna Bank Zagreb*, 4 ASA Bull 807 (2001)

Bundesgerichtshof, 19 December 1997, *Compañía de Minas Buenaventura SA v ICC Arbitral Tribunal*, 13(9) Mealey's IAR C-1 - C-7 (1998)

Hilmarton v OTV, XIX YBCA 214 (1994)

Société de grands travaux de Marseille c/ République populaire du Bangladesh, ATF 102 Ia 574

Tribunal Fédéral, 11 November 2002, *Z v A and B*, 21(2) ASA Bull (2003)

Tribunal Fédéral, 13 November 1998, *X SA, et al v Z S A*, XXV YBCA 443 -534 (2000)

Tribunal Fédéral, 16 May 1983, *Arab Republic of Egypt v Westland Helicopters Ltd*, ASA Bull 203 (1984)

Tribunal Fédéral, 19 September 2000, 19(2) ASA Bull 310 – 312 (2001)

Tribunal Fédéral, 22 October 2002, *X Inc v Y*, 21(2) ASA Bull 382 (2003)

Tribunal Fédéral, 23 June 1992, *Fincantieri-Cantieri Navali italiani SpA v M*, ASA Bull 58-68 (1993)

Tribunal Fédéral, 26 January 1987, *Shobokshi v Saiecom SA*, 109 La Semaine Judiciaire 230 -231 (1987)

Tribunal Fédéral, ATF 120 II 166-168

Tribunal Fédéral, *Fomento de Construcciones y Contratas SA v Colon Container Terminal SA*, 127 III (2001)

Tribunal Fédéral, *Ungrad v Ungrad*, 102 Sem Jud 216 (1981), XXXVII ASDI 254 (1981)

United States

Abbott Laboratories v Baxter International Inc, 27 March 2002, XXVII YBCA 936 - 947 (2002)

Austern v Chicago Bd Options Exchange Inc, 898 F 2d 882 (2d Cir 1990)

Biotronik v Medford Medical Instrument Co (1976) 415 F Supp. 133, II YBCA 250 - 250 (1977) (12 May 1976, USDC)

Dandong Shuguang Axel Corporation, Ltd v Brilliance Machinery Company, et al, 2001 US Dist LEXIS 7493, XXVII YBCA 617 – 625 (2002)

Daihatsu Motor v Terrain Vehicles, XX YBCA 925 - 931 (1995)

- Dean Witter Reynolds, Inc v Byrd*, 470 US 213 (Supreme Court 1985)
- Feichtinger v Conant*, 893 P 2d 1266 (1995)
- George Watts & Son, Inc v Tiffany*, 2001 WL 376322 (7th Cir. 2001)
- HZI Research Center, Inc (US) v Sun Instruments Japan Co, Inc (Japan)*, 1995 US Dist LEXIS 13707, XXI YBCA 830 (1996);
- In re Belship Navigation Inc v Sealift Inc*, 1995 WL 447656 (S D N Y July 28 1995); 6 World Arb & Med Rep 226 (1995)
- Int'l Standard Electric Corp v Bidas Sociedad Anonima*, 745 Fed Sup (1990) pp. 172-182, XVII YBCA 639 -652 (1992)
- Intercontinental Hotels Corp (Puerto Rico) v Golden*, 15 NY 2d 9, 203 NE 2d 210, 254 NYS 2d 527 (1964)
- Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 Fed Sup Second Series 936-958 (2001) (S D Tex), US Dist LEXIS 23079 (2001)
- Ledee v Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir 1982)
- Loucks v Standard Oil Co*, 224 N Y 99, 111, 120, N E 198, 202 (1918)
- Louise Henry v Patrick J Murphy*, 2002 U S Dist LEXIS 227, XXVII YBCA 863 - 868 (2002) at p. 867
- M&A Elec Power Coop v Local Union No 702, International Brotherhood of Electrical Workers, AFL-CIO*, 977 F 2d 1235, 1237-38 (8th Cir 1992)
- Mertz v Mertz*, 271 NY 466, 472, 3 NE 2d 597, 599 (1936)
- Metropolitan Property & Cas Ins Co v JC Penney Cas Ins Co*, 780 F Supp 885, 893 (D Conn 1991)
- Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985)
- National Oil Corp v Libyan Sun Oil Co.*, 733 F Supp 800, 819 (D Del 1990)
- Nat'l Oil Co of Iran v Ashland Oil, Inc.*, 817 Federal Reporter 2d Series 326-335 (1987) (Court of Appeals for the Fifth Circuit, 21 May 1987)
- Ocean Warehousing BV v Baron Metals and Alloys Inc et al*, 2001 U S Dist LEXIS 6898
- Oriental Commercial and Shipping Co Ltd v Rosseel NV*, 609 F Supp 75 (SDNY 1985)
- Parsons & Whittemore (US) v Société Générale de l'Industrie du Papier (RAKTA) (Egypt)*, 508 F 2d at 974

People v Hawkins, 157 NY 1, 12, 51 NE 257, 260 (1898)

Remmey v PaineWebber Inc, 32 F3d 143, 149 (4th Cir 1994)

Riley v Kingsley Underwriting Agencies Ltd, 969 F 2d 953 (10th Cir), cert denied 506 US 1021, 121 L Ed 2d 584, 113 S Ct 658 (1992)

S.A. Mineraçao da Trindade-Samitri v Utah Int'l, Inc, XI YBCA 572 – 575 (1986)

Scherk v Alberto Culver, 417 US 506, 94 S Ct 2449 (1974)

Sphere Drake Insurance Limited (UK) v Clarendon National Insurance Company (US), 263 Federal Reporter, Third Series (2nd Cir. 2001) pp. 26-34, 2001 US App LEXIS 19202

Supercanal Int'l SA v Elias (SD Florida, 23 April 2001), 19(3) ASA Bull 592 - 597 (2001)

Totem Marine Tug & Barge, Inc v North Am Towing, Inc, 607 F2d 649, 650, 652-653 (5th Cir 1979)

United Kingdom v Boeing Co, 29 June 1993 XIX 240 - 248 (1994) (United States Court of Appeals No. 92-9242)

United Paperworkers Int'l Union v Misco Inc, 484 US 29, 42 (1987) and *Hurd v Hodges*, 334 US 24, 34-35 (1948)

Waterside Ocean Navigation Co v Int'l Navigation Ltd, 737 F 2d 150 (2d Cir. 1984), 2(1) J Int'l Arb 82 - 85 (1985)

Zimbabwe

Harare High Court Decisions of 29 March and 9 December 1998, *Zimbabwe Electricity Supply Commission v Genius Joel Maposa*, XXV YBCA 535 – 556 (2000)

Harare High Court Decisions of 18 and 26 January 2000, *Waste Management Services v City of Harare*, XXV YBCA 535 - 556 (2000)

Harare High Court, Case 342 of 1 March and 5 April 2000, *Conforce (Pvt) Limited v The City of Harare*, XXV YBCA 535 – 556 (2000)

ARBITRATION RULES

AAA ICDR Rules Articles 7, 8, 8(1)

AAA Code of Ethics for Arbitrators in Commercial Disputes Canon V(c)
AIA Rules Article 15

CCIRF Para 2(1)

CIETAC Rules Article 29

CPR Rules S. 7(4)

CRCICA Articles 9, 10(1)

French-Iranian Arbitration and Conciliation Rules for Contracts, of 4 May 1977

GAFTA Rules S. 21

German Institution of Arbitration Rules 1998, section 32(2)

ICAC Rules Article 7

DIS Rules Section 18(1)

ICC Rules Article 3, 11, 17

LCIA Rules Article 4(1), 4(2) to (4), 10, 10(3).

LMAA Terms S. 27

NAI Articles 4, 19

PCA Rules For Arbitration of Natural Disputes and/or the Environment Article 10

SIAC Rules Article 12(1)

SMA Rules, Section 9

Stockholm Institute Article 17(2)

UNCITRAL Rules Article 25(a)

WIPO Rules Articles 4, 21, 24

Zurich Chamber of Commerce International Arbitration Rules 1989, Article 190

STATUTORY REFERENCES

Algeria

Law No 93-09 of 25 April 1993, Article 458 bis 17 and 458 bis 23

Australia

International Arbitration Act 1974 Sections 19, 28

Australia, s.5 Terrorism Insurance Act 2003

Austria

Code of Civil Procedure, Art 595(1)

International Arbitration Act Article 19

Law on Private International Law of June 1978, Art 6

Belgium

Belgium, Judicial Code 1998 Articles 1679, 1683, 1690, 1690(1), 1704(3)(a)

Bermuda

International Conciliation and Arbitration Act 1993 Article 27

Brazil

Law 9.307 of 3 September 1996, Article 8 Sole Paragraph, 13 sixth para, 14, 14(1), 21, 29

Canada

Alberta Arbitration Act 1991 S. 45(i)

Commercial Arbitration Act 1986 Sections 34(b) (ii) and 36(1)(b)(ii)

China

Arbitration Law 1994 Articles 4, 19(1), 49

Civil Code 1986, Art 150

Law of Civil Procedure 1991, Art 203

Costa Rica

Expropriation Decree of 5 May 1978

Law on Alternative Resolution of Disputes 2000 Article 13(a)

Denmark

Decree No 117 of 1973 Section (1)

Egypt

Civil Code 1948, Art 28

England

Arbitration Act 1996 Sections 1, 5, 7, 9(4), 24, 24(1)(a), 25, 29, 29(1) and (3), 30, 34(1), 51, 68(g), 76

Reinsurance (Acts of Terrorism) Act 1993

Finland

Arbitration Act Sections 40(1)(2) and 52(2)

France

Criminal Code Article L421-1

NCCP Articles 1443, 1449, 1458, 1484, 1502

Germany

Arbitration Law 1998 (ZPO) Articles 1031(2) to (4), 1032, 1036, 1036(2), 1040, 1042(3) and (4), 1053

Introductory law to the Civil Code, Art 6

Greece

Law 2735 of 1999 Articles 12, 12(2), 30, 34(2)(b)(ii)

Hong Kong SAR

Rules of the Supreme Court Order 73 Section 2

Hungary

Act LXXI of 1994 Section 59(b)

Hungary, Act No IV of 1978 on the Criminal Code, Section 261 (amendment for Acts of Terrorism of 1 March 2003)

India

Arbitration and Conciliation Act 1996 Sections 12(1) and (3), 8(1), 16, 19(2) and (3), 34(1), 34(b), 48 and 57(2)(b)

Indonesia

Code of Civil Procedure Article 643(10)

Law of 1 March 1990 Article 4(2)

Iran

Law on International Commercial Arbitration 1997 Articles 14, 34

Ireland

Arbitration Act 1954 Article 39

Italy

Civil Code, Article 14

Code of Civil Procedure Articles 815, 832, 839(2)

Japan

Code of Civil Procedure 1996, Article 118(3)

Japan, Law of June 1897, amended 1989, Article 33

Jordan

Civil Code 1976, Article 29

Kenya

Arbitration Act No 4 of 1995 Articles 13(3), 35(2)(b) and 37(1)(b)(ii)

Korea

Code of Civil Procedure 1991, Article 203

Libya

Code of Civil and Commercial Procedure, Articles 407(4) and 408

Luxemburg

Code Of Civil Procedure Article 1023(10)

Malta

Arbitration Act 1996 Article 58

Mexico

Commercial Code Articles 1439, 1447, 1462(2), 1457

Mexico, Decree of December 1987, Art 15, para. 2

Netherlands

Code of Civil Procedure Articles 1022(1), 1033, 1053, 1054

New Zealand

Arbitration Act 1996 Sections 12(2), 14, 34(3)

Nicaragua

Civil Code 1904, Art 8

Nigeria

Arbitration and Conciliation Decree 1988 Articles 37, 38, 48(b)(ii) and 52(b)(ii)

OHADA

Uniform Arbitration Law, Articles 12, 31

Oman

Arbitration Act 1997, Articles 18, 53

Peru

Civil Code 1984, Art 2049

General Arbitration Law No. 26572 of 1996 Articles 1, 41, 99, 129(5)

Poland

Code of Civil Procedure 1964, Arts 712(1)(4), 1146 and 1150

Law on Private International Law, November 1965, Art 6

Portugal

Civil Code 1966, Art 22

Code of Civil Procedure 1986, Art 1096(f)

Romania

Law 105 of 1992, Articles 168, 168(2) and 174

Russian Federation

Law 5338-1 on International Commercial Arbitration Articles 3, 8, 12, 16, 19(1) and (2), 34(2) and 36(2)

Singapore

Arbitration Act 2001 (revised 2002) Sections 3(a), 31(4)(b), 24(a), 37(1)

South Africa

Recognition and Enforcement of Foreign Arbitral Awards Act 1977 Article 4(1)(a)(ii)

Spain

Criminal Code Article 571

Decree of May 1974, Article 12

Sweden

Arbitration Act 1999

Switzerland

Private International Law Act Articles 3, 7, 8, 17, 27, 55(2), 176(1), 178(1), 178(3), 182(2) and (3), 186(1), 187

Thailand

Conflict of Laws Act of March 1938, Article 5

Thailand, Arbitration Act 1987 Articles 19, 21, 26(1)

Tunisia

Arbitration Code 1993, Art 81(2)

Turkey

Counter terrorism Act of 1991

Law on Private International Law and International Civil Procedure 1985, Article 5

UNCITRAL

Model Law on International Commercial Arbitration 1985 Articles 1(3) and (4), 3, 7(2), 8, 12, 16(1), 19, 30, 30(2), 34 and 36

United Arab Emirates

Code of Civil Transactions 1985, Art 27.

Uruguay

Civil Code 1868, amended 1941, Art 2404

United States

Foreign Corrupt Practices Act

Arbitration Act, 9 USC S. 10

Terrorism Risk Insurance Act of 2002, Public Law 107-297

Yemen

Code of Civil Procedure, Art 285

Zimbabwe

Arbitration Act 1996 Article 30

INTERNATIONAL INSTRUMENTS

Agreement between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments, signed on 23 November 1992

Agreement on Import Licencing Procedures 1971 (*ex GATT*)

Amman Arab Convention

Annex to the Decision on Notification Procedures (*ex GATT*)

Asia Pacific Economic Cooperation (APEC) forum Business Code of Conduct

Caux Principles for Business

Convention against Discrimination in Education of the United Nations Education, Scientific, and Cultural Organization

Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

Convention and Protocol relating to the Status of Refugees

Convention Applicable to Trusts and their Recognition 1985

Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970

Convention for the Supression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988

Convention on Biological Diversity

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development

Convention on Environmental Impact Assessment in a Trans-boundary Context

Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973

Convention on Offences and Certain Other Acts Committed on Board Aircraft of 14 September 1963

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects 1993, UN doc A/RES/51/49, and additional protocols

Convention on Psychotropic Substances 1971

Convention on the Elimination of All Forms of Discrimination against Women

Convention on the Law Applicable to Agency 1978

Convention on the Law Applicable to Products Liability 1973

Convention on the Marking of Plastic Explosives for the Purpose of Identification of 1 March 1991

Convention on the Physical Protection of Nuclear Material of 3 March 1980

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 14 December 1973

Convention On The Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Signed at Washington, London, and Moscow April 10, 1972

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1993

Convention on the Rights of the Child

Declaration and the Programme of Action on the Establishment of a New International Economic Order, 328 1 (XXIX) of 12 December 1974 containing the Charter of Economic Rights and Duties of States, and 3362 (S-VII) of 16 September 1975 on development and international economic co-operation

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

Declaration on the Right to Development 1986

Ethical Criteria for Medical Drug Promotion and the “Health for All in the Twenty-First Century” policy of the World Health Organization

European Convention 1961

General Agreement on Trade and Tariffs 1994

Geneva Convention for the Execution of Foreign Arbitral Awards 1927

Geneva Protocol on Arbitration Clauses of 1923 OHADA Treaty

Hague Convention on the Law Applicable to International Sales of Goods of 15 June 1955

IBA Guidelines on Conflicts of Interest in International Commercial Arbitration 2003

IBA, *Ethics for International Arbitrators* (1986)

ICC Rules of Conduct on Extortion and Bribery in International Business Transactions, 1999 revised version

Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials

Interfaith Declaration: A Code of Ethics On International Business for Christians, Muslims and Jews

International Code of Marketing of Breast milk Substitutes adopted by the World Health Assembly

International Convention Against the Taking of Hostages of 18 December 1979

International Convention for the Suppression of Terrorist Bombings of 12 January 1998

International Convention on Civil Liability for Oil Pollution Damage 1969

International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences, done at Nairobi, 9 June 1977

International Convention on the Elimination of All Forms of Racial Discrimination

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Marrakesh Protocol of 15 April 1994 (*ex GATT*)

Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979

New York Convention on the Recognition and Enforcement of Arbitration Awards 1958

Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2

North America Free Trade Agreement

OECD Check-List of Criteria to Define Terrorism for the Purpose of Compensation of 15 December 2004

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997

OECD Guidelines for Multinational Enterprises, 2004 revision

Panama Inter-American Convention on International Commercial Arbitration 1975

Plan of Implementation of the World Summit on Sustainable Development 2002

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 23 September 1971

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime 2003

Report of the *Ad Hoc* Working Group on Corrupt Practices in International Commercial Transactions

Resolution 2014 (LXI) of the Economic and Social Council (Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions)

Rio Declaration on the Environment and Development 1992

Riyadh Convention on Judicial Co-operation between States of the Arab League 1983

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 2004

Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the Principles and Rules for Enterprises, including Transnational Corporations (UN)

Single Convention on Narcotic Drugs, 1961

Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment

Treaty on the Non-Proliferation of Nuclear Weapons
Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

UN Convention Against Corruption 2003

UN Convention for the Suppression of the Financing of Terrorism of 25 February 2000

UN Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 26 January 1973

UN Convention on Biological Diversity 1992, available at www.unep-wcmc.org

UN Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris, 14 November 1970

UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, UN Document A/RES/55/255

UN Resolution 1803 (XVII) of 1962 relating to Permanent Sovereignty over natural resources

UN Resolution 3514 (General Assembly)

UN Resolution No 1803 (XVII) of 14 December 1962

UN Resolution No 3281 (XXIX) of 12 December 1974.

UN Resolution No 626 (VII) of 21 December 1952

Understanding on Rules and Procedures Governing the Settlement of Disputes Annexed to the GATT 1994

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris, 14 November 1970

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, done at Rome, 24 June 1995

UNIDROIT Principles and Rules of Transnational Civil Procedure (2000)

United Nations (Vienna) Convention on the International Sale of Goods

United Nations Convention against Transnational Organized Crime

United Nations Millennium Declaration 2000

United Nations Set of Principles and Rules on Competition, UN doc TD/RBP/CONF/10/Rev2

Universal Declaration on the Human Genome and Human Rights
Vienna Convention for the Protection of the Ozone Layer 1985 and the Montreal Protocol on Substances That Deplete the Ozone Layer 1987

Vienna Convention of 13 May 1969 on the Law of Treaties

Washington Conventio

Public policy is a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but where other points fail.

J Burrough in *Richardson v Melish* (1824)

INTRODUCTION

The research problem

- 0.1. Transnational public policy is a method relied upon by international tribunals to uphold essential values in the international community. Its principles have a negative and a positive function within the body of rules considered by an international arbitrator. In its negative function, transnational public policy acts as a shield¹ guarding against any standard offensive to the international community.² In its positive function, transnational public policy acts as a sword, implying fundamental principles in the resolution of the dispute.³
- 0.2. When determining the applicable standards in the arbitration, an arbitral tribunal may consider national, regional,⁴ and international or transnational public policy.⁵ Whereas the national and regional levels of public policy are confined to a national or regional forum, transnational public policy⁶ draws from essential yardsticks proper to international dispute resolution.

¹ See Lew, Mistelis, Kröll, at p. 422, paras. 17-32.

² See P. Lagarde, "Public Policy", *International Encyclopedia of Comparative Law* (J. C. B. Mohr and Martinus Nijhoff Publishers 1994), at p. 9. The international community includes states, corporations, individuals and international organizations.

³ On the functions of public policy see further Chapter 1 below.

⁴ Regional public policy is the public policy of an economic or political area.

⁵ Lew, Mistelis, Kröll, at p. 422, para. 17-33 distinguish national, regional, international or transnational public policy. A three levelled approach including domestic, international or transnational public policy is preferred by D. Miller, "Public Policy in International Commercial Arbitration in Australia", 9(2) *Arb Int* 167 - 196 (1993) at p. 176 and M. Buchanan, "Public Policy and International Commercial Arbitration", 26 *Am Bus Law J* 511 (1988) at pp. 513 *et seq.*

⁶ The terms 'truly international' and 'transnational' public policy are used interchangeably by P. Lalive, "Transnational (or truly international) public policy", *ICCA Congress series no 3*, at p. 295, and B. Goldman, "Les conflits des lois dans l'arbitrage international de droit privé", II *Recueil des Cours* 352 (1963) at p. 432 and understood as such in the present thesis. E. Gaillard and J. Savage in *Fouchard Gaillard Goldman*, at p. 848 suggest also the expression "genuinely international" when referring to transnational public policy. The words "international public policy" have also been used in the sense of transnational public policy.

- 0.3. Arbitration tribunals have referred to transnational public policy when establishing their jurisdiction, the arbitration procedure and the rules governing the substantive issues in dispute. Questions remain however as to how the content of transnational public policy is determined and the extent it is binding in international arbitration.⁷ These questions are answered by exploring the meaning, functions and method of transnational public policy.

Theoretical and practical importance of the study

- 0.4. Public policy can be relevant at different stages of the international arbitration process. Where one party queries the jurisdiction of the arbitrators before the arbitration has begun, a national court may need to determine whether the arbitration agreement is valid under its governing law. During the arbitration, public policy may affect the parties' agreement or prompt a decision of the tribunal.⁸ Public policy imposes fundamental jurisdictional, procedural and substantive principles within the system of rules applied by the arbitrator. It determines thus the conduct of the arbitration and the content of the arbitration award. At the post-award stage, public policy may be relevant to a national judge deciding whether an award should be set aside or denied enforcement.

⁷ As noted by P. Lalive in 1986, "it is not always easy to distinguish what really belongs to the concept of transnational public policy and what "merely" relates to general principles, common or fundamental principles of the law of international trade, of the *lex mercatoria*, of an emerging "transnational law" or also of an "international law of contracts." See P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series no 3*, at p. 289.

⁸ On the duty of international tribunals to observe public policy see H. Alvarez, "To What Extent Do Arbitrators in International Cases Disregard the Bag and Baggage of National Systems?", *ICCA Congress Series no 8*, at p. 142, and the authorities cited at fn 14. See also, e.g., Brazil, Law No 9.307 of 23 September 1996, Article 2, para 1; Romania, Code of Civil Procedure, Article 343 and O. Capatina, "Romania", in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* (Suppl. 26, Kluwer 1998), at p. 9; C. Brunner, "Note - Federal Supreme Court, 28 April 2000", 18(3) *ASA Bull* 566 - 581 (2000) at p. 567; US, *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985); EU, European Court of Justice, 1 June 1999, C 126/97, *Eco Swiss Time Ltd v Benetton International NV* [1999] ECR I 3055, [1999] 2 All ER (Comm) 44, 14(6) Mealey's IAR B-1 (1999), XXIVa YBCA 629 (1999); P. Berger, *International Economic Arbitration* (Kluwer Law and Taxation Publishers 1993), at p. 535. This duty will persist where the arbitrator is acting as an *amiable compositeur*.

0.5. Whilst the transnational level of public policy has been relied upon by international tribunals⁹ and national courts¹⁰ the concept remains in its infancy.¹¹ Some courts have been reluctant to rely on a non-national level of public policy for want of certainty as to its content.¹² Consider for instance the reasoning of the Court of Final Appeal of Hong Kong in the *Polytek* case:

Does [international public policy] mean some standard common to all civilized nations? Or does it mean those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected? I think that it should be taken to mean the latter. If it were the former, it would become so difficult of ascertainment that a court may well feel obliged - as the Supreme Court of India did in *Renusagar Power Co Ltd v General Electric Co*¹³ - to abandon the search for it.¹⁴

⁹ See, e.g., ICC Partial Award in Case No 8420 of 1996, XXV YBCA 11 - 432 (2000); ICC Case No 6248, Final Award of 1990, *Consultant v Contractor*, XIX YBCA 124 - 140 (1994) at p. 132; ICC Case No 1110, Award of 15 January 1963, *Argentine Engineer v British Company*, 3 Arb Int 282 - 294 (1994); ICC Case No 5622, Award of 19 August 1988, *Y v X*, 2 Rev Arb 327 - 342 (1993); ICC case No 6474 of 1992, Partial award on Jurisdiction and Admissibility, *Supplier (European country) v Republic of X*, XXV YBCA 279 - 310 (2000).

¹⁰ See, e.g., England, *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 A C 883, 2002 W L 819941 (HL), [2002] 3 All ER 209, [2002] 2 WLR 1353, [2002] 1 All ER (Comm) 843, at paras 114 and 115; Switzerland, Tribunal Fédéral, ATF 120 II 166-168; Italy, Supreme Court, *Alarcia Castells v Hengstenberge e Procuratore generale presso la Corte di appello di Milano*, XIX RDIPP (1983) at p. 364; Uruguay, Court of Appeal, 18 June 2003, *Enersis SA and Others v Pecom Energia SA and Others*, unpublished (original in Spanish); Canada, *Schreter v Gasmac Inc* (1992), 7 OR (3d) 608, 89 DLR (4th) 365.

¹¹ As noted by *Fouchard Gaillard Goldman*, at p. 860, para 1533; J. Ancel, "French Judicial Attitudes Toward International Arbitration", 9(2) *Arb Int* 121 - 130 (1993) at p. 127; S. Schwebel and M. Lahne, "Public Policy and Arbitral Procedure", *ICCA Congress series No 3*, at pp. 205, 206-207 and K. Bockstiegel, "Public Policy and Arbitrability: Summary on National Laws", *ibid*, at pp. 177, 181; P. Lagarde, "Public Policy", *International Encyclopedia of Comparative Law* (J C B Mohr and Martinus Nijhoff Publishers 1994), at p. 48 *et seq*; Lew, Mistelis, Kröll, at pp. 422 - 423; P. Mayer, *Droit International Privé* (6th ed., Montchrestien 1998), at p. 135..

¹² Redfern and Hunter add however that "if a workable definition of 'international public policy' could be found, it would be an effective way of preventing an award in an international arbitration from being set aside for purely domestic policy considerations." See Redfern and Hunter at p. 498, para 9-33.

¹³ Reported in XX YBCA 681 (1995) at p. 700.

¹⁴ HKSAR, Court of Final Appeal, 9 February 1999, *Hebei Imp & Exp Corp v Polytek Engineering Comp Ltd*, (1999) 14(2) Mealey's IAR G-1 - G-15, [1999] XXIVa YBCA 652 - 677, at p. 676, para 85.

- 0.6. Clarifying the concept of transnational public policy gives a wider reach to the public policy of a country.¹⁵ The observance of transnational principles and rules promotes the states' interest in the increase of international trade and unifies the standards by which agreements to arbitrate are observed and arbitral awards are enforced, a development often urged by the courts,¹⁶ scholars¹⁷ and international tribunals.¹⁸
- 0.7. From the parties' standpoint, the transnational public policy theory has a decisive impact on the finality of the award. Even though the country of enforcement may not be known to the arbitrators during the proceedings,¹⁹ an award based on the public policy of the world community²⁰ is more likely to be given effect in the national courts.
- 0.8. In turn international arbitration tribunals, given their role and position, must look beyond national public policy when construing the applicable law.²¹ Whilst the national levels of public policy have a relative character and are

¹⁵ Applicable to international arbitration awards via Article V(2)(b) of the New York Convention.

¹⁶ See *Hebei Imp & Exp Corp v Polytek Engineering Comp Ltd* [1999] XXIVa YBCA 652 – 677, at p. 676, para 85. In the same sense see US, *Parsons and Whittemore Overseas Co, Inc v Société générale de l'industrie du papier (RAKTA)*, 508 F 2d 969, 973 (2d Cir 1974).

¹⁷ See, e.g., M. Quilling, "The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: A North-South Perspective", 11 *GA J Int'l & Comp L* 635 (1981) at p. 646; See M. Hwang and A. Chan, "Enforcement of Foreign Arbitral Awards – The Perspective of Common Law Countries", in A. van den Berg (ed.), *ICCA Congress Series no 10*, at pp. 145, 157.

¹⁸ See, e.g., Ad hoc, Award of April 1982, *Company Z and others (Republic of Xanadu) v State Organization ABC (Republic of Utopia)*, VIII YBCA 94 (1983) at p. 94 *et seq*; ICSID, Arbitral Award on Jurisdiction of September 25 1983, *Amco Asia Corp v Indonesia*, 23 ILM 351-383 (1984) at p. 351; ICC Case No 6474 of 1992, Partial award on Jurisdiction and Admissibility, *Supplier (European country) v Republic of X*, XXV YBCA 279 – 311 (2000) at p. 283, para 15.

¹⁹ Where, e.g., the losing party has assets in different countries. See B. Wortmann, "Choice of Law by Arbitrators: The Applicable Conflict of Laws System", 14(2) *Arb Int* 97 - 114 (1998) at p. 109.

²⁰ The expression was used in e.g., Ad hoc, Award of 17 November 1994, *Banque Arabe et Internationale D'Investissement (France) et al v Inter-Arab Investment Guarantee Corporation (Kuwait)*, XXI YBCA 13 - 39 (1996) at p. 22, and US, Court of Appeals in *Daihatsu Motor v Terrain Vehicles*, XX YBCA 925 - 931 (1995) at p. 926 (17 December 1993).

²¹ See Lew, Mistelis, Kröll, at p. 111, para. 6-33. See also J. Lew, "The Law Applicable to the Form and Substance of the Arbitration Clause", *ICCA Congress Series no 9*, at p. 136; and J. Lew, "Determination of Arbitrators' Jurisdiction and the Public Policy Limitation on That Jurisdiction", in J. Lew (ed.), *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987).

confined to the territory of the forum,²² transnational public policy has recognisable effects beyond national borders. As tribunals are unaware whose national public policy prevails at the enforcement stage, transnational public policy avoids “both the subjectivism of leaving the arbitrators free to apply only the requirements of their own sense of justice, and the permissiveness of having no public policy reaction at all.”²³

- 0.9. Lastly, an investigation into the application of transnational public policy in international awards may dispel the uncertainties and misunderstandings in relation to the content of transnational public policy in some academic circles.²⁴

Scope of the study

- 0.10. The thesis explores the content of transnational public policy. Although tribunals must indeed consider national²⁵ and regional public policy, these levels of public policy are not dealt with unless they interact with their transnational counterpart.

²² See P. Lagarde, “Public Policy”, *International Encyclopedia of Comparative Law* (J. C. B. Mohr and Martinus Nijhoff Publishers 1994), at p. 48. It is true that a national judge may, on occasion, recognise the effects of a foreign public policy, particularly where the public policy of the forum is unaffected. Consider, e.g., the English Court of Appeal in *Soleimany v Soleimany* (1999) 3 All ER 847. Yet the ratio of such cases is tied to international comity rather than transnational public policy.

²³ *Fouchard Gaillard Goldman*, at p. 583.

²⁴ A. Okekeifere, for instance, sees transnational public policy as a creation of industrialised nations to impose western legal concepts “by the backdoor.” According to the author, “it can hardly be shown to Third World countries for instance which of the principles that purportedly constitute the transnational public policy is of Third World nativity.” See A. Okekeifere, “The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria”, 14(3) *J Int'l Arb* 223 (1997) at p. 224. See however the section on the sources of transnational public policy in Chapter 2 below. The author adds: “The so-called transnational public policy for instance will be a restatement of the controversial principles like *pacta sunt servanda* and deny poor Third World States, whose only measure of sovereignty is in the control of their natural resources, the right to make fair rules about the adjudication of disputes arising in connection with the exploitation of such resources.” See A. Okekeifere, *ibid*, at p. 224. Yet an analysis of recent arbitral decisions reveals that transnational public policy protects both State sovereignty over national resources and the responsibility of States for the expropriation of those resources. On this point see Chapter 5, Rule S2.

²⁵ For an extensive discussion on the applicability of national public policy in arbitration see I. Derains, “Public Policy and the Law Applicable to the Dispute in International Arbitration,” *ICCA Congress series no 3*, at p. 227 – 256. See also A. Sheppard, “Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards”, 19(2) *Arb Int* 217 - 248 (2003) at p. 243 and L. Ebb, “Reflections on the Indian Enforcement of the GE/Renusagar Award,” 10(2) *Arb Int* 141 - 162 (1994) at p. 142.

- 0.11. Where a specific area of the law is explored, the thesis explores the transnational public policy standards relevant to international trade arbitration. Other rules of transnational public policy, such as those dealing with family or criminal law, are not addressed.
- 0.12. The thesis focuses on transnational public policy standards applied in institutional and *ad hoc* arbitration awards from the beginning of the 20th Century to August 2006. It does not examine court decisions except where they demonstrate the recognition of transnational public policy by national courts or corroborate its application in arbitration proceedings.
- 0.13. Where appropriate, the thesis identifies whether a transnational public policy rule belongs to investment and commercial arbitration. A treaty cause of action is distinguishable from a contractual cause of action²⁶ and a different standard may be relevant to investment arbitration tribunals.
- 0.14. Finally, emphasis is given to the static or structural content of transnational public policy. No attempt is made to suggest an exhaustive formula for the application of public policy principles by international tribunals.

Literature Review

- 0.15. There is a consensual perception in the available literature that there is a need to examine the meaning and content of transnational public policy, in light of the “changing relationship between the law of nations and municipal law in the sphere of international economic relations.”²⁷
- 0.16. The notion of transnational public policy has been addressed, with varying degrees of analysis and depth, in a number of monographs, articles and conference reports on public policy in international arbitration. The subject became a focus of interest following the article by Lalive, which

²⁶ As it requires a showing of conduct contrary to the relevant treaty.

²⁷ See Pierre Lalive, “Transnational (or Truly International) Public Policy and International Arbitration”, in ICCA Congress series - no. 3 pp. 258-318 (Kluwer 1986), at p. 309.

explores and compares the application of transnational public policy in national courts and international tribunals.²⁸

0.17. For Lalive transnational public policy comes into play as a corrective mechanism and a necessary component of the body of rules which the tribunal is called upon to apply and produce.²⁹ Transnational public policy is seen as a method to determine and uphold essential principles, close to that applied to the *lex mercatoria* and other transnational rules.³⁰

0.18. The author concludes that the operation of national and transnational public policy does not vary in essence. Whilst the public policy of a state safeguards the fundamental interests of a nation, transnational public policy protects the vital interests of the international community. The conditions for the application of transnational public policy are analogous to the public policy of national courts, with the exception that the factual situation does not have to be sufficiently connected with a national legal system.³¹ The condition of “sufficient” connection is always fulfilled as long as the interests of international trade are involved.

0.19. Racine dedicates a chapter in his book *L'Arbitrage Commercial International et L'Ordre Public - Ordre Public et Justice Arbitral*³² to the notion of transnational public policy. The author begins by distinguishing the positive and negative functions of transnational public policy.³³ For Racine

²⁸ The author notes that “in the whole field, in full expansion, of commercial international arbitration, few subjects are more vague, more difficult to seize and more controversial than that of the existence, contents and function of a public policy which would be “really” or “truly” international (...).” See Pierre Lalive, “Transnational (or Truly International) Public Policy and International Arbitration”, in ICCA Congress series - no. 3 pp. 258-318 (Kluwer 1986), at p. 259.

²⁹ P. Lalive, *ibid*, p.312, at para. 186(3).

³⁰ See Pierre Lalive, “Transnational (or Truly International) Public Policy”, in P. Sanders (ed.), *ICCA Congress Series no. 3 – Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law and Taxation Publishers, 1987), p. 288, at paras. 103 and 104 *et seq.* We will return to this point in further detail in Chapter 2 below.

³¹ Since arbitration proceedings take place in a neutral forum. See Pierre Lalive, “Transnational (or Truly International) Public Policy”, in P. Sanders (ed.), *ICCA Congress Series no. 3 – Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law and Taxation Publishers, 1987), p. 313, at para. 108(5).

³² LGDJ, 1999.

³³ Racine, *L'Arbitrage Commercial International et L'Ordre Public* (LGDJ, 1999), p.419, at para. 751. With regard to the role of general principles, see also, e.g., Ronald Bernstein, John

the negative function of transnational public policy results in the ousting of a law otherwise applicable and is triggered by the international character of the dispute.³⁴ In its negative function transnational public policy acts as a “constitution of world trade.”³⁵ The operation of negative transnational public policy is close to the control of constitutionality within the national legal system.³⁶

0.20. In turn, the positive function of transnational public policy operates in the same manner as a mandatory rule.³⁷ Based on the conceptualisation of M. Bareau, Racine notes that general principles of law are applied at the moment of determination of conflict rules.³⁸ It follows that, since the arbitrator has to determine the applicable law, he or she can also apply the principles of transnational public policy.³⁹

0.21. Lew, Mistelis and Kroll distinguish national, regional, international or transnational public policy.⁴⁰ According to the authors, arbitration tribunals apply public policy standards such as the prohibition of bribery, smuggling, assembling a mercenary army, slavery or underage labour, supplying weapons to a terrorist organization or the trade in illicit drugs even though the parties have chosen a law which would otherwise validate the contract. The authors point out that transnational public policy may also be relevant to national courts considering a challenge to an award.⁴¹

0.22. Fouchard Gaillard and Goldman distinguish transnational public policy from the method applied to national mandatory rules.⁴² For the authors, the

Tackaberry, Arthur L. Marriott and Derek Wood (eds.), *Handbook of Arbitration Practice*, (3rd edition, Sweet & Maxwell, London 1997), at p. 363

³⁴ Racine, *ibid*, p. 421, at para. 756 writes: “L’unique condition de mise en oeuvre de l’ordre public transnational est donc l’internationalité de la relation litigieuse”. (author’s translation: *The sole condition for the operation of transnational public policy is therefore the internationality of the dispute*).

³⁵ Author’s translation. See Racine, *ibid*, p. 423.

³⁶ Racine, *ibid*, p.422, at para. 729.

³⁷ Racine, *L’Arbitrage Commercial International et L’Ordre Public* (LGDJ, 1999), p. 425, at para. 767.

³⁸ Racine defends the application of general principles of law when determining conflict rules. See Racine, *L’Arbitrage Commercial International et L’Ordre Public* (LGDJ, 1999), para 763.

³⁹ Racine, *ibid*, p. 424, at para. 763.

⁴⁰ See Lew Mistelis Kroll, at p. 422, paras 17-33 *et seq.*

⁴¹ Lew Mistelis Kroll, at p. 676, para 25-40.

⁴² See Fouchard Gaillard Goldman, at pp. 852 *et seq.*

tribunal's reliance on mandatory rules requires two steps. The arbitrators first identify the essential policies of the applicable law. Then determine the connection between that law and the facts of the case and the consequences of its application or non application.

0.23. The authors note that the application of national mandatory rules may at times lead to inconsistent or inequitable results. The example given is the measure taken by Iraq in response to the freezing by foreign countries of assets belonging to Iraqi nationals.⁴³ Such mandatory measures are in conflict with the laws to which they respond but mandatory in the country from which they originate. The mandatory rules theory provides no guidance, other than functional criteria, to decide whether or not to apply such rules to a particular case. The theory inevitably reintroduces moral considerations, leaving room for subjective considerations by the arbitrators.

0.24. For the authors, transnational public policy is based on a different philosophy. Under the transnational public policy theory international arbitrators "decide on the basis of values very widely accepted by the international community, and not according to their own discretion as to whether it would be appropriate to give effect to a particular national policy."⁴⁴ The fact that apartheid, drug trafficking or corruption are condemned by most countries in the international community provides sufficient justification for the exclusion, through the application of international public policy,⁴⁵ of any contrary provisions of the *lex contractus*.

0.25. The authors note also that the international mandatory rules method is itself tempered by more global considerations. The example given is Article 9 of the 1991 Resolution of the Institute of International Law, concerning the autonomy of the parties in international contracts between private persons or entities, which provides that:

⁴³ Referring to Iraqi Law No. 57 of September 16, 1990 on Protection of Iraqi properties, interests and rights inside and outside Iraq, 5 INT'L ARB. REP. C1 (Dec. 1990).

⁴⁴ *Fouchard Gaillard Goldman*, at p. 853.

⁴⁵ The authors use the term 'international public policy' and 'transnational public policy' interchangeably.

If regard is to be had to mandatory provisions ... of a law other than that of the forum or that chosen by the parties, then such provisions can only prevent the chosen law from being applied if there is a close link between the contract and the country of that law and if they further such aims as are generally accepted by the international community.

0.26. For the authors, the need to sustain universal values must be the tribunals' first approach to international legality. Having no forum, arbitrators draw the legitimacy of their decisions from the broad recognition of the rules they apply. A decision based on transnational public policy, rather than mandatory rules, is more consistent with the transnational source of the arbitrators' decision-making powers. The tribunal should justify the application of mandatory rules other than that of the *lex contractus* on the basis of international public policy or run the risk that the award will be set aside in certain jurisdictions.⁴⁶ The authors conclude that where the goal is to defeat conduct widely viewed as unacceptable (such as apartheid, drug trafficking, corruption or even antitrust violations), the best approach is to avoid the concept of mandatory rules altogether and rely on genuinely international public policy.

0.27. Similarly, Blessing sees transnational public policy as one criterion for the application of mandatory rules. For the author the notion is based on a "shared-values test." The arbitrator should only apply a national mandatory rule where it corresponds to transnational public policy.⁴⁷

0.28. Cordero Moss analyses the relationship between public policy and mandatory rules in the decisions of national courts dealing with international awards.⁴⁸ The author notes that public policy is construed very narrowly by the courts and inspired by general principles, rather than the rules of positive

⁴⁶ Namely Switzerland, where the public policy applicable to international arbitration is expressly identified with transnational public policy.

⁴⁷ Blessing, M., "Choice of substantive law in international arbitration", 14(2) *J Int'l Arb* 39 - 66 (1997) at p. 61.

⁴⁸ See G. Cordero Moss, *Lectures on International Commercial Law*, 162 Publication Series of the Institute of Private Law, University of Oslo (2003); G. Cordero Moss, "International Commercial Arbitration. Party Autonomy and Mandatory Rules", 68(3) *Nordic J Int'l Law* 375 - 377 (1999).

national legislation. As what is fundamental may vary from State to State, there can be no absolute rule to determine public policy.⁴⁹

0.29. For Cordero Moss, the concept of international public policy refers to those principles in a legal system that are so fundamental as to be upheld even if the context of the dispute is international or regardless of a link between the dispute and the forum.

0.30. The concept of international *ordre public* does not differ from the restrictive concept of public policy based on principles rather than national mandatory rules. The adjective 'international' merely means that when applying public policy the judge excludes the positive function of public policy, that is, the application of local mandatory rules. Thus, 'international public policy' is a synonym of negative public policy.

0.31. According to the author the concept of 'truly international' public policy should be distinguished from international public policy by its sources. When applying 'truly international' public policy the judge refers to principles considered fundamental in a plurality of legal systems.

0.32. Although Cordero Moss recognises the importance of 'truly international' public policy to arbitration tribunals, the author questions the usefulness of the concept to national courts. A national legal system, the argument runs, should not be expected to disregard its own fundamental principles in the name of an ideal of harmonisation in international commerce.⁵⁰

0.33. Other authors have remarked however that national laws may contribute to the content of transnational public policy. As proposed by Berger, "applying the restrictive notion of international public policy may well induce domestic courts to use a comparative approach in determining the contents of the *ordre public international* of their legal system and look to other jurisdictions for guidance which may in the long run help to develop a truly

⁴⁹ Impliedly, the author was referring to the national level of public policy.

⁵⁰ The view that transnational public policy leads national courts to disregard their own law is analysed in further detail in Chapter 2 below.

international ordre public by the domestic international public policy ‘feeding’ its transnational counterpart.”⁵¹

0.34. Seraglini examines the application of mandatory rules or *lois de police* by international arbitrators.⁵² The author defends that arbitrators have a duty to observe national *lois de police*. According to the author, the relevant *lois de police* to be observed by the tribunal are determined in accordance with a widely accepted view in the international community of states, the objectives of those rules and the consequences of their application.⁵³

0.35. Redfern, Hunter, Blackaby and Partasides note that while the distinction between domestic, international and ‘transnational or truly international’ is indeed helpful and well established, the precise definitions remain to be widely accepted.⁵⁴

0.36. In turn, Mantilla-Serrano focuses his inquiry on the procedural category of transnational public policy.⁵⁵ The author begins by pointing out that the term ‘transnational,’ meaning ‘beyond’ nations, is distinct from the term ‘international,’ ‘among’ or ‘between’ nations. The author remarks that since there is no authoritative definition of the term transnational, the meaning that appears obvious in the context of procedural public policy is that of consensus.

0.37. For the author, the existence of a procedural transnational public policy stems out of the need felt in most national legal systems to uphold fundamental procedural rules. Procedural transnational public policy has its sources in the procedural rules of the major international arbitration organizations, the domestic international arbitration laws of the countries most often serving as the seat of arbitration, and the New York Convention of 1958.⁵⁶ Mantilla-Serrano compares the New York Convention, the UNICITRAL Model Law, domestic arbitration laws and judicial decisions to

⁵¹ See K. Peter Berger, *International Economic Arbitration* (Kluwer Law and Taxation Publishers 1993) at p. 675.

⁵² See C. Seraglini, *Lois de police et justice arbitrale internationale* (Dalloz 2001).

⁵³ C. Seraglini, *ibid*, at p. 352.

⁵⁴ See A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004), at para 9-33.

⁵⁵ See F. Mantilla-Serrano, “Towards a Transnational Procedural Public Policy,” 24(1) *Arb Int* 333 – 353 (2004).

⁵⁶ See F. Mantilla-Serrano, *ibid*, 24(1) *Arb Int* 333 – 353 (2004), at p. 337.

conclude that the right to equal treatment⁵⁷ and the duty to give parties an opportunity to present their case have been elevated to the level of transnational public policy.

0.38. H. Arfazadeh dedicates his monograph⁵⁸ on public policy to the principles of public policy imposed on arbitration tribunals and national judges in international commerce. The author analyses the national sources of procedural public policy which may limit the decision making powers of arbitration tribunals and the limits imposed on their jurisdiction.

0.39. Hunter and Conde e Silva address the notion and content of transnational public policy in investment arbitration.⁵⁹ The authors note that the concept of transnational public policy is narrower in scope but more uniform than the international public policy of a nation.

0.40. The distinction between transnational and 'domestic-international' public policy is based on the individual approach to international law.⁶⁰ Most investment arbitration,⁶¹ the argument runs, arise under the dispute resolution and substantive provisions of international treaties, not out of a direct contractual relationship between an investor and the host State. This influences the position of the arbitrators, who cannot ignore the fundamental interests protected by international law. In investment arbitration transnational public policy is consequently analogous to public policy in international law.

0.41. In investment arbitration issues of public policy typically arise with regard to subjective non-arbitrability (or incapacity of the State to arbitrate), absence of special powers by the signatory of an arbitration agreement,⁶² the

⁵⁷ For the author the principle of equality would be expressed, *e.g.*, in the right to appoint an arbitrator or the prohibition of *ex parte* communications.

⁵⁸ H. Arfazadeh, *Ordre public et arbitrage international à l'épreuve de la mondialisation - Une théorie critique des sources du droit des relations transnationales* (Schulthess 2005).

⁵⁹ See M. Hunter and G. Conde-e-Silva, "Transnational Public Policy and its Application in Investment Arbitrations", 4(3) *JWI* 367 – 378 (2003).

⁶⁰ *Ibid*, at p. 317.

⁶¹ But not all. See, *e.g.*, ICC arbitration *SPP v Egypt*, *Yearbook Commercial Arbitration*, vol. XIX, 1994, p. 51 *et seq.*

⁶² See ICC arbitration award No. 3896, *Framatome-Atomic Energy Organization of Iran*, *Clunet* 1983, 914, note S. JARVIN, X *YBCA* 47 (1985).

unilateral rescission of an arbitration agreement,⁶³ immunity from jurisdiction, restrictive interpretations of State contracts,⁶⁴ expropriation,⁶⁵ bribery, fraud, contracts in violation of a UN resolutions or embargo, protection of the environment, tax law, and exchange control regulation.

0.42. For the authors, the sources of transnational public policy include the fundamental principles of natural law, universal justice, *Jus Cogens*, the general principles of morality accepted by civilised nations⁶⁶, international custom, arbitral precedent and the spirit of international treaties.

0.43. Taking as an example the published award on liability in *S D Myers Inc. -v- The Government of Canada*⁶⁷ the authors note that international tribunals may apply transnational public policy without expressly referring to the concept.⁶⁸

0.44. The authors then discuss several examples of the application of transnational public policy by investment tribunals, including the notion of State responsibility,⁶⁹ expropriation,⁷⁰ compensation for unlawful interference

⁶³ See the *Losinger* case PCII Series A-B, Fasc., No. 67 and 69; Series C, Fasc. No. 78; and *Topco Calasiatic v. Libyan Government*, cited below, note 19.

⁶⁴ See, e.g., ICSID award *Amco Asia Corporation et al. v Indonesia*, ILM XXIII, 1984, p. 351 (jurisdiction); XXIV, 1985, p. 1022 (merits).

⁶⁵ See the *Topco-Calasiatic* case, Clunet 1977, 350, 374 No. 79 and 379 Nos. 87-88; and *Aminoil-Kuwait* case; *Liamco* ILM XX, 1981, pp. 1-87, 120-121; *Aminoil*, Clunet, 1982, 869, 900 No. 143.

– ⁶⁶ As provided by Article 38 of the Statute of the International Court of Justice. See also *Fedax N.V. v Republic of Venezuela*, Decision of 11 July 1997 on Objections to Jurisdiction and Award of 9 March 1998 in case no. ARB/96/3, 37 ILM, 1998, p. 1378-1398, where the ICSID tribunal decided in accordance with general principles of law which, along with the relevant BIT, provided the basis for the decision on jurisdiction and the award on the merits. In *Company Z and others (Republic of Xanadu) v State Organization ABC (Republic of Utopia)*, Award of April 1982, *Yearbook Commercial Arbitration* Vol VIII, 1983, p. 94 and *Amco Asia Corp. v Indonesia*, ICSID Arbitral Award on Jurisdiction of September 25 1983, 23 International Legal Materials 1984, p. 351-383 the arbitral tribunal decided in accordance with the principles of good faith. Also, in *Indonesia v Amco Asia Corp.*, annulment decision of 16 May 1986, the principle of *pacta sunt servanda* dictated the outcome of the award.

⁶⁷ The awards in this case can be found on, *inter alia*, www.appletonlaw.com, www.dfait-maeci.gc.ca, and www.naftalaw.org.

⁶⁸ See M. Hunter and G. Conde-e-Silva, "Transnational Public Policy and its Application in Investment Arbitrations", 4(3) *JWI* 367 – 378 (2003) at p. 371.

⁶⁹ Based on ICSID Case No ARB/97/3, Award of 21 November 2000, *Compañía de Aguas v Argentina*, 40 ILM 457-473 (2001); ICSID Case No ARB(AF)/97/1, *Metalclad v Mexico*, Award of 30 August 2000 in, 16(1) ICSID Rev-FILJ 165-202 (2001); *SPP (Middle East) Ltd v Egypt*, award of 20 May 1992 in ICSID Case No ARB/84/3, 32 ILM 933-1038 (1993); ICSID Case No ARB/87/3, Final Award of 27 June 1990, *Asian Agricultural Products Ltd v Republic of Sri Lanka*, 30 ILM 580-627 (1991); ICSID Case No. ARB/93/1, Award of 21 February

with contractual rights,⁷¹ corruption on the part of a member of the tribunal and serious departure from a fundamental rule of procedure. Examples of the operation of transnational public policy with regard to the latter are found in the principle in *Goetz v. Burundi*,⁷² the care devoted to the proper administration of justice,⁷³ and rules concerning the burden of proof.⁷⁴

0.45. V. Shaleva finds that the concept of international public policy has been confined to the idea of 'truly international' or 'transnational' public policy.⁷⁵ For the author, the latter reflects the existence of universal standards or accepted norms of conduct common to the international community.⁷⁶ Truly international public policy reflects an abhorrence to slavery, racial, religious and sexual discrimination, kidnapping, murder, piracy, terrorism, fundamental human rights (as declared in the UN Universal Declaration of Human Rights) and the basic standards of honesty and bona fides.

0.46. According to O. Chukwumerije, regardless of the law chosen by the parties, international arbitration tribunals have to respect *ius cogens* and other principles of transnational public policy. The author notes that the limitations placed on party autonomy by transnational public policy are very limited as its principles extend only to issues such as racial discrimination or genocide.⁷⁷

1997, *American Manufacturing & Trading, Inc v Zaire*, 12(4) Int'l Arb Rep A-1 - A-20 (1997).

⁷⁰ The example given is ICSID Case No. ARB/96/1, Award of 17 February 2000, *Compañía del Desarrollo v Costa Rica*, 15(1) ICSID Rev-FILJ (1999), award at p. 169-204, decision on rectification at pp. 206-210; 39 ILM 1317-1337 (2000).

⁷¹ As in, e.g., ICSID Case No. ARB/81/8, Award of 5 June 1990, *Amco Asia Corp v Indonesia*, XVII YBCA 73 - 105 (1992); ICSID, Award of August 8 1980, *Benvenuti & Bonfant v Congo*, XXI ILM 740-766 (1982).

⁷² According to which tribunals are not confined to the material submitted by the parties. See ICSID Case No ARB/95/3, Award of 10 February 1999, *Goetz v Burundi*, 15(2) ICSID Review-FILJ 457-527 (2000).

⁷³ As seen in *Jamahiriya Libyan Arab Republic v United States of America*, http://www.icj-cij.org/icjwww/idocket/ilus/ilusjudgment/ilus_ijudgment_980227_frame.htm, at paras. 37 and 42.

⁷⁴ Demonstrated by ICSID Case No ARB/87/3, Final Award of 27 June 1990, *Asian Agricultural Products Ltd v Republic of Sri Lanka*, 30 ILM 580-627 (1991) and ICJ case law.

⁷⁵ See V. Shaleva, "The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia", 19(1) *Arb Int* 67 - 94 (2003).

⁷⁶ Shaleva cites the article by P. Lalive, "Transnational (or truly international) public policy", *ICCA Congress series no 3*, at p. 266.

⁷⁷ See O. Chukwumerije, "International Law and Article 42 of the ICSID Convention", *J Int'l Arb* 14(3) 79 - 102 (1997) at fn 20.

- 0.47. In the interim Report of the International Law Association, the concept of transnational or 'truly international' public policy is understood as having a more restrictive scope than international public policy, "but of universal application, comprising fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as 'civilized nations'."⁷⁸
- 0.48. The report points out that, although the national courts apply a concept of international public policy generally regarded as more restrictive than domestic public policy, none of the international conventions relating to the enforcement of arbitral awards, nor the UNCITRAL Model Law, makes express reference to international or transnational public policy.
- 0.49. As pointed out by the Rapporteurs, the Committee on International Commercial Arbitration of the International Law Association had initially envisaged the promotion, in its 'Recommendations on Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards,' of a notion of transnational public policy transcending national characteristics.⁷⁹ Yet the option was finally abandoned as the very notion of transnational public policy gave rise to hesitations, in particular regarding whether it constitutes the core of a true world legal order or the principles common to State legal systems. The Commission found difficulty in articulating a sufficiently solid corpus of principles upon which a consensus could be found.
- 0.50. Consequently, the task was left to the national courts. Art. 2(b) of the Recommendations encourages judges to take into account the "existence or otherwise of a consensus within the international community as regards the

⁷⁸ See Sheppard, A., "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", 19(2) *Arb Int* 217 - 248 (2003), at p. 220.

⁷⁹ See P. Mayer, "Recommendations of the International Law Association on Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards: Presentation", XXIX *YBCA* 339 - 345 (2004)

principle under consideration. When said consensus exists, the term 'transnational public policy' may be used to describe such norms".⁸⁰

0.51. Miller, while acknowledging the transnational level of public policy, notes that the conception of public policy is dependent upon the judgment of the court and that the fundamental concepts of law or public philosophy in one state do not always transcend all national boundaries.⁸¹

0.52. Yet, as noted by Lew in 2006,

The doctrine of international public policy could provide national courts with the opportunity to avoid and refuse enforcement on grounds that reflect parochial and national interests. However, increasingly, international public policy is interpreted from a non-national, a-national or transnational standard, reflecting the autonomous character of arbitration.⁸²

0.53. According to Blessing, the supplementary or corrective transnational public policy comes into play where international arbitrators find themselves in a position where they cannot apply the particular provisions of a *lex contractus* or pertaining to an applicable public law.

0.54. For the author, transnational public policy is connected to two trends in international law. The examples given are the conclusion of important projects in developing countries, with the uncertainties and surprises as to the content of the local law, and the fact that such contracts are concluded with States or state-controlled entities or organizations which seek the application of the State's domestic law as the *lex contractus*. Transnational public policy becomes relevant where the state attempts to release itself or its nationals by amending domestic laws, by proclaiming a new law, or by issuing a general or

⁸⁰ See P. Mayer, "Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", 19(2) *Arb Int'l* 249 – 263 (2003).

⁸¹ See D. Miller, "Public Policy in International Commercial Arbitration in Australia", 9(2) *Arb Int* 167 - 196 (1993) at p. 177.

⁸² J. Lew, "Achieving the Dream: Autonomous Arbitration," 22(2) *Arb Int* 179 - 203 (2006) at p. 201.

individual governmental directive. Tribunals then apply the appropriate sanction by declining to take into account self-proclaimed public or private laws, mandatory rule of laws or governmental directives.⁸³

0.55. In turn, Mourre examines the contributions of criminal law to the content of transnational public policy⁸⁴ in the fields of international corruption,⁸⁵ money laundering, smuggling, piracy, embargo measures, the prohibition of drugs or human organs trafficking, as well as many other internationally recognised crimes. For the author, the application of transnational public policy is based on self-regulation and the need to prevent international arbitration from becoming a safe harbour for illegality or a tool for fraud, which would lead to its rejection by states as the normal way of resolving international business disputes.⁸⁶

0.56. The author notes that annulments and refusals of enforcement on grounds of national public policy are now rare exceptions. Given the apparent contradiction between the control of public policy and the prohibition of the review of the merits, the argument runs, the national public policy at the stage of enforcement must be replaced by transnational public policy.⁸⁷

0.57. Baron and Liniger criticise the view that the arbitrators must rigorously comply with the parties' will and ignore the principles of transnational public policy.⁸⁸ For the authors, an international arbitrator is not merely the

⁸³ See M. Blessing, "The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism", 5(2) *J Int'l Arb* 9 – 82 (1999) at p. 57.

⁸⁴ See A. Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator", 22(1) *Arb Int* 95 – 118 (2006).

⁸⁵ As illustrated by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 December 1997; the 1996 OECD Recommendation on Tax Deductibility of Bribes to Foreign Public Officials; the Criminal Law Convention on Corruption signed in Strasbourg, 27 January 1999; the Civil Law Convention on Corruption signed in Strasbourg, 4 November 1999; the UN Economic and Social Council 1979 Draft Convention to prevent and eliminate illicit payments in international business transactions; the 1996 Inter-American Convention against Corruption; the 1997 Convention against Corruption involving Officials of the European Communities or Officials of Member States of the European Union and the 2003 African Union Convention on Preventing and Combating Corruption.

⁸⁶ See A. Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator", 22(1) *Arb Int* 95 – 118 (2006) at p. 115.

⁸⁷ See A. Mourre, L. di Brozolo, "Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back", 23(2) *J Int'l Arb* 171 – 188 (2006) at fn 62.

⁸⁸ See P. Baron, S. Liniger, "A Second Look at Arbitrability," 19(1) *Arb Int* 27 – 54 (2003) at p. 52.

'obedient servant' of the parties, and must take into account other interests when rendering the award. As the arbitrators cannot be placed on an equal footing with a state judge, who is the 'guardian' of the interests of a particular state, they must take notions into consideration that belong to a transnational *ordre public*.

Methodology

- 0.58. There is a consensual view in the existing literature that transnational public policy must be upheld regardless of a contract or national law. The authors reveal however that there may be more than one approach to the notion and content of transnational public policy.
- 0.59. Should transnational public policy be understood as a set of values or a method to determine those values, or both? Is the content of transnational public policy based on a common denominator in national laws or the autonomous standards of an emerging legal order? In order to answer these questions and clarify the use of terminology in this area⁸⁹ it is necessary to understand the meaning, purpose and content of transnational public policy.
- 0.60. A quantitative approach based on a comparison of judicial decisions in different countries⁹⁰ would confine the content of transnational public policy to "a relationship between independent and dependent variables"⁹¹ and is inadequate to address the questions raised. The method is hindered by a relative scarcity of judicial decisions on the topic, explained by the fact that issues of transnational public policy appear first and foremost before the international tribunal,⁹² and the effects of the public policy in the national courts. Whereas for a national judge public policy is confined by the interests

⁸⁹ As noted in the 6th IBA International Arbitration Day, held in Sydney on 13-14 February 2003 on the topic "International Commercial Arbitration and Globalisation" at http://www.ibanet.org/ConferencePDFs/program/3291_sydney%202003.pdf

⁹⁰ As suggested, e.g., by recommendation 1(g) of the Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 19(2) *Arb Int* 249 - 263 (2003) at p.257.

⁹¹ D. Nachmias and C. Nachmias, *Research Methods* (Edward Arnold Publishers 1976), at p. 23.

⁹² The reluctance of national courts to interfere with the decisions of international tribunals provides fertile soil for the development of transnational rules.

of the forum, transnational public policy is tied to the interests of a wider international community. Since national courts observe their own public policy, it is difficult to determine with precision whether the standard applied may be de-localised.

0.61. The quantitative approach is further made superfluous by the fact that the consensus surrounding transnational public policy need not be universal. The search for an absolute acquiescence is impractical and may exclude legitimate notions of public policy. The method, if followed strictly, would produce inconsistent results allowing, *e.g.*, rogue states to determine the content of the public policy of the international community. A comparison of national decisions may demonstrate a consensus amongst certain national laws⁹³ but not necessarily the public policy of the international community.⁹⁴

0.62. That encourages primarily the use of qualitative methods⁹⁵ with focus on a direct approach. Emphasis is given to the collection of data and teleological analysis of the primary sources of transnational public policy.⁹⁶ The analysis of arbitral awards, international instruments and other sources provide ample clues as to the manner transnational public policy can be ascertained and applied. Scholarly writings offer the doctrinal framework necessary to understand those sources.

0.63. Even though the term 'transnational public policy' is seldom used in awards and international instruments,⁹⁷ a closer analysis shows that standards with the functions and characteristics of transnational public policy⁹⁸ have

⁹³ The comparative method may have other roles in the transnational public policy theory. It may be useful, for instance, to analyze the meaning of specific standards in national laws and distinguish similar standards in transnational law.

⁹⁴ Including those of nations, international organizations, individuals and corporations.

⁹⁵ This conclusion agrees with Morse's classification. See J. Morse, "Approaches to qualitative-quantitative methodological triangulation," 40(1) *Nursing Research* 120-123 (1991) at p. 120. See further, *e.g.*, J. Holland and J. Webb, *Learning Legal Rules* (3rd ed., Blackstone Press 1996) and D. Stott, *Legal Research* (Cavendish Publishing Ltd 1993).

⁹⁶ For a discussion of the sources of transnational public policy see Chapter 2 below.

⁹⁷ Often the goals of transnational public policy are laid down in the preamble and main provisions of international treaties and other instruments developed by organisations such as the UN, the International Bar Association or the International Chamber of Commerce.

⁹⁸ For the functions and characteristics of transnational public policy see below Chapter 2.

been observed.⁹⁹ The same approach has been adopted with regard to national public policy. As noted by the Delhi High Court, a principle of public policy may “at times be implied in the provisions and procedure prescribed by law.”¹⁰⁰

- 0.64. On a final note, it should be remarked, as J Donaldson did in *Deutsche Schachtbau*, that “considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution.”¹⁰¹ This is especially warranted with regard to transnational public policy. An attempt to establish criteria for the determination of a standard risks being influenced by the background of the observer and a natural tendency to endorse the fundamental yardsticks of particular national cultures.¹⁰² The present study must be undertaken with consideration for those inherent pitfalls.

Synopsis of the chapters

Part I - Theoretical considerations

- 0.65. Part one of the thesis examines the theoretical and legal framework surrounding the notion of transnational public policy. It prepares the ground for exploring the manner and extent principles of public policy have been expounded by international tribunals.

Chapter 1

- 0.66. The thesis addresses here the notion of public policy. The chapter begins by shedding light on the nature of public policy and its role within the

⁹⁹ As seen throughout this thesis, transnational public policy is, as the *lex mercatoria*, not always invoked by name. See D. Rivkin, “Enforceability of Arbitral Awards Based on Lex Mercatoria”, 9 *Arb Int* 67 (1993) at p. 68.

¹⁰⁰ See India, Delhi High Court, 19 February 1999, *Fuerst Day Lawson Ltd v Jindal Exports Ltd*, (1999) 1 *Arb Law Rep*, 571-589, (1999) XXIVa YBCA 688 – 695, at p. 693, referring to the principles of natural justice.

¹⁰¹ UK, *Deutsche Schachtbau und Tiefbohr-Gesellschaft mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295.

¹⁰² This point is underlined by H. Holtzmann *et al*, “Hypothetical Case for Use in a Comparative Study of Arbitration Practice in Various Legal Systems”, *ICCA Congress series No 3*, at pp. 19-152; See also P. Griffin, “Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings”, 17(2) *J Int Arb* 19-30 (2000) at p. 19-21.

applicable law. That is followed by an analysis of the different levels of public policy, distinguished by their domestic, domestic-international or regional origin and scope.

Chapter 2

- 0.67. Chapter 2 explores the concept of transnational public policy and examines the method to determine transnational public policy, preparing the ground for the practical application of the hypothesis. The chapter identifies the sources of transnational public policy and concludes with a synopsis of the conclusions reached in Part I of the thesis.

Part II - Practical application of the thesis

- 0.68. Part two sheds light on the different categories of transnational public policy and their principles and rules.

Chapter 3

- 0.69. Whilst the preceding chapters dealt with the origins, concept and methodology leading to the determination of transnational public policy, chapter 3 explores the maxims relevant to the jurisdiction of international arbitration tribunals.
- 0.70. It shows that international tribunals have relied on transnational public policy to determine their jurisdiction. The latter is influenced by general rules proper to international arbitration such as the principle of *kompetenz-kompetenz*, the prohibition of denial of justice or the *res judicata* effect of arbitration awards. Overall conclusions close the chapter.

Chapter 4

- 0.71. Chapter 4 expounds the principles of procedure belonging to transnational public policy. The thesis investigates the role of public policy in international arbitration procedure in light of established arbitration practice.

- 0.72.** Examples of procedural transnational public policy include rules of due process expounding the principle of equality between the parties, the principle of *contradiction*¹⁰³ and the international notion of procedural good faith.

Chapter 5

- 0.73.** Chapter 5 explores the substantive principles of transnational public policy. Two categories of substantive public policy standards are distinguished, illustrating the office of protection of the global market by the arbitrators and the need to guarantee fair play in international disputes.
- 0.74.** An extensive set of awards and other international sources are relied upon to demonstrate that international tribunals have raised certain substantive standards to the level of transnational public policy. It is shown that arbitrators feel bound to uphold those standards regardless of the applicable law.

Conclusion

- 0.75.** Overall conclusions close the dissertation. Through a critical analysis of arbitral awards, scholarly writings and international instruments the thesis demonstrates the recognition, method, functions and content of transnational public policy principles relevant to international arbitration tribunals.

¹⁰³ Right to be heard.

PART ONE

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THE NOTION OF TRANSNATIONAL PUBLIC POLICY

Theoretical considerations

Chapter 1

NOTION AND LEVELS OF PUBLIC POLICY

1.1. Notion and origins of public policy

1.2. Public policy and international arbitration

(i) Domestic-international public policy

(ii) Regional public policy

1.1 This chapter deals with the notion and origins of public policy and distinguishes the different levels of national public policy relevant to international arbitration.

1.1. Notion and origins of public policy

1.2 Public policy is based on the fundamental economic, legal, moral, political, religious and social standards of a state or extra-national community.¹⁰⁴ The construction of those standards differs according to the development of the community to which they appertain. For this reason, it has been said that the content of public policy can never be exhaustively defined.¹⁰⁵

¹⁰⁴ See Lew, Mistelis, Kröll, at p. 422, para 17-32; J. Lew, *Applicable Law*, at p. 532; J. Enterria, "The role of Public Policy in International Commercial Arbitration", 21 *L & Pol'y Int'l Business* 389 (1989-90); S. Perloff, "The Ties That Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration", 13 *U Pa J Int'l Bus L* 323 (1992-3); M. Buchanan, "Public Policy and International Commercial Arbitration", 26 *Am Bus L J* 514 (1988).

¹⁰⁵ England, *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v R'as Al Khaimah National Oil Co (UAE) and Shell International Co Ltd (UK)* [1987] 2 Lloyd's Rep 246, [1987] 2 All ER 769, (1988) XIII YBCA 522, at pp. 534 – 535. Consider also the cautious approach of the courts in e.g., Italy, Corte di Appello di Venezia, decision of 21 May 1976, III YBCA 277 (1978); Luxembourg, Cour Supérieure de Justice, *Kersa Holding Company Luxembourg v Infancourtage and Famajuk Invesment and Isny*, XXI YBCA 617 (1996) at p. 625; France, Cour d'appel de Paris, 27 October 1994, *LTDC v Sté Reynolds*, 4 *Rev Arb* 709 - 713 (1994) at p. 709; US, *Ledee v Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir 1982); *National Oil Corp v Libyan Sun Oil Co.*, 733 F Supp 800, 819 (D Del 1990); Canada, *Schreter v Gasmac Inc.* (1992), 7 OR (3d) 608, 89 DLR (4th) 365.

1.3 Public policy has a negative and a positive function within the applicable law.¹⁰⁶ Negative public policy is expressed in three different ways. First, it affects the legal relationship between the parties. In every legal system a contract contrary to public policy is null and void.¹⁰⁷ Second, it purges any legal provision leading to an undesirable, unpredictable or inconsistent result.¹⁰⁸ Third, it ousts the effects of a contravening arbitration award or judicial decision.

1.4 The positive function of public policy imposes essential standards on the legal relationship.¹⁰⁹ Arbitrators give effect to positive public policy by applying mandatory rules.¹¹⁰ The operation of positive public policy does not require an offensive contract or chosen law. Rather, it is directly applicable.

¹⁰⁶ The positive and negative functions of public policy draw from the *a priori* and *a posteriori* conceptions of public policy. *A priori* public policy is based on the idea that the ability to oust foreign law is an inherent characteristic of certain rules within the legal system. Historically, this approach coincided with the tendency to maximise the application of the *lex fori* in international cases. In turn, the *a posteriori* view of public policy looks at the effects of public policy on the local legal, social and economic system. This distinction was first proposed by F. von Savigny and is analysed in detail by W. Goldschmidt, *Systema y Filosofia del Derecho International Privado* (Bosch, Barcelona 1948), Vol. I, at pp. 283 *et seq.*

¹⁰⁷ See, generally, Malaurie, *L'ordre public et le contract* (1953). The effects of negative public policy may follow the application of, *e.g.*, a statute providing for the invalidity of any contract in breach of public policy or containing provisions governing specific grounds such as incapacity or illegality.

¹⁰⁸ On the topic see G. Kegel, "The Crisis of Conflict of Laws", 112 *Recueil des Cours* 91-268 (1964).

¹⁰⁹ The conception of public policy as a positive connecting factor appeared in Italy and France in the XIX with the works of Mancini and Pillet. The positive function of public policy consists in considering that foreign law, acts or decisions are not capable of ousting the rules of the forum, rather than public policy being an exception to the application or recognition of those laws, acts and decisions. As a result of international comity this function is seldom put in motion in private international law.

¹¹⁰ "Eingriffsnormen", "lois d'application immédiate" or "lois de police." where they are a reflection of public policy. On this point see, *e.g.*, M. Blessing, "Choice of substantive law in international arbitration", 14(2) *J Int'l Arb* 39 - 66 (1997) at p. 58; V. Shaleva, "The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia", 19(1) *Arb Int* 67 - 94 (2003) at p. 72; Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, International Law Association, London Conference, 2000, available at <http://www.ila-hq.org/pdf/ComArbitration.pdf>, at p. 18; C. Brunner, "Note - Federal Supreme Court, 28 April 2000 - Public Policy as a Ground for Setting Aside International Arbitral Awards", 18(3) *ASA Bull* 566 - 581 (2000) at pp. 573 - 574. M. Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration", 14(4) *J Int'l Arb* 23 - 40 (1997) at p. 32, suggests that "a notion pertaining to a truly transnational public policy" is one of the criteria for the direct application of mandatory rules of law. For the relationship between lois de police and transnational public policy see further C. Seraglini, *Lois de police et justice arbitrale internationale* (Daloz, Nouvelle Bibliothèque des Thèses 2001).

Whereas negative public policy leaves a gap in the applicable law, positive public policy provides the solution to the case.¹¹¹

1.5 It may be argued that the discussion on the existence of a positive or negative function of public policy is purely academic. The negative function of public policy would be held redundant by its positive effects. Yet the distinction remains relevant in international arbitration. As a result of Articles II(1), III and V of the New York Convention, the jurisdiction of national courts in international arbitration cases is confined to the negative effects of public policy.¹¹²

1.6 As the principles and functions of public policy are veered towards an axiom at the heart of the legal system, the first step to understanding this notion is to go back to its origins.

1.7 The idea that certain provisions of the applicable national law should not prevail over nuclear principles of the forum was not the object of doctrinal writings until the high middle ages.¹¹³ In the XIIth century, Aldricus suggested that a judge confronted with two opposing customary laws should select the law whose application would be best and most useful¹¹⁴ in relation to the facts in dispute.¹¹⁵ This train of thought was brought into Canon law at the end of the XIIth century, where it was accepted that although the plaintiff's

¹¹¹ See J. Racine, *L'Arbitrage Commercial International et L'Ordre Public* (LGDJ, 1999), at p. 423, para 761 and p. 425, para 767.

¹¹² Otherwise the operation of public policy would amount to a decision on the merits. See, e.g., Switzerland, Tribunal Fédéral, 30 January 2002, *X SA v Y*, 20(2) ASA Bulletin 328 – 336 (2000) at p. 333: “Il faut souligner à cet égard que l'ordre public, au sens de l'Art 190 al. 2 let. e LDIP, ne constitue qu'une simple clause de réserve ou d'incompatibilité, ce qui signifie qu'il a uniquement une fonction protectrice (ordre public négatif).” See also Switzerland, Tribunal Fédéral, 16 May 1983, *Arab Republic of Egypt v Westland Helicopters Ltd*, ASA Bull 203 (1984), relying on *Société de grands travaux de Marseille c/ République populaire du Bangladesh*, ATF 102 Ia 574, where the court vacated a decision by a lower court for lack of a positive function of public policy. On the relevance of the distinction see D. Evrigenis, “Regards sur la doctrine contemporaine de droit international privé”, 2 *Multitudo Legum Ius Unum* 269 – 284 (1973) at p. 280.

¹¹³ See G. Kegel, “The Crisis of Conflict of Laws”, 112 *Recueil des Cours* 91 - 268 (1964) at p. 91.

¹¹⁴ *Quae potior et utilior videtur*.

¹¹⁵ See P. Lagarde, “Public Policy”, *International Encyclopaedia of Comparative Law* (J. C. B. Mohr and Martinus Nijhoff Publishers 1994), at p. 5.

custom should be applied as a matter of principle it should be disregarded if the defendant's was closer to the *truth*.¹¹⁶

1.8 The creation of exceptions to the application of foreign laws in medieval Europe can be explained by the growth of foreign legal relations. Guillaume de Cuneo, followed by Bartolus, Baldus and the other postglossators, classified then foreign statutes as *favourable* or *odious*. Odious statutes were denied any effect beyond the city enacting them.¹¹⁷ The classic distinction between favourable and odious statutes was subsequently abandoned for being unclear and based exclusively on political considerations. Still, for as late as the XVIth century scholars in France such as Dumoulin would suggest that the courts should not apply the law of a country with which it was at war.¹¹⁸

1.9 A more positivist approach to public policy dawned with the development of the conflict of laws system and the systemic integration of fundamental policy rules within private international law. Well into the XIX century, F. von Savigny identified a set of norms in the legal system motivated by the general interest (*publica utilitas*).¹¹⁹

1.10 According to Savigny, the higher public interest imposed that certain provisions should be deemed 'strictly mandatory.'¹²⁰ In this category, the author included provisions of the *lex fori* to protect the individual or morality and those with a strictly political or economic character. For Savigny, public policy rules could not be replaced by foreign law since they were not strictly

¹¹⁶ This conception of public policy is still far from the application of neutral conflict of laws rules. Emphasis is placed on the observation of substantive justice, centred in the direct application of axiomatic values. Perhaps for this reason it had its greatest influence on the conception of public policy in the United States, as discussed below.

¹¹⁷ H. Batiffol, *Droit International Privé* (4th, Librairie Generale de Droit et de Jurisprudence, 1967), p. 401, at para 354.

¹¹⁸ See P. Lagarde, "Public Policy", *International Encyclopaedia of Comparative Law* (J. C. B. Mohr and Martinus Nijhoff Publishers 1994), at p. 4.

¹¹⁹ See A. Pillet, *Traité pratique de droit international privé* (J. Allier/Sirey, Grenoble – Paris 1924), vol. II at p. 236 and F. Savigny, *A Treatise on the Conflict of Laws and the Limits to their Operation in Respect of Place and Time* (2nd ed., Stevens and Sons 1880); G. Sperduti, "Norme di applicazione necessaria e ordine pubblico", *RCDIPP* 469 – 490 (1976) at p. 476.

¹²⁰ It is noteworthy that Savigny never used the expression "public policy norms" but "strictly mandatory norms". On this point, see J. Aubry, "De la notion de territorialité en droit international privé", *Clunet* 209 – 243 (1902) at p. 218.

legal norms and thus stood beyond the legal system. Conversely, they could not be subject to the application of conflict of laws rules.¹²¹

1.11 In 1874 Mancini, in his report submitted to the session of the International Law Institute in Geneva,¹²² opposed the laws of a ‘private order,’ applicable in accordance with nationality as a connecting factor, to the laws of a ‘public order,’ applicable to both nationals and foreigners regardless of their national law.¹²³ The author argued that private international law should be governed by a principle of nationality and respect for party autonomy.¹²⁴ The only exception to the general rule would lie in the norms belonging to public law and public policy. According to the author the latter was an expression of state sovereignty which justified the imposition of the *lex fori* in international cases.

1.12 The doctrine of Mancini was followed by several authors¹²⁵ who greatly contributed to its development. At the forefront Pillet conceived public policy as a notion essentially based on the concept of territoriality. For the French Professor, legal provisions could only be either territorial or extraterritorial.¹²⁶ While the former applied within the territory of a state to foreigners and nationals alike, extraterritorial provisions applied to nationals abroad only.¹²⁷ As to the criteria used in making this distinction, the author suggested the analysis of the social function of the norm and the relative interest of the states in connection with the dispute in safeguarding those social aims.¹²⁸

¹²¹ On Savigny’s theory on public policy see P. Lagarde, “Public Policy”, *International Encyclopaedia of Comparative Law* (J. C. B. Mohr and Martinus Nijhoff Publishers 1994), at p. 5.

¹²² See P. Mancini, “De l’utilité de rendre obligatoires pour tous les Etats, sous la forme d’un ou de plusieurs traités internationaux, un certain nombre de règles générales du Droit international privé, pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles”, *Clunet* 221 – 239 and 285 – 304 (1874).

¹²³ P. Mancini, *ibid*, pp. 292 and 296 *et seq*.

¹²⁴ P. Mancini, *ibid*, at p. 298 – 299.

¹²⁵ E.g., amongst whom P. Fedozzi, P. Fiore, A. Weiss and F. Laurent. See P. Fedozzi, “Quelques considérations sur l’idée d’ordre public international”, *Clunet* 69 – 78 (1897).

¹²⁶ See A. Pillet, *Traité pratique de droit international privé* (J. Allier/Sirey, Grenoble – Paris 1923), at p. 102 *et seq*.

¹²⁷ This conception is more limited than the concept of extraterritoriality under US conflict of laws, which may apply to non-nationals abroad as long as the interests of the forum are affected.

¹²⁸ A. Pillet, *Traité pratique de droit international privé* (J. Allier/Sirey, Grenoble – Paris 1923), at p. 106.

- 1.13 When considering the social aims of different legal provisions, Pillet found that while some provisions aimed to protect the individual others were designed to protect legal order and society. The first had an extraterritorial character, *i.e.*, accompanied the individual in his international affairs. Public policy in turn was seen as being strictly territorial, confined to the territory of the forum.¹²⁹
- 1.14 In his wake, Bartin, followed by Maury and von Bar at the turn of the XXth century, sought the systematic integration of public policy as an exception to the operation of conflicts of laws.¹³⁰ Their work was sealed with the writings of P. Francescakis.¹³¹ The author sought to unify the *lois de police et de sécurité* found in Article 3(1) of the French civil code with public policy by advancing the concept of norms of immediate or direct application, which would impose local standards regardless of the operation of conflict of laws. The concept lies close to the notion of positive public policy.
- 1.15 In the US the notion of public policy evolved in a slightly different manner. Under US law, policy considerations are at the heart of conflict of laws.¹³² Currie, in his interest analysis doctrine, narrowed public policy to the

¹²⁹ A. Pillet, *ibid*, at p. 109 – 110.

¹³⁰ See Bartin, *Etudes de droit international privé* (Paris 1899), at p. 189 *et seq.*, cited in P. Lagarde, “Public Policy”, *International Encyclopaedia of Comparative Law* (J. C. B. Mohr and Martinus Nijhoff Publishers 1994), at p. 5

¹³¹ See P. Francescakis, “Lois d’application immédiate et règles de conflit”, *RDIPP* 691 – 698 (1967).

¹³² See Leflar, *American Conflicts Law* (3d ed., Indianapolis 1977), at para 107. For an American judge, a foreign rule should only be applied if there is no governmental interest in applying a rule of the forum. See, *e.g.*, B. Currie, “On the displacement of the law of the forum”, in *Selected Essays on the Conflict of Laws* (Duke University Press, Durham 1963) at pp. 3 – 76; D. Cavers, *The Choice of Law Process* (University of Michigan Press 1965). Interest analysis is based on the consideration of the centre of gravity of a given policy interest at the moment of the choice of law. See P. Lalive, “Transnational (or Truly International) Public Policy”, *ICCA Congress Series No 3*, at p. 263. The notion of governmental interest was at times taken to an extreme. For instance, according to F. Despagnet, “L’ordre public en droit international privé”, *Clunet* 5 – 21 (1889), at p. 13, the US courts initially found that, on public policy grounds, the capacity of a foreigner is governed either by the law of its nationality or by the *lex fori*, whichever is more advantageous to the US party. This ambiguous position on public policy was considered monstrous by US doctrine and subsequently abandoned. For a description of the analogous evolution in French case law, see H. Batiffol, *Traité élémentaire de droit international privé* (3d ed., LGDJ 1959), at p. 416.

governmental interest in upholding its policies.¹³³ Subsequent forms of Currie's theory created the basic approach adopted by US courts today.

1.16 Another important, albeit somewhat eclectic contribution to the notion of public policy is found in the works of A. Ehrenzweig. For Ehrenzweig certain rules, such as the Roman *Ius Gentium*, the feudal order, natural law, the law merchant or international law, were imposed by a superior legal order¹³⁴ applicable in the presence of true conflicts cases.¹³⁵ Private international law would be essentially governed by three basic standards: the primacy of the *lex fori*, party autonomy and what he called the rules of validation.¹³⁶ Such rules would apply automatically, regardless of the operation of conflict of laws.¹³⁷ According to the author, rules of validation included the procedural rules of the forum and rules corresponding, for their cogent nature, to a moral *datum* and as such belong to that country's international public policy.¹³⁸ Examples of the latter included the ability to pierce the corporate veil, estoppel, the clean hands doctrine,¹³⁹ *fraus legis* and the rules of natural law as devised in the civil law.

1.17 Despite these apparent contradictory findings, the suggestion that certain principles apply by virtue of belonging to a superior legal order was later found at the heart of the notion of transnational public policy.

¹³³ Currie was adverse to the uncertainty and lack of uniformity in traditional conflict of laws. For the author, the only problem of conflict of laws is, in the presence of a true conflict between the interests of two or more states, to determine "which interest shall yield". See B. Currie, "Notes on Methods and Objectives in the Conflict of Laws", in *Selected Essays on the Conflict of Laws* (Durham, N.C. 1963). Currie later restated his principles and dealt with objections raised by others. See Currie, "Comments on Babcock v. Jackson", 63 *Colum L Rev* 1233 (1963) at p. 1242 - 43. For a modern critique, see Juenger, "Conflict of Laws: A Critique of Interest Analysis", 32 *Am J Comp Law* 1 (1984) and R. Lefflar, L. McDongall and R. Felix, *American Conflicts Law* (4th ed. 1986) at 269, fn 6.

¹³⁴ See A. Ehrenzweig, *A treatise on the Conflict of Laws* (West Publishing Co., St. Paul - Minn. 1962), at p. 316.

¹³⁵ See A. Ehrenzweig, *ibid*, at p. 311. In the case of false or pseudo conflicts, the author proposed the application of the *lex fori*.

¹³⁶ Ehrenzweig gives as an example of a rule of validation the principle of *favor validitatis*. These true conflict rules would be determined by the policy underlying local law.

¹³⁷ See A. Ehrenzweig, *Private International Law – General Part* (A. W. Sijthoff / Oceana Publications, Dobbs Ferry – New York, 1967), at p. 76.

¹³⁸ A. Ehrenzweig, *ibid*, at p. 77.

¹³⁹ *He who comes to equity must come with clean hands.*

- 1.18 Notwithstanding different doctrinal contributions, the definition and content of public policy remains remarkably similar in both the Civil and Common law families.
- 1.19 In the civil law, a reference to public policy is found almost infallibly in statutory law, either in a local code¹⁴⁰ or some other law regulating private international relations.¹⁴¹ Although the statutes do not define the concept in any detail, courts have construed public policy provisions widely.
- 1.20 In Luxembourg, the Supreme court understood public policy as “all that affects the essential principles of the administration of justice or the performance of contractual obligations”¹⁴², that is, that which is considered “essential to the moral, political or economic order.”¹⁴³ For the Swiss Federal Supreme court, “a decision violates public policy when it violates fundamental legal principles to the point of being irreconcilable with our legal order and system of values.”¹⁴⁴ In Belgium, public policy relates to “the essential interests of the state or the community, or to private laws that set forth the legal basis on which the economic or moral order of the community rely.”¹⁴⁵ Similarly, for the Supreme Court of Cyprus, the term ‘public order’ contains the “fundamental principles which a society, at a given time, recognizes as

¹⁴⁰ See, e.g., China, Civil Code 1986, Art 150; Peru, Civil Code 1984, Art 2049; Jordan, Civil Code 1976, Art 29, Egypt, Civil Code 1948, Art 28; Nicaragua, Civil Code 1904, Art 8; Portugal, Civil Code 1966, Art 22; Uruguay, Civil Code 1868, amended 1941, Art 2404; Germany, introductory law to the Civil Code, Art 6; Italy, Civil Code, Article 14; United Arab Emirates, Code of Civil Transactions 1985, Art 27.

¹⁴¹ See, e.g., Thailand, Act on Conflict of Laws of March 1938, Art 5; Austria, Law on Private International Law of June 1978, Art 6; Switzerland, Law on Private International Law, Art 17; Mexico, Decree of December 1987, Art 15, para. 2; Poland, Law on Private International Law, November 1965, Art 6; Spain, Decree of May 1974, Art 12; Turkey, Law on Private International Law and International Civil Procedure 1985, Art 5; Japan, Law of June 1897, amended 1989, Art 33.

¹⁴² See *Clunet* 1977, p. 114.

¹⁴³ See the decision of the Belgian Supreme Court of 25 October 1979, *Journal des Tribunaux* (1980) at p. 860, cited in Luxembourg, Supreme Court of Justice, *Kersa Holding Company Luxembourg v Infancourtage and Famajuk Investment and Isny*, XXI YBCA 617 (1996) at p. 626.

¹⁴⁴ Tribunal Fédéral, 13 November 1998, *X SA et al v Z SA*, XXV YBCA 511 (2000) at p. 513.

¹⁴⁵ Belgium, Brussels Court of Appeal, 6 December 2000, *Sarl Génie Mécanique zaïrois et crts v s a A I G Europe et crts*, unpublished.

governing transactions, as well as other manifestations of the life of its members, on which the established legal order is based.”¹⁴⁶

1.21 For the Common law, there is no such thing as an *ordre public* in the sense found in the Civil law.¹⁴⁷ The content of public policy is far more restrictive, confined to clearly defined topics¹⁴⁸ contained in decided cases.¹⁴⁹ For a Common law practitioner public policy is a set of unwritten principles revealed by precedent.¹⁵⁰

1.22 As in the Civil law, the notion is broadly defined by the courts. Public policy is regarded 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

¹⁴⁶ Cyprus, Supreme Court, 28 April 1999, *The Attorney General of the Republic of Kenya v Bank für Arbeit und Wirtschaft AG*, XXV YBCA 692 - 709 (2000) at p. 699.

¹⁴⁷ The expression “ordre public” in the civil law and “public policy” in the common law world may have different scopes. See, e.g., A. van den Berg, *The New York Convention*, at p. 359 and 376. See also H. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers, Deventer - Boston, 1988), at p. 914 who note that the term “public policy” has been understood as having a narrower meaning than “ordre public” in civil law systems. Public policy and ordre public are however used interchangeably in international practice. See K. Bockstiegel, “Public Policy and Arbitrability,” *ICCA Congress Series No 3*, pp. 177 *et seq.*, at p. 179, A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (3rd edition, Sweet & Maxwell, London, 1999), at paras. 9-29. See also C. Liebscher, “European Public Policy – A Black Box?”, 17(3) *J Int’l Arb* 73 -88 (2000) at p. 74, fn 5, who justifies this position with Article 16 of the Rome Convention on the Law Applicable to Contractual Obligations, which bears the heading “ordre public” while the provision speaks of “public policy (*ordre public*) of the forum”.

¹⁴⁸ See J. Lew, *Applicable Law*, at fn 401.

¹⁴⁹ See Kahn-Freund, “Reflections on Public Policy in the English Conflict of Laws”, 38 *Transactions Grotius Society* 39 (1953). The general rule is found in Dicey & Morris, *The Conflict of Laws* (12th ed., Sweet & Maxwell, 1993), Vol. I, Rule 2, pp 81 *et seq.* para 5R-001 which states that English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law.

¹⁵⁰ As held by Lord Tackleton, the courts should not expand but expound questions of public policy. Where a new set of circumstances exists courts will apply existing principles of public policy. See England, *Fender v St John-Mildway* [1938] 1 AC 23, [1937] 3 All ER 402 at 414. This general guidance in no way restricts the development of public policy as such. As illustrated by G. Treitel, *The Law of Contract* (8th Ed. 1991) at p. 425, “the courts may occasionally invalidate a contract even though it is of a kind to which the doctrine of public policy has not been applied before. Such novel applications of the doctrine of public policy are illustrated by decisions to the effect that a money lending contract is illegal if it imposes quasi-servile obligations on the borrower; that a contract by which a trade journal promises not to comment on the affairs of a company is illegal as it may prevent the journal from exposing frauds perpetrated by the company.” See also US, *Abbott Laboratories v Baxter International Inc*, 27 March 2002, XXVII YBCA 936 - 947 (2002) at p. 946. See however India, *Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly*, AIR 1986 SC 1571, where the court held that the principles governing public policy must be and are capable, on proper occasions, of expansion and modification.

public good.”¹⁵¹ In the US, the courts often refer to “the forum state’s most basic notions of morality and justice”.¹⁵²

1.23 The definitions of public policy in both legal families give the impression of a pervasive notion based on axiomatic considerations whose application is, at most, unpredictable.¹⁵³ Statutory law has not offered further clarification.¹⁵⁴ Yet references to public policy have found their way into virtually every international convention dealing with conflict of laws concluded in the XX century¹⁵⁵ and the laws,¹⁵⁶ treaties¹⁵⁷ and institutional rules¹⁵⁸ governing international arbitration.

¹⁵¹ England, *Egerton v Brownlow* (1853) 4 HLC 1.

¹⁵² See Judge Joseph Smith in US, *Parsons and Whittemore Overseas Co Inc v Société Générale de l’Industrie du Papier RAKTA and Bank of America*, 508 F 2d 969 (2d Cir., 1974). See also the US decision *Loucks v Standard Oil Co*, 224 N Y 99, 111, 120, N E 198, 202 (1918), where the court found that public policy should only apply if “some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal” is violated. See also T. Guedji, “Theory of the Lois de Police, a Functional Trend in Continental Private International Law – a Comparative Analysis with Modern American Theories”, 39 *Am J Comp L* 660 (1991) at p. 679.

¹⁵³ As noted by J. Junker, “The Public Policy Defense to the Recognition and Enforcement of Foreign Arbitral Awards”, 7 *Calif West Int LJ* (1977) at pp. 228, 245.

¹⁵⁴ Regardless of the call of P. Fiore, “De l’ordre public en droit international privé”, 23 *AIDI* 205 - 230 (1910) at p. 209, a paper presented at the International Law Institute, Paris Session, who suggested that each legal system should indicate which rules within its system should be considered mandatory or as belonging to its public policy.

¹⁵⁵ References to public policy appear, e.g., in Art 18 of the Convention Applicable to Trusts and their Recognition 1985; Art 10 of the Convention on the Law Applicable to Products Liability 1973; Art 17 of the Convention on the Law Applicable to Agency 1978; and Art 6 of the Hague Convention on the Law Applicable to International Sales of Goods of 15 June 1955. There is, in fact, a public policy provision in all 38 conventions of the Hague Conference. The United Nations (Vienna) Convention on the International Sale of Goods does not contain any provisions dealing with public policy, but its relevance is guaranteed by Articles 4 and 7, which safeguard the standards of member states affecting the validity of contracts regulated by the convention.

¹⁵⁶ See, e.g., Italy, Code of Civil Procedure, Art 839(2); Poland, Code of Civil Procedure 1964, Arts 712(1)(4), 1146 and 1150; Nigeria, Arbitration and Conciliation Decree 1988, Art 38; Oman, Arbitration Act 1997, Art 53; Japan, Code of Civil Procedure 1996, Art 118(3); Finland, Arbitration Act, Section 40; Tunisia, Arbitration Code 1993, Art 81(2); Algeria, Decree 83.09 of 1993, Art 458 bis 23(h); Korea, Code of Civil Procedure 1991, Art 203; Sweden, Arbitration Act, Section 55(2); Portugal, Code of Civil Procedure 1986, Art 1096(f); Yemen, Code of Civil Procedure, Art 285; Libya, Code of Civil and Commercial Procedure, Arts 407(4) and 408; China, Law of Civil Procedure 1991, Art 203; Romania, Law 105 of 1992, Arts 168(2) and 174; France, Code of Civil Procedure, Art 1502; Austria, Code of Civil Procedure, Art 595(1); Peru, General Arbitration Law No. 26572, Arts 1 and 99; New Zealand Arbitration Law 1995, Art 34; Mexico, Code of Commerce, Art 1457. See also the UNCITRAL Model Law on International Commercial Arbitration 1985, Art 34 and 36; and the OHADA Uniform Arbitration Law, Art 31. Other countries make indirect reference to public policy by referring to good morals, social order, basic principles of the legal system and the like. In the US, the FAA does not make any explicit reference to public policy. It is

1.2. Public policy and international arbitration

1.24 Despite the uncertainty surrounding the role of national public policy in arbitration a few conclusions may be drawn from established case law. Judicial decisions show that national public policy has lost ground with the increasing autonomy of international arbitration.

1.25 National courts only apply domestic public policy rules where the dispute does not contain a foreign element.¹⁵⁹ Domestic public policy may impose, for instance, limits on the arbitrability of local disputes which would not apply to in international arbitration or oust the effects of a contract or award enforceable under the international or transnational public policy theories.¹⁶⁰ The inclusion of the denomination of the country¹⁶¹ in provisions similar to Article V(2)(b) of the New York Convention and Articles 34 and 36 of the Model Law is thus not a reference to domestic public policy.¹⁶² This level of public policy is irrelevant to international arbitration.

however applied at common law. See US, *United Paperworkers Int'l Union v Misco Inc*, 484 US 29, 42 (1987) and *Hurd v Hodges*, 334 US 24, 34-35 (1948).

¹⁵⁷ See, e.g., the Geneva Convention for the Execution of Foreign Arbitral Awards 1927, Art 1(e); the Riyadh Convention on Judicial Co-operation between States of the Arab League 1983, Art 30(a); the Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979, Art 2(h); the Panama Inter-American Convention on International Commercial Arbitration 1975, Art 5(2)(b); and the New York Convention on the Recognition and Enforcement of Arbitration Awards 1958, Art V(2)(b).

¹⁵⁸ See, e.g., Arbitration Rules of the German Institution of Arbitration 1998 section 32(2) and International Arbitration Rules of the Zurich Chamber of Commerce 1989 Article 190.

¹⁵⁹ H. Holtzmann, "United States", in J. Paulsson (ed.), *ICCA International Handbook on Commercial Arbitration*, Suppl. 13, November (Kluwer 1992), at p. 39.

¹⁶⁰ See Craig, Park and Paulsson, *ICC Arbitration* (3rd ed.), at p. 30.

¹⁶¹ The following countries include such a reference: Russian Federation, Law of the Russian Federation 5338-1 on International Commercial Arbitration of 14 August 1993, Articles 34(2) and 36(2), Denmark, Decree No 117 of 1973 Section (1); Canada, Commercial Arbitration Act 1986 Sections 34(b) (ii) and 36(1)(b)(ii); Mexico, Code of Commerce Article 1462(2); Malta, Arbitration Act 1996 Art 58; South Africa, Recognition and Enforcement of Foreign Arbitral Awards Act 1977 Article 4(1)(a)(ii); Finland, Arbitration Act Sections 40(1)(2) and 52(2); Nigeria, Arbitration And Conciliation Decree 1988 Articles 48(b)(ii) and 52(b)(ii); Singapore, International Arbitration Act 1994 Article 31(4)(b); Hungary, Act LXXI of 1994 Section 59(b); Poland, Code Of Civil Procedure 1964 Article 712(4); Kenya, Arbitration Act No 4 of 1995 Art 35(2)(b) and 37(1)(b)(ii); Australia, International Arbitration Act 1989 Section 19; India, Arbitration and Conciliation Act 1996 Sections 34(b), 48 and 57(2)(b). See also Indonesia, Law of 1 March 1990 Article 4(2), which refers to the basic principles of the legal system and society in Indonesia; and Iran, Law on International Commercial Arbitration 1997 Article 34 which refers to the moral principles of the State.

¹⁶² As stated in Luxembourg, Supreme Court, 24 November 1993, XXI YBCA 617 (1996), "the public policy of the State where the arbitral award is invoked is thus not the internal public policy of that country, but its international public policy"). See also Germany,

1.26 The courts restrict the national public policy applied to international arbitration to the domestic-international level. The scope of the public policy of the forum is determined by reference to principles deemed binding on a court dealing with international legal relationships.

1.27 Such principles need not necessarily emanate from the forum. When construing public policy the court or tribunal may consider the rules of a regional public policy deriving from an arrangement between a limited number of countries. We will look now at each level of national public policy relevant to international arbitration in turn.

(i) Domestic-international public policy

1.28 The distinction between a domestic (or internal) and an ‘international’ (or external) public policy was first introduced in conflict of laws in 1882 by Brocher.¹⁶³ Whereas domestic public policy governs domestic affairs, ‘international’ public policy provides for the application of certain rules of the forum to international cases.

1.29 The distinction is found “in the very nature of private international law, a branch of the law which is based on a fundamental distinction between ‘domestic’ situations and ‘international’ situations”¹⁶⁴ and can be found in the statutory law of some countries.¹⁶⁵ In France, for instance, where Article 1484

Bundesgerichtshof, 15 May 1986, *Neue Juristische Wochenschrift* (1986) at 3027, holding that international public policy applied under the Article V(2)(b) exception.

¹⁶³ See Ch. Brocher, *Cours de Droit International Privé suivant les principes consacrés par le droit positif français* (E. Thorin / Librairie H. Georg, Paris – Geneva 1882), Vol I, at pp. 106 – 112.

¹⁶⁴ See P. Lalive, “Transnational (or Truly International) Public Policy”, *ICCA Congress Series No 3*, at p. 260.

¹⁶⁵ See, e.g., Greece, Law 2735/1999 on International Commercial Arbitration, Article 34(2)(b)(ii); Peru, General Arbitration Law No 26572, Article 129(5); Algeria, Law No 93-09 of 25 April 1993, Article 458 bis 17 and 458 bis 23 and the laws of Portugal, Lebanon, the OHADA Uniform Arbitration Law. Tunisia and Romania refer to “public policy as understood in private international law.” A proposal was made to include a reference to international public policy in Article 34(2)(ii) of the UNCITRAL Model Law. See the Second Secretariat Note – Possible Features of a Model Law: Questions for Discussion A/CN.9/WG.II/WP.35 (1 December 1981), published in H. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, Deventer - Boston - The Hague, 1994), at p. 136. It was suggested that the trend in judicial case law to make the distinction between the international public order and the national public order of a state justified that inclusion. See First Secretariat Note - Possible Features of a Model Law,

of the NCPC¹⁶⁶ dealing with domestic arbitration refers to public policy, Article 1502 (*ex vi* Article 1504) applicable to international arbitration awards includes the words “international public policy.”

1.30 Where statute is silent courts have expressly or impliedly distinguished the two concepts. In England, for instance, where unreasoned foreign awards are not contrary to public policy under paragraph 2(b) of Article V of the New York convention, lack of reasons in domestic awards have been held to be in breach of public policy.¹⁶⁷ Similarly, the Chinese courts have relied on this level of public policy to recognise foreign awards rendered by an even number of arbitrators.¹⁶⁸ In the US a sale of stocks was deemed “a truly international agreement” and for that reason arbitrable in the US.¹⁶⁹ Likewise, Germany imposes strict limits on the scope of national public policy in international cases.¹⁷⁰

1.31 The concept of international public policy is often used in the sense of transnational public policy. Yet, the international public policy of a country may be tied to the fundamental rules and interests of the forum “concerning international cases,”¹⁷¹ and retain a relative or selfish character.¹⁷² In those

A/CN.9/207 (14 May 1981), published in H. M. Holtzmann and J. E. Neuhaus, *ibid*, at p. 923. The proposal was however dropped for want of precision. See H. Holtzmann and J. Neuhaus, *ibid*, at p. 929 and the Second Working Group Report, A/CN.9/232 (10 November 1982) considered therein. See further the Third Working Group Report, *ibid*, at p. 1087.

¹⁶⁶ Article 1484 of the Nouveau Code de Procedure Civil deals with domestic arbitration disputes.

¹⁶⁷ See LJ Bingham, “Reasons and Reasons for Reasons,” 4(2) *Arb Int* 141 – 154 (1988) at p. 145 *et seq*.

¹⁶⁸ Li Hu, “Enforcement of the International Commercial Arbitration Award in the People’s Republic of China”, 16(4) *J Int’l Arb* 1 – 40 (1999) at p. 31, writes that *ad hoc* proceedings and arbitration tribunals with an even number of arbitrators are contrary to the (domestic) social and public interest of the PRC and yet the Dalian Maritime Court in *the Tekso case* of 10 July 1997 has recognized an ad hoc award with two arbitrators rendered in London. The Guangzhou Maritime Court has also recognised a similar award in *Guangdong Ocean Shipping Company (China) v Marships of Connecticut Company Limited (US)* with a specific reference to international public policy. The facts of this case can be found in M. Moser, “China and the Enforcement of Arbitral Awards”, 5 *Arbitration* 132 (1995) at pp. 133-134. See also Italy, Corte di Appello di Venezia, decision of 21 May 1976, III YBCA 277 (1978).

¹⁶⁹ See US, *Scherk v Alberto Culver*, 417 US 506, 94 S Ct 2449 (1974). For other examples of the application of US public policy see *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985); *Louise Henry v Patrick J Murphy*, 2002 U S Dist LEXIS 227, XXVII YBCA 863 - 868 (2002) at p. 867, quoting *Waterside Ocean Navigation Co v International Navigation Ltd*, 737 F 2d 150, 152 (2d Cir 1984).

¹⁷⁰ See Germany, Bundesgerichtshof, 15 May 1986, NJW 3027 – 3028 (1986).

¹⁷¹ See the Second Secretariat Note – Analytical Commentary on Draft Text A/CN.9/264 (25 March 1985), H. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on*

circumstances it is more appropriate to refer to it as 'domestic-international' public policy.

1.32 Courts have given general guidance as to the meaning of domestic-international public policy. For instance, the French Court of Appeal,¹⁷³ described it as "an assemblage of rules and values which the French legal order cannot disregard, even in situations of an international character."¹⁷⁴ Similarly, for the Supreme Court of Luxembourg international public policy only operates where the award concretely violates, "at the time of application before the court, that court's fundamental convictions as to the law applicable to international relationships."¹⁷⁵

1.33 The question of knowing whether domestic or domestic-international public policy applies turns on the classification of the arbitration as international.¹⁷⁶ An arbitration is international where it contains a foreign element, such as the economic interests of more than one country,¹⁷⁷ a truly international arbitration institution, or where the parties originate from different jurisdictions.¹⁷⁸ Often the law combines those criteria.¹⁷⁹

1.34 In 1978 Julian Lew identified two situations where this level of public policy¹⁸⁰ comes into play in international arbitration:

International Commercial Arbitration: Legislative History and Commentary (Kluwer Law and Taxation Publishers, Deventer - Boston - The Hague, 1994), pp. 964 *et seq.*, at p. 966.

¹⁷² As remarked by P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series No 3*; at p. 314.

¹⁷³ France, Cour d'appel de Paris, 27 October 1994, *LTDC v Sté Reynolds*, 4 Rev Arb 709 - 713 (1994) at p. 709. See also Court of Appeal, Versailles, 2 October 1989, *Société Grands Moulins de Strasbourg v Cie Continentale France*, Rev Arb 115 - 121 (1990) at p. 132, para 9 *et seq.*, with note by L. Idot at pp. 125 - 133.

¹⁷⁴ Author's translation. French original: *l'ensemble des règles et des valeurs dont l'ordre juridique français ne peut souffrir la méconnaissance, même dans des situations à caractère international.*

¹⁷⁵ See Luxembourg, Cour Supérieure de Justice, *Kersa Holding Company Luxembourg v Infancourtage and Famajuk Investment and Isny*, XXI YBCA 617 (1996) at p. 625.

¹⁷⁶ See Lew, Mistelis, Kröll, at pp. 58.

¹⁷⁷ See, e.g., France, Cour d'appel de Paris, 14 March 1989, *Murgue Seigle v Coflexip*, Rev Arb 355 (1991); Cour de Cassation, 21 May 1997, *Renault v V 2000 (formerly Jaguar France)*, Rev Arb 537 (1997); France, NCPC Art 1492.

¹⁷⁸ This was the solution in Switzerland, Private International Law Act Article 176(1).

¹⁷⁹ See, e.g., Italy, Code of Civil Procedure Article 832; Geneva Convention Article I(1)(a); UNCITRAL Model Law Article 1(3) and (4).

¹⁸⁰ Domestic-international public policy corresponds to external public policy identified in J. Lew, *Applicable Law*, at p. 533.

First: where, despite the existence of an agreement to submit to arbitration, one party institutes court proceedings. Whether those proceedings should be stayed pending arbitration will depend on the validity of the arbitration agreement. For this purpose, a court will consider whether national public policy legislation denies one of the parties the right to submit to arbitration or has reserved for the exclusive jurisdiction of its national courts' disputes of that particular nature.

Second: where a national court is requested to enforce a foreign arbitration award. Here for the purposes of recognition and enforcement, the court must again consider the right of the parties to submit to arbitration and the arbitrability of the subject-matter of the dispute. Furthermore, a court may not give effect to a foreign award if the procedure followed in the arbitration proceedings or the award per se violate the fundamental public policies of the forum.¹⁸¹

1.35 While narrowing public policy to the domestic-international level represents a welcomed development, this fact alone is not sufficient to elevate its content to the transnational plane. As seen in the following chapter, only public policy rules with certain characteristics are deemed 'transnational or truly international.' Transnational public policy attends to the effects of the breach on the international community, rather than a national legal system. Conversely, while some rules applied under the guise of the forums' international public policy belong in essence to transnational public policy, a public policy rule remains domestic-international where it pursues, and is objectively confined to, the interests of a national legal system or a particular

¹⁸¹ See J. Lew, *Applicable Law*, at p. 556. See also B. Oppetit, *Théorie de l'arbitrage* (Presses Universitaires de France, 1998), at p. 84; and H. Arfazadch, "Arbitrability Under the New York Convention: The Lex Fori Revisited", 17(1) *Arb Int* 73 - 87 (2001). But see C. Alfaro, "Who Should Determine Arbitrability? Arbitration in a Changing Economic and Political Environment", 12(4) *Arb Int* 415 - 428 (1996); M. Blessing, "The Law Applicable to the Arbitration Clause and Arbitrability", *ICCA Congress Series No 9*, at p. 168; B. Hanotiau, "What Law Governs the Issue of Arbitrability", 12(4) *Arb Int* 391 - 403 (1996); and W. Park, "The Arbitrability Dicta in *First Options v Kaplan* : What Sort of Kompetenz - Kompetenz Has Crossed the Atlantic?", 12(2) *Arb Int* 137 - 160 (1996).

national culture. Examples can be found in certain standards on arbitrability, gambling, foreign exchange regulations, State immunity or the prohibition of trade in alcohol.¹⁸²

- 1.36** International tribunals apply the domestic-international public policy of the law chosen by the parties where it is not offensive to the public policy of the international community.¹⁸³ Indeed the very idea that parties should not be permitted to subvert or evade conforming mandatory rules of the chosen law is a recognisable part of transnational public policy.¹⁸⁴

(ii) Regional public policy

- 1.37** Other rules belong to what some authors have termed a 'regional public policy.'¹⁸⁵ This level of public policy contains the fundamental principles of an economic or political region.¹⁸⁶

- 1.38** Most principles of regional public policy relevant to arbitration are drawn from the international agreements giving birth to the regional entity. Examples of an embryonic regional public policy can be found in the countries of the EU, OHADA,¹⁸⁷ Mercosur agreement¹⁸⁸, NAFTA,¹⁸⁹ the Islamic theory of Siyasa,¹⁹⁰ and perhaps in the near future, amongst the countries of Asia.¹⁹¹

¹⁸² See A. El-Ahdab, "Arbitration in Saudi Arabia under the New Arbitration Act", 3(3) *J Int'l Arb* 27 - 56 (1986) at p. 40.

¹⁸³ See S. Lazareff, "Mandatory Extraterritorial Application of National Law", 11(2) *Arb Int* 137 - 150 (1995) at p. 139 and M. Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration", 14(4) *J Int'l Arb* 23 - 40 (1997) at p. 23.

¹⁸⁴ See J. Lew, *Applicable Law*, at p. 535 and the cases cited therein: England, *Regazonni v K C Sethia (1944) Ltd* [1958] AC 301; Germany, Supreme Court, *Jur W* 1927, 2288, BGH, 22 June 1972, BGHZ 59. Consider also, e.g., CIETAC, Award of 27 February 1993, *Award on Dispute concerning Delivery of Bread Improving Tablets*, 74 CIETAC awards 304-308 (1993), at p. 308, para 7, concerning customs duties.

¹⁸⁵ See J. Lew, *Applicable Law*, *ibid*; K. Berger, *International Economic Arbitration* (Kluwer Law and Taxation, Deventer-Boston, 1993), at p. 456; L. Idot, *Comment*, *Rev Arb* (1990), at p. 125, at para. 16; P. Schlosser, "Arbitration and European Public Policy", *L'Arbitrage et le Droit Européen* (Bruylant, Brussels, 1997), at 85; Y. Brulard and Y. Quintin, "European Community Law and Arbitration - National Versus Community Public Policy", 18(5) *J Int'l Arb* 533 - 548 (2001); Lew, Mistelis, Kröll, at p. 422, para 17-33.

¹⁸⁶ For examples of regional rules see, e.g., E. Gaillard, "Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules", 10 *ICSID Rev - FILJ* 208 (1995).

¹⁸⁷ The Organization for the Harmonization of Business Law in Africa. See R. Dossou, "OHADA Arbitration: Historic Background and Objectives", *XI International Conference of Bar Associations*, Ouagadougou, 9-14 December 1996.

1.39 The law of the European Union serves as a paradigm of this level of public policy.¹⁹² Rules on the free movement of capital, goods, people, establishment and services, human rights¹⁹³ and competition rules¹⁹⁴ have been identified as belonging to a European public policy.¹⁹⁵

1.40 In the *Kajo* case,¹⁹⁶ for instance, the Austrian Supreme court found that Arts. 81 and 82 of the EU Treaty, cornerstones of the rules and basic principles of the Common Market, are, given the principle of supremacy of EC law, part of the public policy of every EU member state.¹⁹⁷ Similarly, as held by the ECJ in *Eco Swiss*,¹⁹⁸ Article 81¹⁹⁹ of the EC treaty belongs to a group of

¹⁸⁸ See, generally, J. Van Ee, "Mercosur Arbitration: A New Regime", 4(2) *Int'l ALR* 55 - 65 (2001); L. Baptista and M. Gomes, "Mercosur: décision du premier tribunal arbitral", 3 *Revue de Droit des Affaires Internationales* 353 - 357 (2000).

¹⁸⁹ North American Free Trade Agreement. See M. Hunter, G. Conde e Silva, "Transnational Public Policy and its Application in Investment Arbitrations", 4(3) *J W I* 368 (2003).

¹⁹⁰ Containing certain standards of the Sharia' or Islamic law. See Brand, "Aspects of Saudi Arabian Law and Practice", 9 *B C Int'l Comp L Rev* 2 - 23 (1986). See also A. El-Ahdab, "Enforcing Foreign Awards in the Middle East", *Commercial Law in the Middle East* 323 - 336 (Hilary Lewis & Chibli Mallat 1995) at p. 332 - 333 according to whom the Riyadh Convention allows a court to "refuse enforcement of an award if it contains provisions contrary to the principles of the shari'a, even if the current notion of public order in the enforcing country would allow such a provision." M. Jaili, "Amman Arab Convention on Commercial Arbitration", 7 *J Int'l Arb* 139 - 146 (1990) at 144 states however that the Amman Convention does not indicate whether international awards must comply with national public order or international public order and the meaning of the term "public order" may differ in each member state.

¹⁹¹ With the development of regional agreements such as the proposed East Asia Community or the SAARC.

¹⁹² See, e.g., Y. Brulard et al., "European Community Law and Arbitration - National Versus Community Public Policy", 18(5) *J Int'l Arb* 533 - 548 (2001); H. van Houtte, "From a National to a European Public Policy", in J. Nafziger and S. Symeonides (eds.), *Law and Justice in a Multistate World: Essays in Honour of Arthur T. von Mehren* (Transnational Publishers 2002), at pp. 841 *et seq.*

¹⁹³ See, e.g., J. Moitry, "Right to a Fair Trial and the European Convention on Human Rights: Some Remarks on the République de Guinée Case", 6(2) *J Int'l Arb* 115 - 122 (1989), at p. 120.

¹⁹⁴ See, e.g., C. Liebscher, "European Public Policy After *Eco Swiss*", 10(1) *Am Rev Int'l Arb* 81 - 94 (1999).

¹⁹⁵ See P. Schlosser, "Arbitration and the European Public Policy", in *Arbitration and European Law - Reports of the International Colloquium of CEPANI April 25, 1997* (Bruylant, Brussels 1997), at p. 85.

¹⁹⁶ Oberster Gerichtshof, 20 October 1993 / 23 February 1998, *Kajo-Erzeugnisse Essenzen GmbH v DO Zdravilisce Ra-denska*, 105 Österreichische Juristen-zeitung 513, XXIVa YBCA 919 (1999), Rev Arb 419 (1998), XX YBCA 1051 (1995) and Rev Arb 385 (1999). For an analysis of this case and its impact on European public policy see C. Liebscher, "European Public Policy and the Austrian Supreme Court", 16(3) *Arb Int* 357 - 366 (2000).

¹⁹⁷ Oberster Gerichtshof, *ibid*, XXIVa YBCA 919 (1999) at p. 927.

¹⁹⁸ European Court of Justice, 1 June 1999, C 126/97, *Eco Swiss Time Ltd v Benetton International NV* [1999] ECR I 3055, [1999] 2 All ER (Comm) 44, 14(6) Mealey's IAR B-1(1999), XXIVa YBCA 629 (1999).

¹⁹⁹ Former Article 85.

core rules within European law which “may be regarded as a matter of public policy within the meaning of the New York Convention.”²⁰⁰

1.41 Regional public policy has a controlling function towards the laws of all countries within the region.²⁰¹ Given its supranational sources it must be distinguished from the purely national levels of public policy.²⁰² Yet a further step is required for its integration within the notion of transnational public policy. The rule must not be exclusive to that region and must sanction the interests of the international community. In a case decided in Switzerland, for instance, the Supreme Court found it

doubtful that the provisions of - national or EU - competition law are among those fundamental legal or moral principles that are recognized in all civilized countries, to the point that their violation should be seen as a violation of public policy.²⁰³

1.42 Unfortunately, the decision does not clarify this point any further. An analysis of regional and national competition rules and an enquiry as to their purpose in international trade could have revealed whether substantive transnational public policy rules have emerged in this area.²⁰⁴ This is discussed in chapter 5 below.

²⁰⁰ See European Court of Justice, 1 June 1999, C 126/97, *Eco Swiss Time Ltd v Benetton International NV* [1999] ECR I 3055, [1999] 2 All ER (Comm) 44, 14(6) Mealey's IAR B-1(1999), XXIVa YBCA 629 (1999) at para 17. On this point see also C. Liebscher, “European Public Policy – A Black Box?”, 17(3) *J Int'l Arb* 73 -88 (2000) at p. 76.

²⁰¹ See Lew, Mistelis, Kröll, at p. 483, para 19-25.

²⁰² As stated by C. Liebscher, “the concept of public policy of Member States and the concept of European public policy in arbitration are not the same as they serve different purposes.” See C. Liebscher, *ibid*, 17(3) *J Int'l Arb* 73 -88 (2000) at p. 76. See also European Court of Justice, 1 June 1999, C 126/97, *Eco Swiss Time Ltd v Benetton International NV* [1999] ECR I 3055, [1999] 2 All ER (Comm) 44, 14(6) Mealey's IAR B-1(1999), XXIVa YBCA 629 (1999) at paras 35 *et seq*; France, Cour de Cassation, 15 February 1988, *Société Grands Moulins de Strasbourg c/ Cie Continentale France*, Rev Arb 115 (1990) at p. 130 and A. McClellan, “Commercial Arbitration and European Community Law”, 5(1) *Arb Int* 68 - 79 (1989), at p. 72.

²⁰³ Tribunal Fédéral, 13 November 1998, *X SA et al v Z SA*, XXV YBCA 511 (2000) at p. 514.

²⁰⁴ As suggested by J. Moitry, “Arbitrage International et Droit de la Concurrence: Vers un Ordre Public de la Lex Mercatoria”, 1 *Rev Arb* 3 (1989).

1.43 Public policy yardsticks based on territoriality are controlled by transnational public policy where they affect the interests of the international community. Important questions remain as to what is meant by 'transnational public policy' and how its content may be determined.

Chapter 2

TRANSNATIONAL PUBLIC POLICY

- 2.1. Understanding the origins and meaning
 - (i) transnational public policy in national courts
 - (ii) transnational public policy in arbitration practice
- 2.2. Transnational public policy as a method
- 2.3. The sources of transnational public policy
 - (i) primary sources of transnational public policy
 - (ii) secondary sources of transnational public policy
- 2.4. Conclusions to Chapter and Part I

2.1 This chapter explores the origins and meaning of transnational public policy as applied by arbitration tribunals and national courts. It further proposes a method to determine the content and sources of transnational public policy.

2.1. Understanding the origins and meaning

2.2 Transnational public policy had its birth with the concept of natural law in the classic period. The idea of universal standards based on the nature of man and society²⁰⁵ was not unknown to ancient Greece. Natural law was seen then as a set of unwritten norms with a higher standing than the imperfect statutes of the *polis*.²⁰⁶

²⁰⁵ Natural law was initially identified with a primitive natural order to which all animals and humans belonged. See J. Kelly, *The Catholic Encyclopedia Volume IX* (Lafort 1910). The observation of nature inspired, for instance, the right to form a family and the freedom of circulation.

²⁰⁶ See R. van Caenegem, *An Historical Introduction to Private Law* (Cambridge University Press 1992), at p. 117. See further T. West, *Plato's Apology of Socrates* (Cornell University Press 1979); L. Straus, "On Plato's Apology of Socrates and Crito", in Strauss, *Studies in Platonic Philosophy* (University of Chicago Press, 1984); M. Nussbaum, *The Fragility of Goodness*, (Cambridge University Press, 2001). The axiomatic content of natural law is more restrictive but lies close to the notion of karmic causation in Eastern philosophy.

- 2.3 Natural law soon acquired a controlling function within the laws of the Roman Empire. In this period, the Emperor would appoint *praetors* and later *praetor peregrinus* to resolve disputes between citizens and non-citizens.²⁰⁷ The law applied by the *praetors*, known as the *Ius Gentium*,²⁰⁸ contained universally recognised rules overseeing local customs in the provinces conquered by Rome.²⁰⁹ Subsequently those standards became part of the law applicable to contracts between Romans themselves.²¹⁰
- 2.4 When jurists speculated why the rules of *Ius Gentium* were universally recognised, they came to the conclusion that they must be based on common sense, or ‘natural reason.’ This is why the *Ius Gentium* is sometimes called *Ius Naturale*. Indeed, the terms were used interchangeably, except with regard to slavery which was recognised under the *Ius Gentium* but could not be considered as common sense and therefore dictated by natural law. This method of legal reasoning based on universal standards later influenced the development of the law in every legal system.²¹¹ Importantly, it became central to the content of transnational law and its public policy.

²⁰⁷ See M. Hunter, “Arbitration procedure in England: past, present and future”, 1(1) *Arb Int* 82-102 (1985) at p. 82.

²⁰⁸ As opposed to Roman law which was applicable only to citizens of the Empire. See P. Stein, *Legal Institutions – The Development of Dispute Settlement* (Butterworths 1984), at p. 13.

²⁰⁹ P. Stein, *ibid*, at p. 155.

²¹⁰ In Roman law public policy was expressed in general principles such as *bona fide* or *pacta sunt servanda* and the *leges* designed to protect marriage and the rights of slaves. See A. Borkowski, *Roman Law* (2d ed, Blackstone 1997), at pp. 263 – 264.

²¹¹ In the middle ages natural law gained a religious connotation and was identified with the controlling functions of Divine law. On the topic see R. van Caenegem, *An Historical Introduction to Private Law* (Cambridge University Press 1992), at p. 117. XVII century jurists sought to create a modern version of the *Ius Gentium* by identifying rules common to all nations. According to Hugo Grotius, the first great exponent of the School of Natural Law, there were a set of self-evident axiomatic principles from which all rules derived. Grotius identified these rules as being accepted by all men and civilized states and corresponding to principles of human nature. Although these principles were independent from Roman and Divine law the manner they were ascertained had still a strong religious influence. The work of Grotius was continued by Samuel Pufendorf. See R. C. van Caenegem, *ibid*, at p. 119. The Professor at Heidelberg devised a rational system under which the rules of natural law could be determined by means of a scientific process, by observation and deduction. Pufendorf’s claim had a profound influence on the civil codes drafted later in Europe. His work was followed by Christian Thomasius in the following century. As Pufendorf, Thomasius conceived natural law as a closed logical system. According to this author, all rules of law would be deducted from the axioms of natural law according to the principles of geometric proof provided by Spinoza and by means of detailed examples. The aim behind the School of Natural Law was then to free the decision maker from the restrictions of ancient authority. Natural law was based on an ideal nature of man, disassociated with positive law. It enabled

- 2.5 The Middle Ages witnessed a period of sacralization of the law. Canonic law in Europe and the Sh'ria in the Middle East had a controlling function over the laws of the kingdoms under their sphere of influence. Buddhism and Taoism were embedded in the normative rituals in China. The medieval *lex mercatoria* grew alongside secular laws. It developed principles binding to merchants²¹² but never shared the overarching influence of religious law.²¹³
- 2.6 With the Enlightenment period and the advent of laic nation states, international law sought to replace religion as a controlling body of law in foreign relations. At the dawn of the XXth century the *Ius Cogens* promised to establish itself as the public policy of an emerging international legal order.²¹⁴ The conflict of laws system sought a similar conception of public policy applicable to private relationships.
- 2.7 World War II brought a number of changes to an international order already in crisis. The emergence of a complex interrelated world community carried an infinite variety of problems to which neither public international law nor conflict of laws were able to respond.
- 2.8 International law is concerned with interstate relations and does not govern dealings between corporations or individuals and foreign states or other individuals or corporations. In turn, conflict of laws deals with the determination of particular national laws and has been unable to yield rules universally applicable to private disputes. Individually considered, these two areas show substantial gaps when applied to a legal relationship transcending state boundaries.

jurisprudence to humanise the strict positive law of the Codes in the Enlightenment period and has still an important role in the construction of the law and public policy today.

²¹² Such as freedom of contract and decision of cases *ex aequo et bono*.

²¹³ See D. Roebuck, "The Myth of Judicial Jealousy", 10(4) *Arb Int* 395-406 (1994) at p. 398; P. Thayer, "Comparative Law and the Law Merchant", 6 *Brooklyn LR* 139 (1936) at p. 141 and G. Baron, "Do the UNIDROIT Principles of International Commercial Contracts Form a New *Lex Mercatoria*?", 15(2) *Arb Int* 115-130 (1999) at pp. 116-117; G. Malynes, *Lex Mercatoria: Of Arbitrators and their Awards* (1686 edition re-published by Professional Books Limited, Abingdon, 1981) at pp. 305 *et seq*, extract in 9(3) *Arb Int* 323 - 328 (1993).

²¹⁴ See, e.g., M. Bluntschli, *Le droit international codifié* (Guillaumin 1895).

- 2.9 The response of legal science to these problems was to investigate a body of rules distinguishable, by its nature and function, from international law. Jessup termed this body of rules 'transnational law.'²¹⁵
- 2.10 According to the author, humans, beginning with the individual and reaching up to the family of nations,²¹⁶ form groupings of increasing complexity which, based on history, geography, convenience or necessity, have dispersed the sources of rules men live by. Such rules can originate from religious authorities, the head of a family or tribe, corporations regulating their subsidiaries, secret societies, towns, cities, states or international organisations.²¹⁷ They are found in inter-legal relations, within the legal systems themselves or as a result of party autonomy.
- 2.11 For a rule to be deemed transnational it would be irrelevant were it originates from, as long as it is recognised as binding by the parties²¹⁸ and puts an end to the dispute. For this reason, transnational law is defined as "all law which regulates actions or events that transcend national frontiers."²¹⁹
- 2.12 Whilst international law is based on the relationship between nations and international organisations, transnational law contains principles and rules applicable to all transnational subjects. Transnational rules are applicable not only to states but also to individuals, corporations, governmental or non-governmental organizations and other collective entities. For Jessup

²¹⁵ The expression was first used in 1931 by Gutzwiller, *Nussbaums internationales Jahrbuch für Schiedsgerichtswesen* III, 1931, p. 123, quoted in E. Langen, *Transnational Commercial Law* (A. W. Sijthoff Leiden 1973), at p. 17, fn 46.

²¹⁶ See P. Jessup, "Transnational Law", in *Storrs Lectures on Jurisprudence* (Yale University Press 1956), at p. 1. P. Jessup based his theory on Scelle's monistic idea of a *droit intersocial unifié*. See G. Scelles, *Précis de droit des gens* (Recueil Sirey 1932), at p. 7. Jessup however did not go as far as Scelles in saying that individuals, not states, were the only subjects of international law. On this point see also W. Schiffer, *The Legal Community of Mankind* (Columbia University Press 1954), at p. 259.

²¹⁷ P. Jessup, "Transnational Law", *ibid*, at p. 9. Those rules would be categorised today as "soft law" and "hard law."

²¹⁸ Jessup exemplified this idea with the characterisation of the oil concession agreement in the Anglo-Iran Oil Co case, Judgment of 22 July 1952, *ICJ Reports* 1952, p. 93 at p. 112. In that case the British Government considered that the agreement was both a concession contract between the Iranian Government and the company and a treaty between the two nations.

²¹⁹ P. Jessup, "Transnational Law", in *Storrs Lectures on Jurisprudence* (Yale University Press 1956), at p. 2.

transnational law supplies a larger pool of rules from which to draw, making it unnecessary to distinguish public or private international norms.²²⁰

2.13 Jessup's doctrine provides a good starting point insofar as demonstrates that the law applied by an international court or tribunal may have non-national sources. Yet it gives us no criteria to determine precisely which rules 'regulate actions or events that transcend national frontiers.'²²¹

2.14 The trans-frontier phenomena Jessup was referring to has changed substantially in the following decades. Transnational law developed in concert with globalisation,²²² the growing autonomy of the international community and the resulting need to establish 'neutral' standards independent from national policy. To a certain extent, it gained a higher degree of institutionalisation than envisaged by Jessup. Transnational law provides

²²⁰ On the notion of transnational law see further C. Schmitthoff, "International Business law: A New Law Merchant", 2 *Current Law and Social Problems* 129 (1961); E. Langen, *Transnational Commercial Law* (Sijthoff & Noordhoff 1973); C. Schmitthoff, *Commercial Law in a Changing Economic Climate* (2d ed, Sweet & Maxwell 1981); O. Lando, "The Lex Mercatoria in International Commercial Arbitration", 34 *ICLQ* 747 (1985); Lord Mustill, "The New Lex Mercatoria – the First Twenty-five Years", Bos & Brownlie (ed), *Liber Amicorum for Lord Wilberforce* (Oxford 1987), at p. 149 and 2 *Arb Int* 86 (1988); Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996); G. Teubner (ed), *Global Law Without a State* (Aldershot 1997); K. Berger, "The New Law Merchant and the Global Market Place: A 21st Century View of Transnational Commercial Law", *Int ALR* 91-102 (2000); R. Goode, "Usage and Its Reception in Transnational Commercial Law", 46 *ICLQ* 35 (1997); L. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform", 34(3) *The International Lawyer* 1055 (Fall 2000); L. Mistelis, "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law", in Fletcher, Mistelis and Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet and Maxwell 2001), at p. 1. See also the International Law Association Committee on International Commercial Arbitration, "The Applicability of Transnational Rules in International Commercial Arbitration", *ILA Report of the 64th Conference*, Queensland, Australia (1991); P. Bowden, "Transnational Rules in International Commercial Arbitration", ICC Publication No 480/4 (1993) at p. 247; V. Wilkinson, "The New Lex Mercatoria Reality or Academic Fantasy?" 12(2) *J Int'l Arb* 103-118 (1995); E. Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?", 17(1) *Arb Int* 59-72 (2001).

²²¹ Jessup's subsequent work was focused mainly on the relationship between states and international organizations.

²²² On this point, see L. Mistelis, "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law", Fletcher, Mistelis and Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet and Maxwell 2001), at p. 1; Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996). See also W. Reinicke, "Global Public Policy", 76(6) *Foreign Affairs* 127 (1997); M. Blessing, "Globalization (and Harmonization?) of Arbitration", 9(1) *J Int'l Arb* 79 - 90 (1992).

today the backbone of a legal order proper to the international community²²³ of individuals, companies and states.

2.15 The international community is undergoing, much like national states have throughout their history, a process of constant recreation and metamorphosis. It follows the process of a-nationalization of the economy, art, religion, politics, ethics and the sociological makeup of modern societies. It grows in unison with the problems facing a globalized world, which individual nation states are incapable or unwilling to address.²²⁴

2.16 The current structure of the international community can be described as follows.

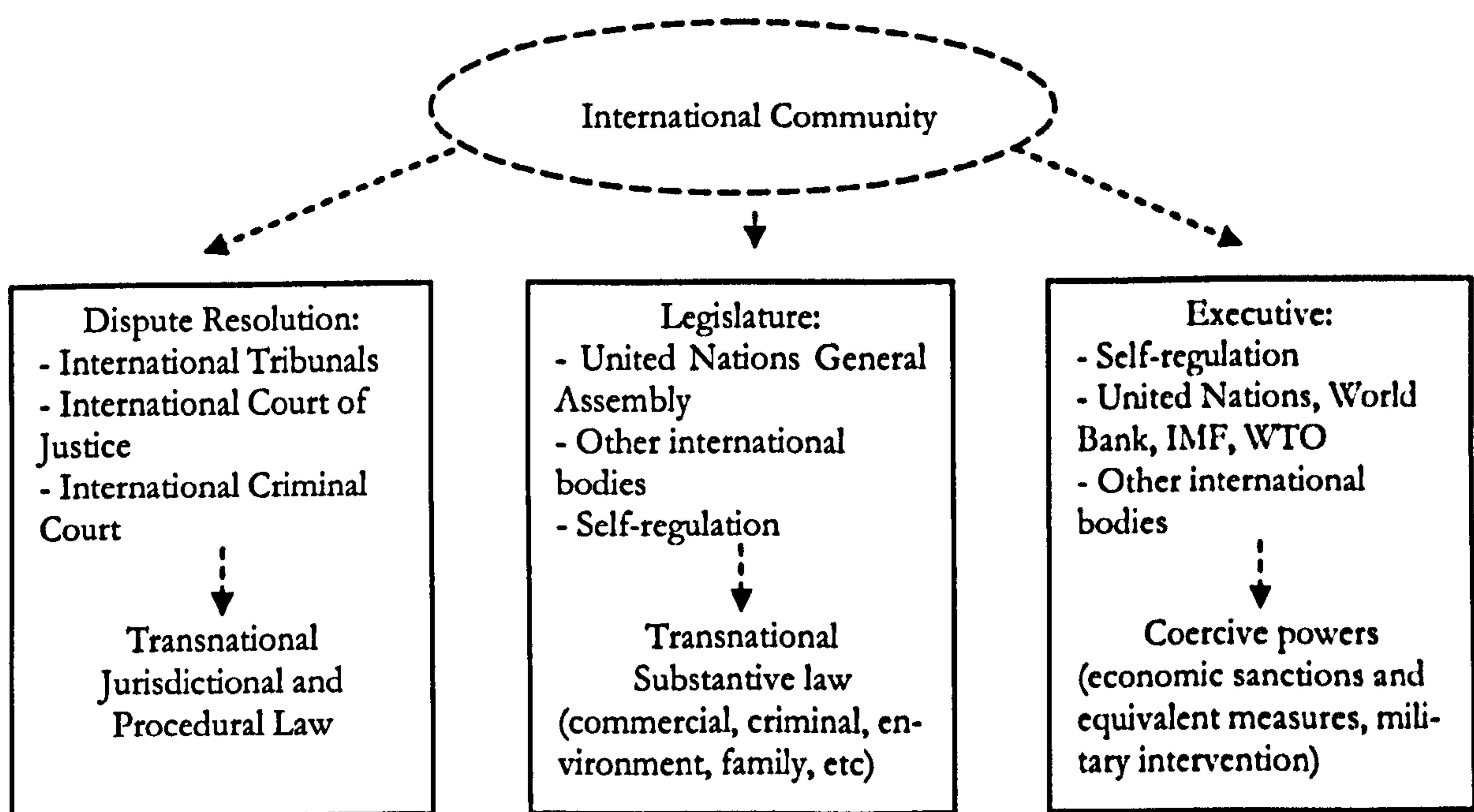


Diagram 1 – Structure of the international community.

2.17 For Gaillard the transnational legal order is grounded on four characteristics. First, it is complete, that is, able to respond to any legal situation. Second, it is structured or based on an organised body of rules with different but closely linked levels of abstraction. Third, it has the ability to

²²³ For a description of what is meant by the 'international community' see M. Quiroga, "Globalizacion, Deslocalizacion y Arbitraje Privado Internacional: Utopia o Realidad de un Orden Publico Transnacional?," *Revista de Corte Espanola de Arbitraje* 83 (2000). The structural elements of this community are laid down in international instruments including UN conventions and model laws, the WTO family of agreements and guidelines of international organizations such as the ICC or the World Bank.

²²⁴ A similar consideration has influenced the development of European Law.

evolve according to the needs of the society it regulates. And lastly, it is predictable, if based on a comparative approach to transnational rules.²²⁵

2.18 Whether one departs from a transnational legal order or a legal order of the international community of states and merchants, for our purposes it is sufficient to examine the relevance of the rules originating therefrom to international arbitration and its public policy.

2.19 Whilst transnational rules apply to different areas of the law, only those specific to international trade are likely to be relevant for an international arbitration tribunal.²²⁶ Goldman and others have termed such rules the *new*²²⁷ *lex mercatoria*.²²⁸ As a subset of transnational law²²⁹ the *lex mercatoria* can be defined as

²²⁵ See E. Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?", 17(1) *Arb Int* 59 - 72 (2001) at p. 65. The author adds however that the observation of this characteristic will lose its practical importance where the parties have submitted their dispute to general principles of law or the arbitrators have been authorised to apply "rules of law."

²²⁶ See, e.g., the list of rules discussed in Lord Mustill, "The New *Lex Mercatoria*: The First Twenty-five Years", 4 *Arbitration International* 86 (1988); Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (1999); M. Bonell, *The UNIDROIT Principles of International Law in Transnational Law in Commercial Legal Practice* (1999) at p. 7 *et seq*; E. Gaillard (ed.), *Transnational Rules in International Commercial Arbitration* (ICC Publication No. 480/4); the Lando Principles on European Contract Law and the CENTRAL list of Principles. For examples of the application of transnational rules see ICC Case No 6500 (1992), 119 *Clunet* 1015 (1992); ICC Case No 8385 (1995), 124 *Clunet* 1061 (1997); Paris Arbitration Chamber, 8 March 1996, *Agent (Austria) v Principal (Egypt)*, XXII YBCA 28 (1997). See also France, Cour de cassation, 9 October 1984, *Pabalk Ticaret Limited Sirketi v Norsolor SA*, 112 *Clunet* 679 (1985), English translation in 24 ILM 360 (1985); Italy, Corte di cassazione, 9 May 1996, no 4342; Corte di appello Bari, 2 November 1993, no 811, *Société Arabe des Engrais Phosphates et Azotes (SAEPA) and Société Industrielle d'Acide Phosphorique et d'Engrais (SIAPE) v Gemanco srl*, XXII YBCA 737 (1997).

²²⁷ The new *lex mercatoria* retrieves the medieval *lex mercatoria* received by national laws in the 17th and 18th century. On the old law merchant see, e.g., H. Berman and C. Kaufman, "The Law of International Commercial Transactions (*Lex Mercatoria*)" 19 *Harv Int L J* 221 (1978) at p. 224; but see O. Volckart and A. Mangels, *Has the Modern Lex Mercatoria Really Medieval Roots?* (Max-Planck Institut for Research into Economic Systems, Diskussionsbeitrag) at pp. 8-96; A. Cordes, "The Search for a Medieval Lex Mercatoria, 5 *Oxford U Comp L Forum* (2003), available at ouclf.iuscomp.org, last visited in August 2004.

²²⁸ See B. Goldman, "Le *lex mercatoria* dans les contrats et l'arbitrage internationaux; realites et perspectives", 106 *Clunet* 475 (1979); see also C. Schmitthoff (ed), *The Sources of the Law of International Trade* (International Association of Legal Science 1964); C. Schmitthoff, "The Law of International Trade", in *Commercial Law in a Changing Economic Climate* (2d ed, Sweet & Maxwell 1981), 18-33; Y. Fortier, "The New, New Lex Mercatoria, or, Back To The Future", 17(2) *Arb Int* 121-128 (2001) at pp. 122 *et seq*; J. Paulsson, "Le *lex mercatoria* dans l'arbitrage CCI", *Rev Arb* 55 (1990); G. Baron, "Do the UNIDROIT Principles Form a New Lex Mercatoria?", 15 *Arb Int* 115 (1999); L. Nottage, "The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery", 16 *Arb Int* 53 (2000); A. Maniruzzaman, "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration", 14 *Am U Int'l L Rev* 657 (1999); D. Rivkin,

rules of law which are common to all or most of the States engaged in international trade or to those States that are connected with a dispute, and if not ascertainable, then the rules of which would appear to be the most appropriate and equitable.²³⁰

"Enforceability of Arbitral Awards Based on Lex Mercatoria", 9 *Arb Int* 67 (1993) 72 *et seq*; K. Berger, "The New Law Merchant and the Global Market Place - A 21st Century View of Transnational Commercial Law", in Berger (ed), *The Practice of Transnational Law* (Kluwer 2000); A. Freeman, "Lex mercatoria: its emergence and acceptance as a legal basis for the resolution of international disputes", IX *ADRLJ* 289 (1997); A. Alvarez, "To What Extent Do Arbitrators in International Cases Disregard the Bag and Baggage of National Systems?", *ICCA Congress Series no 8*, at pp. 139-156; M. Hunter, "Publication of Arbitration Awards and Lex Mercatoria", 54 *Arbitration* 55 (1988); B. Goldman "The applicable law: general principles of law", J. Lew (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987), at p. 113; C. Stoecker, "The Lex Mercatoria": To What Extent does it Exist?" 7(1) *J Int'l Arb* 101 (1990); Lord Mustill, "Contemporary Problems in International Commercial Arbitration: A Response", 17 *Int'l Bus Law* 161 (1989); Lord Mustill, "The New Lex Mercatoria - the First Twenty-five Years," Bos & Brownlie (ed), *Liber Amicorum for Lord Wilberforce* (Oxford 1987), at p. 149 and 2 *Arb Int* 86 (1988); P. Mayer, "Mandatory rules of laws in international arbitration", 2 *Arb Int* 274 (1986); F. De Ly, *International Business Law and Lex Mercatoria* (North-Holland 1992); T. Carbonneau (ed.), *Lex Mercatoria and Arbitration: a Discussion of the New Law Merchant* (2d revised ed, Kluwer and Juris Publishing 1998); O. Lando, "The Lex Mercatoria in International Commercial Arbitration", 34 *ICLQ* 747 (1985); A. Lowenfeld, "Lex Mercatoria: An Arbitrator's View" 6 *Arb Int* 133 (1990); D. Rivkin, "Enforceability of Arbitral Awards based on Lex Mercatoria", 9 *Arb Int* 67 (1993); and Wilkinson "The New Lex Mercatoria - Reality or Academic Fantasy?" 12(2) *J Int'l Arb* 103 (1995).

²²⁹ See R. Goode, *New Developments in International and Consumer Law* (Hart Publishing 1998), at pp. 3 - 34, at p. 4 and H. Grigera Naón, *The Transnational Law of International Commercial Transactions* (1984), at p. 89. While some authors use the term "transnational law" interchangeably with "lex mercatoria," see, e.g., B. Wortmann, "Choice of Law by Arbitrators: The Applicable Conflict of Laws System", 14(2) *Arb Int* 97 - 114 (1998) at p. 101; J. Alcántara, "An International Panel of Maritime Arbitrators?", 11(4) *J Int'l Arb* 117 - 126 (1994), at p. 125, F. Blase, "Proposing a New Road Map for an Old Minefield", 20(3) *J Int'l Arb* 267 - 283 (2003) at p. 267, the former has a broader meaning than *lex mercatoria*. On the scope of the *lex mercatoria* see further C. Schmitthoff (ed), *The Sources of the Law of International Trade* (International Association of Legal Science 1964) and C. Schmitthoff, "The Law of International Trade", in *Commercial Law in a Changing Economic Climate* (2d ed, Sweet & Maxwell 1981) at p. 18-33; B. Goldman, "The Applicable Law: General Principles of Law", in Lew (ed), *Contemporary Problems*, 113. Awards based on the *lex mercatoria* have been upheld in France, Cour de Cassation, 22 October 1991, *Compania Valenciana de Cementos Portland SA v Primary Coal Inc*, Rev crit dip 113 (1992), with note by Oppetit, 114, 119 *Clunet* 177 (1992) with note by Goldman, 178, Rev Arb 457 (1992), with note by Lagarde (in English) XVIII YBCA 137 (1993) at p. 458; Cour de cassation, 9 December 1981, *Fougerolle v Banque du Proche-Orient*, 109 *Clunet* 935 (1982); Tribunal de grande instance Paris, 4 March 1981, *Société Norsolor v Société Pabalk Ticaret Sirketi*, 108 *Clunet* 836 (1981); England, *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v R'As al Khaimah National Oil Co* [1987] 3 WLR 1023, YBCA XIII (1988), 522 (CA and HL).

²³⁰ See E. Langen, *Transnational Commercial Law* (1973), at p. 33.

- 2.20 Tribunals will consider transnational principles whenever they are required to apply rules of law.²³¹ Of those principles some will have sufficient strength to be included in the notion of public policy.
- 2.21 Under the transnational public policy theory arbitrators will decide²³² on the basis of values endorsed by the international community and not according to a particular national policy.²³³ Transnational public policy is knit to the goals of the international community and applicable regardless of the connection of the facts to a particular country. In all other respects, the characteristics of transnational public policy are similar to those of national public policy.
- 2.22 Given their positive and negative controlling functions,²³⁴ principles of transnational public policy must be imperative. Imperative principles can only give way to other principles with the same standing.
- 2.23 In order to be imperative, a transnational principle must be essential to the international community. Whether a principle is essential will depend on the needs of the international community as perceived by the average member of that community at a given time.²³⁵ Therefore, the construction of transnational public policy may evolve over a period of time.²³⁶ An international tribunal must ascertain transnational public policy in light of the

²³¹ See M. Blessing, "The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism", 5(2) *J Int'l Arb* 9 – 82 (1999) at p. 14, for whom "the arbitrators are not restricted to applying only a particular national law as a whole, but may refer to "rules of law" forming part of a transnational law, or pertaining to international public policy, or to trade usage." The expression "rules of law" is used *e.g.*, in ICC rules Article 17, Netherlands CCP Article 1054 and Swiss PIL, Article 187. See also UNCITRAL Doc A/CN 9/245, para 94, Art XIX(1) and H. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers, Deventer - Boston, 1988), at pp. 766-767.

²³² Where, *e.g.*, arbitrators consider the effects of a contract despite the fact that it complies with the *lex contractus*,

²³³ See *Fouchard Gaillard Goldman*, at p. 583.

²³⁴ As remarked by Mr. Justice Burrough in *Richardson v Mellish* (1824) 2 Bing 229, 252 and the House of Lords in *Vervaeke v Smith* [1983] AC 145, [1982] 2 All ER 144, the operation of public policy is based on "considerations of wider social interests which call for the modification of a normal legal rule."

²³⁵ The requirement of due process is an example of an essential rule.

²³⁶ See, *e.g.*, Switzerland, Tribunal Fédéral, 19 September 2000, 19(2) *ASA Bull* 310 – 312 (2001), where the court considered this point in relation to the gambling prohibition under modern Swiss law.

actual requirements of the international community, not when the facts took place.²³⁷

2.24 It follows that transnational public policy can only be determined in light of facts established before the tribunal.²³⁸ The operation of transnational public policy is always connected to the circumstances of the case. For this reason transnational public policy is inherently flexible or versatile. As noted by Graulich, “uncertainty and ambiguity as to its content is an essential characteristic of public policy.”²³⁹ Versatility here implies that transnational public policy has the potential to address unforeseen legal problems.²⁴⁰

2.25 For transnational public policy to apply the tribunal must be persuaded that there has been an actual or constructive breach of one or more of its principles. In enforcement proceedings the court will determine whether the effects of an award²⁴¹ or arbitration agreement²⁴² result in a significant and verifiable damage to the essential standards²⁴³ of the international

²³⁷ On this point see E. Gaillard, “Transnational Law: A Legal System or a Method of Decision Making?”, 17(1) *Arb Int* 59 - 72 (2001), at p. 69: “The issue of whether transnational rules possess this evolutionary character depends in part on the school of thought to which one belongs. Where transnational rules are understood as a list of principles, they may or may not be evolutionary. (...) Nonetheless, where transnational rules are understood as a methodology drawing from a number of sources pursuant to the comparative law approach, they will by nature be extremely responsive to the changing needs of international commerce. At any given time, this methodology will enable arbitrators to take into account the most current status of the various laws from which the principles are to be drawn.” On the evolutionary character of public policy see also C. Jarrosson, *La notion d'arbitrage* (Librairie Generale de Droit et de Jurisprudence 1987), at p. 225: “public policy is a variable notion, depending on changing manners, morals and economic conditions. In theory, this flexibility of the doctrine of public policy could provide a judge with an excuse for invalidating any contract which he violently disliked. On the other hand, the law does adapt itself to changes in economic and social conditions, as can be seen particularly from the development of the rules as to contracts in restraint of trade. (...) The present attitude of the courts represents a compromise between the flexibility inherent in the notion of public policy and the need for certainty in commercial affairs.” Finally, see G. Treitel, *The Law of Contract* (8th Ed. 1991) at pp. 424 and 425.

²³⁸ With regard to the courts, idea that the assessment of public policy has to be made *in concreto* only concerns the solution given to the dispute and not the assessment of the parties' rights made by the arbitrators in connection with the public policy requirements at issue. See France, Cour d'appel Paris, 14 June 2001, *Cargill France v SA Tradigrain France*, Rev Arb 805 - 810 (2001) at p. 808.

²³⁹ See Graulich, *Principles de droit international privé* (Dalloz 1961), at p. 155, para 210, cited in J. Lew, *Applicable Law*, at p. 531.

²⁴⁰ In this sense, see P. Lalive, “Transnational (or Truly International) Public Policy”, *ICCA Congress Series no 3*, at p. 289.

²⁴¹ See New York Convention, Articles V(2)(b) and VII.

²⁴² Within the limits set out in Article II(3) and V(2)(a) of the New York Convention.

²⁴³ This was the test proposed in Germany, Federal Court of Justice, *BGHZ*, 22, 162, 167.

community.²⁴⁴ It follows that transnational public policy may be applied severally. An arbitration tribunal should only disregard those claims contrary to transnational public policy. In enforcement proceedings transnational public policy merely bars the enforcement of a severable part of the award.²⁴⁵

2.26 Finally, it is generally recognised that transnational public policy should be relied upon in exceptional circumstances.²⁴⁶ A rule is relied upon as transnational public policy where the above standards are met.

2.27 For Racine²⁴⁷ the application of transnational public policy by international arbitrators is justified by the autonomy of international arbitration and the fact that arbitrators have no forum.²⁴⁸ An international tribunal is in a better position to safeguard the vital interests of the international community²⁴⁹ than a national court.²⁵⁰

²⁴⁴ There is no suggestion here that an enforcement court should revise the content of the award. As stated by the Swiss Tribunal Fédéral in its decision of 14 November 1991, XVII YBCA 279 -286 (1992) at p. 284, para 8, "the setting aside of a decision is only justified when its result violates public policy, not simply when the reasoning appears to contravene public policy." And, *ibid*, para 10, "only the result and not the individual considerations of the arbitral judgment can be attacked as incompatible with public policy and that even clear violations of law and manifestly incorrect findings of fact are in and of themselves not capable of establishing the ground for appeal". Similarly, see Germany, Oberlandesgericht Hamburg, 26 January 1989, XVII YBCA 491 – 499 (1992) at p. 495 and Zimbabwe, Harare High Court, Case 342 of 1 March and 5 April 2000, *Conforce (Pvt) Limited v The City of Harare*, XXV YBCA 535 – 556 (2000) at p. 550. See also section 81 of the English Arbitration Act which, after saving public policy to the common law, states in sub-section 2 that "Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award." Errors of law or fact are irrelevant for the purposes of transnational public policy. As stated by the Corte di Appello of Milan, December 1992, *Allsop Automatic Inc v Tecnoski snc*, 30 Rivista di diritto internazionale privato e processuale 873-874 (1994), XXII YBCA 725 – 726 (1997) at p. 726, para 5, in international arbitration "the so-called public policy limit is less stringent, since the court only evaluates the effect of the foreign award." As a matter of policy in international arbitration cases a losing party should not be allowed to circumvent the finality of the award simply by arguing that the arbitrator has misapplied the law or misread the facts.

²⁴⁵ See, e.g., Hong Kong SAR, *JJ Agro Industries Ltd v Texuna Int'l Ltd*, (1992) HK Law Digest H10, (1993) XVIII YBCA 396 - 402 (High Court of Hong Kong, 12 August 1992) at p. 401, para 19.

²⁴⁶ See K. Böckstiegel, "Public Policy and Arbitrability", *ICCA Congress Series no 3*, at p. 179.

²⁴⁷ J. Racine, *L'Arbitrage Commercial International et L'Ordre Public* (LGDJ 1999), at p. 363, paras 650 *et seq*.

²⁴⁸ This was the reasoning of Judge Lagergren in ICC Case No 1110 of 15 January 1963, *Argentine Engineer v British Company*, 3 Arb Int 282-294 (1994), at p. 50, para 16, with note J. Gillis Wetter, pp. 277-281.

²⁴⁹ See J. Lew, *Applicable Law*, at p. 535; C. Kuner, "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention", 7(4) *J Int'l Arb* 71-92 (1990), at p. 80; H. Batiffol, *Droit*

2.28 The notion of transnational public policy is not, however, without its critics. Some authors have questioned whether this level of public policy is ascertainable or indeed needed at all.²⁵¹

2.29 Among those who find transnational public policy unascertainable two different arguments have been put forth. Some authors argue that the formation of a transnational public policy is rendered impossible where parties with different cultural backgrounds enter into a commercial relationship.²⁵² The example given is the difficulty in finding transnational public policy standards on the charging of interest when one of the parties comes from an Islamic country.²⁵³

2.30 Yet, this view departs from a conception of transnational public policy knit to national laws. As seen below, the public policy of the international

International Privé (4th ed, Librairie Generale de Droit et de Jurisprudence 1967), at p. 401 *et seq.* See also the dictum in *Ad Hoc*, Interim Award of 26 September 1999 and Final Award of 16 October 1999, *Himpurna California Energy Ltd v Republic of Indonesia*, XXV YBCA 11 – 432 (2000) at p. 182 *et seq.* The arbitrator has a duty to determine the requirements of the applicable law. See P. Mayer, “Reflections on the International Arbitrator’s Duty to Apply the Law – The 2000 Freshfields Lecture”, 17(3) *Arb Int* 235 (2001) at p. 239.

²⁵⁰ Recalling the words of E. Langen, courts have “relegated the applicable law question to second place, despite the priority accorded it by classical methodology, inasmuch as they have accepted the competence of arbitral bodies set up *ratione materiae* or by particular exchanges, and thus at the same time admitted the international trade law practiced in such fora.” See E. Langen, *Transnational Commercial Law* (A. W. Sijthoff Leiden 1973) at pp. 30 – 31.

²⁵¹ See the discussion in M. Buchanan, “Public Policy and International Commercial Arbitration”, 26 *American Business Law Journal* 511 (1988) at p. 514 *et seq.*; and J. Racine, *L’Arbitrage Commercial International et L’Ordre Public* (LGDJ 1999) at p. 357, paras 640 *et seq.*

²⁵² See the discussion in O. Sandrock, “How Much Freedom Should an International Arbitrator Enjoy? The Desire from Freedom from Law v. The Promotion of International Arbitration”, 3 *Am Rev Int’l Arb* 30 (1992) at p. 55.

²⁵³ On the charging of interest in Arab countries see J. Paulsson (ed.), “General Introduction on Arbitration in Arab Countries”, in *International Handbook on International Commercial Arbitration* (Kluwer suppl. 15 Aug. 1993); N. Kathigamar, “Who is Afraid of Shari’a? - Islamic Law and International Commercial Arbitration” 59(2) *Arbitration* 125 - 131 (1993); J. Lew, “The recognition and enforcement of arbitration agreements and awards in the Middle East”, 1(2) *Arb Int* 161 – 178 (1985); A. El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law and Taxation Publishers 1990); and S. Saleh, *Commercial Arbitration in the Arab Middle East* (Graham & Trotman, 1984), at pp. 20 *et seq.* Liberalisation in some Islamic jurisdictions may in future bring together different public policies. See D. Branson and R. Wallace, “Awarding Interest in International Arbitration: Establishing a Uniform Approach”, 28(4) *Virg J Int’l L* 919-947 (1988); UNCITRAL Doc. A/CN.9/460, paras 101-106; Articles 170 and 226 of the Egyptian Civil Code which allow for the charging of interest; M. Alam-Eldin, *The New Commercial Code of Egypt* (Dar Elnahda El-Arabia 1999); Iran-US, Case No 953 Chamber Two – Award No. 587-953-2 of 24 June 1998 at para. 128; ICC Case No 5277, Second interim Award of 1987, XIII YBCA 80 – 90 (1988) at p. 90; CRCICA Case No 19, Award of 13 April 1991, *Asian Company v African Agricultural Bank*, Alam Eldin (ed), *Arbitral Awards of the Cairo Regional Centre*, p. 23 at p. 28.

community has an autonomous, axiomatic nature and is not concerned with national policy. Transnational public policy applies to the dispute between the parties and is not confined by the laws of a nation state.

2.31 Other authors conceive transnational public policy as beyond the reach of arbitrators, who will always be influenced by a certain cultural background. An arbitrator, the argument runs, has only his or her own moral standards as a reference. When deciding a dispute, the tribunal is placed in a legal vacuum, having the arbitrators' conscience as the sole source of determinative moral rules.²⁵⁴ Given the difficulty in reuniting different moral references in an international dispute, arbitrators count only on the *dictum* of their own judgment, inevitably tainted by a certain cultural, ideological or legal background.

2.32 This position does not invalidate the existence of transnational public policy as an axiom. Instead, it underlines the importance of defining the sources and content of transnational rules. While it is indeed difficult for arbitrators to 'delocalise' their moral judgment in the presence of conflicting cultures, this can be achieved by reference to universal rules of ethics²⁵⁵ and the other sources of transnational public policy, as analysed below.

2.33 The other criticism facing transnational public policy is that it is a useless legal concept.²⁵⁶ This view stems from the observation of the content of public policy. If the content of transnational public policy is identical to that of the laws in contact with the dispute, its application would have the same result as prescribed in those laws.

²⁵⁴ See P. Mayer, "La règle morale dans l'arbitrage international", in *Etudes Offertes à P. Bellet* (Paris 1991), at pp. 379 *et seq.*

²⁵⁵ For examples of ethical rules see, *e.g.*, B. Spinoza, *Ethics* (Wordsworth 2001), at p. 169, Part IV, proposition 7: "an affect cannot be restrained nor removed unless by an opposed and stronger affect"; and Spinoza, *ibid*, at p. 211, Part V, proposition 25: "according to the guidance of reason of two things that are good, we shall follow the greater good, and of two evils, we shall follow the less"; on the topic see also H. Paton, *The Moral Law* (Hutchinson's University Library 1955), at p. 13 *et seq.* Ethics uncover what is noble and good, qualities which give security and stability. It is the aspect of reason which ensures the correctness of one's behaviour and is beyond criticism. Every culture is be abhorred by instances of theft, fraud, extortion or bodily harm.

²⁵⁶ This argument is also criticised by J. Racine, *L'Arbitrage Commercial International et L'Ordre Public* (LGDJ 1999) at p. 356, paras 635 *et seq.*

2.34 Even though transnational yardsticks may be endorsed by national public policy,²⁵⁷ this view overlooks the controlling functions of transnational public policy.²⁵⁸ The national law chosen by the parties to govern their contract may be offensive to the international community.²⁵⁹ The contract may fully comply with a national law and be contrary to transnational public policy.

2.35 Another argument for the uselessness of the concept is that, in the context of judicial proceedings, any court invoking transnational public policy would reject its own law.²⁶⁰ This objection can be rebutted on several grounds.

2.36 First, the same can be said of the application of a principle of public international law. Transnational public policy may well found such a principle. Second, by rejecting its own law the court accepts the supremacy of transnational public policy. Lastly, transnational public policy need not be universal.²⁶¹ Where the law of a country disapplies transnational public policy the latter is still required to control the extraterritorial effects of that law.

(i) transnational public policy in the national courts

2.37 Transnational public policy may be relied upon by a national court where one party institutes court proceedings in breach of an arbitration agreement or where enforcement of an award is at odds with the fundamental interests of the international community.

2.38 Courts determine those interests by reference to a widely held view amongst the members of the international community, including developed

²⁵⁷ See P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series no 3*, at p. 314.

²⁵⁸ As suggested by J. Racine, *L'Arbitrage Commercial International et L'Ordre Public* (LGDJ 1999) at p. 356, para 637

²⁵⁹ In this sense, see the Final Report of the Institute of International Law (by Rapporteurs Professor Arthur T. von Mehren and Judge Eduardo Jiménez de Aréchaga) in *Arbitration between States and Foreign Enterprises*, 63/1 AnnIDI (1989), pp. 191-201, at p. 196.

²⁶⁰ This point is addressed in P. Lagarde, "Public Policy", *International Encyclopaedia of Comparative Law* (JCB Mohr and Martinus Nijhoff Publishers 1994), at p. 51.

²⁶¹ See J. Racine, *L'arbitrage commercial international et l'ordre public* (LGDJ 1999) at p. 360, para 647. See also J. Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications 1978), at p. 532 for whom the principles of public policy are not found in mass opinion but "in the opinion of the healthy elements of the community."

and developing countries. By applying transnational public policy a national judge endorses those principles of public policy “as to which a broad consensus has emerged in the international community.”²⁶²

2.39 As stated by the International Court of Justice in the *Barcelona Traction* case²⁶³ all States must protect legal interests and obligations which derive, for example, from “outlawing of acts of aggression, of genocide, or from principles and rules governing the basic rights of the human person including protection from slavery and racial discrimination.”²⁶⁴ National courts give effect to transnational public policy by recognizing the notion within their own national public policy.²⁶⁵

2.40 As noted by P. Lalive, although

International” public policy remains always national by its source for the judges, it may well, however, on occasions, be inspired by supranational legislative purposes and therefore it may have, by its object, a truly international purpose.

It is erroneous or far too narrow to state, as is often done in doctrinal writings, that the international public policy of the forum can have no other purpose or result but to impose the application of a mandatory rule or fundamental principle of the domestic law of the forum. Such a

²⁶² See Article 2 of the Resolution of the Institute of International Law, “Arbitration Between States, State Enterprises or State Entities, And Foreign Enterprises”, adopted at the IIL session in Santiago de Compostela, 5-13 September 1989, published at XVI YBCA 236 – 239 (1991). National courts have narrowed the public policy of the forum to reflect this consensus.

²⁶³ 1970 ICJ Reports 3 at p. 32.

²⁶⁴ See P. Lalive, “Transnational (or truly international) public policy”, Pieter Sanders (ed), *ICCA Congress series No 3*, pp. 295–6.

²⁶⁵ As noted by Francescakis in his “Ordre public” (Encyclopédie Dalloz, no. 9), when construing public policy the national interest may “consist sometimes of taking into account and satisfying the interests and need of international trade, in the broadest sense of this term, notwithstanding the rules of domestic law (rules which have been elaborated and imposed for domestic situations).” Take for instance the transnational public policy prohibiting terrorism, the traffic of children, slaves or illegal weaponry, genocide, fraud, corruption or bribery or the protection of the environment and cultural assets. These rules are often common to the public policy of a *lex fori* and transnational public policy. See, e.g., Switzerland, Tribunal Fédéral, 13 November 1998, *X SA, et al v Z S A*, XXV YBCA 443 -534 (2000) at p. 513, para 6; and Luxembourg, Court of Appeal, 28 January 1999, *Sovereign Participations International S A (Luxembourg) v Chadmore Developments Ltd (Ireland)*, XXIVa YBCA 714 - 723 (1999) at pp 719 – 720 where due process, a principle of transnational public policy, was deemed part of the public policy of the local court.

statement misses the point, since the real question is not to ascertain the source of international public policy, but it is to determine its precise normative contents.²⁶⁶

2.41 The *ordre public transnational* is a presumptive part of the public policy of every nation aligned with the international community.²⁶⁷ The reference to the public policy of the country of enforcement contained in Article V(2)(b) of the New York Convention must be construed accordingly.²⁶⁸ When the public policy provision was first introduced in the New York Convention, “it was understood that it was not equivalent to the political stance or international policies of a State.”²⁶⁹

2.42 Transnational public policy is limited to any such principles as required to protect the vital interests of the international community. A national court relies on transnational public policy rules to the extent that “these provisions have, according to the specific circumstances of the case at hand, a sufficiently transnational significance. In such cases, the public policy to be taken into account by the Court is the same as that by the arbitral tribunal, however, with

²⁶⁶ P. Lalive, “Transnational (or Truly International) Public Policy”, *ICCA Congress Series no 3*, at p. 278.

²⁶⁷ As stated by Lachs during the debate on the draft Articles of the International Law Commission, I(2) *YILC* (1966) at p. 69, para. 62, “the very fact that a State is a member of the international community makes it incumbent upon it to accept the rules of *Jus Cogens*.” There is an osmosis between national and transnational public policy where national law complies with the law of nations. See P. Lalive, “Transnational (or Truly International) Public Policy”, *ICCA Congress Series No 3*, at p. 309.

²⁶⁸ This is in tune with Section 2(b) of the International Law Association Resolution 2002, which states that “in order to determine whether a principle forming part of its legal system must be considered sufficiently fundamental to justify a refusal to recognise or enforce an award, a court should take into account, on the one hand, the international nature of the case and its connection with the legal system of the forum, and, on the other hand, the existence or otherwise of a consensus within the international community as regards the principle under consideration (international conventions may evidence the existence of such a consensus). When said consensus exists, the term “transnational public policy” may be used to describe such norms.” See S. 2 b) of the ILA Resolution 2/2002, adopted in the 70th Conference of the International Law Association held in New Delhi, India, 2-6 April 2002.

²⁶⁹ See Canada, *Schreter v Gasmac Inc* (1992), 7 OR (3d) 608, 89 DLR (4th) 365.

the important difference that the Court must only review the award's compatibility with the public policy in the light of the award's result."²⁷⁰

2.43 Several examples can be given of the recognition of transnational public policy by national courts. In Switzerland, for instance, courts construe the public policy provision in Article 190(2)(e) of the Private International Law Act, applicable to international cases, as a reference to transnational public policy.²⁷¹ Under Swiss law, public policy is "a universal notion, not a national one, aiming at sanctioning incompatibility with the fundamental legal or moral principles recognized in all civilized States."²⁷² Arbitration tribunals are encouraged to uphold public policy principles "regardless of the connection of the dispute to a specific country."²⁷³

2.44 The Italian courts have understood public policy relevant to international arbitration as a "body of universal principles shared by nations of similar civilization"²⁷⁴ and "independent of the laws of the individual States,"²⁷⁵ whose operation is "based first and foremost on the need to safeguard a legal and moral minimum which is common to the feeling of several nations."²⁷⁶

2.45 In turn, the US courts have construed the public policy exception in the New York convention in the following manner:

²⁷⁰ C. Brunner, "Note - Federal Supreme Court, 28 April 2000 - Public Policy as a Ground for Setting Aside International Arbitral Awards", 18(3) ASA Bull 566 - 581 (2000) at pp. 573 - 574.

²⁷¹ See Switzerland, Tribunal Fédéral, ATF 120 II 166-168.

²⁷² Tribunal Fédéral, 13 November 1998, X SA *et al* v Z SA, XXV YBCA 443 -534 (2000) at p. 513, para 6. See however Switzerland, Bundesgericht, 28 March 2001, WI *Beverly Overseas SA v Privredna Bank Zagreb*, 4 ASA Bull 807 (2001).

²⁷³ See Switzerland, Tribunal Fédéral, ATF 120 II 166-168. See also ICC Case No 8420 of 1996, Partial Award, *Agent v Supplier*, XXV YBCA 328 - 340 (2000) at p. 334, para 26, original in French.

²⁷⁴ See Italy, Corte di Appello of Milan, December 1992, *Allsop Automatic Inc v Tecnoski snc*, 30 Rivista di diritto internazionale privato e processuale 873-874 (1994), XXII YBCA 725 - 726 (1997) at p. 726, para 4.

²⁷⁵ Italy, Corte di Cassazione, 8 February 1982, *Fratelli Damiano s n c v August Topfer & Co.*, XVIII Rivista di diritto internazionale privato e processuale (1983) pp. 329 - 438, extracts in IX YBCA 418 - 420 (1984) at p. 420.

²⁷⁶ See Italy, Supreme Court, *Alarcia Castells v Hengstenberge e Procuratore generale presso la Corte di appello di Milano*, XIX RDIPP (1983) at p. 364.

change in circumstances had taken place, resulting in the application of the principle of *rebus sic stantibus*; and c) there had been an abuse of rights. It was accepted by the Court that the latter grounds depended on a negative answer to point a).

2.49 Argentine law, applicable to the merits, granted a party to a shareholder agreement the right to terminate the contract if it could be shown that a termination date had not been included in the agreement. From the outset of the arbitration, Respondent argued that the absence of a contractual time limit merely showed the intention of the parties to be bound by the contract for the duration of their venture.

2.50 In the last submissions allowed by the tribunal before the proceedings were closed, the Respondent altered its submission arguing now that the parties had tacitly incorporated the time limits contained in the relevant Concession Agreement.

2.51 Claimant sought the annulment of the award in the Uruguayan Courts on the grounds that a) the arbitration clause was null and void as it excluded an appeal to the courts and b) there was a breach of the internal public policy of Uruguay, as it had been denied an opportunity to respond to the incorporation point and, further, the tribunal had exceeded its mandate by relying on an extemporaneous submission.

2.52 In relation to the first point, the Court held that it was bound under international law to recognise an arbitration agreement, adding that a foreign award may only be set aside in the Uruguayan courts where it carries a breach of international public policy.

2.53 International public policy was defined as a basic notion of justice derived from the transnational legal system²⁸¹ and requiring the protection of due process in international arbitration.

2.54 The Court then clarified that the public policy exception contained in Article V of the New York Convention should be distinguished from the internal public policy of an individual State. The distinction enabled, for

²⁸¹ *Civilización jurídica común*, at p. 28 of the judgment.

instance, the Court to exclude a foreign mandatory rule offensive to international public policy.

2.55 According to the judgment, the principles of *audiatur et altera pars* and *contradiction* contained in Article V(1)(b) of the New York Convention were seen as an expression of *ius gentium* and excluded the intervention of national law.

2.56 Turning to the jurisdiction of the arbitration tribunal, the Court concluded that the arbitrators had merely construed a legal concept and that their award was not based on the extemporaneous submissions.²⁸² There had been therefore no breach of the procedural public policy of Uruguay, in the sense given above.

2.57 Similarly, the Court of Appeal in Canada considered transnational public policy in a dispute involving the United Nations embargo to Libya following the Lockerbie plane crash.²⁸³ The dispute concerned the jurisdiction of the arbitral tribunal to decide whether Air France had rightfully terminated its contract with Libyan Arab Airlines following UN Resolution 883.

2.58 In the arbitration, respondent argued that as, a result of the international embargo, the dispute was not arbitrable. In its partial award on jurisdiction the tribunal found however that the arbitrability of the dispute was not precluded by transnational public policy, French or Canadian law.

2.59 The Court of Appeal of Quebec was asked to declare the inarbitrability of the dispute and the invalidity of the partial award on jurisdiction. The Court held, however, that arbitration tribunals were bound by the *ordre public supranational* and declined to set aside the tribunal's decision for breach of transnational public policy, stating that its application was within the jurisdiction of the arbitrators.

²⁸² The Court further noted that some legal systems allow an arbitral tribunal to decide beyond the Terms of Reference where the parties have tacitly recognised such power.

²⁸³ See Canada, Court of Appeal of Montréal, 31 March 2003, *Air France v Libyan Arab Airlines*, 21(3) ASA Bull 630 - 648 (2003), original in French.

2.60 The tribunal's mission in matters of public policy was also underlined by the French courts in the *Ganz* case.²⁸⁴ The dispute concerned three contracts under which Ganz Mavag, a state-owned Hungarian company, would supply rail equipment to the Tunisian National Rail Company. In 1987 the Hungarian government divided the company into seven smaller companies. In 1988, the Tunisian National Rail Company commenced ICC proceedings, arguing that the scission amounted to fraud and expropriation in breach with French law, which governed the contract.

2.61 The following year, the Hungarian government nominated one of the seven companies, GMVV, as successor to the contracts. The Hungarian companies argued that Hungarian company law should apply to the government decision and, as such, the arbitration agreement included in the contracts would only bind GMVV.

2.62 The ICC tribunal disagreed, holding that the decision of the Hungarian government to divide Ganz Mavag was not opposable to the Tunisian company and therefore all seven companies were bound by the arbitration clause.

2.63 Following the tribunal's decision, the Hungarian companies appeared before the French Court of Appeal, arguing that the tribunal had exceeded its powers. According to the court, in international matters it was within the arbitrators' mission to uphold public policy and punish a conduct between international business partners contrary to good faith. When considering allegations of fraud or theft, the court found, arbitrators were right "not to attend to the interests of a state"²⁸⁵ particularly when that state had become a party to the arbitration.

(ii) transnational public policy in arbitration practice

2.64 Transnational public policy has a self-regulatory function within the law applied by the arbitrator. As a part of the legal system of the international community, it controls the effects of international law, national law and the

²⁸⁴ See France, Court of Appeal, 29 March 1991, *Sté Ganz v Sté nat'le des Chemins de fer tunisiens*, *Rev Arb* 478 - 480 (1991), note L. Idot.

²⁸⁵ Court of Appeal, *Ganz*, *ibid*, at p. 480. Original in French.

agreement of the parties. As noted by Lalive, transnational public policy is a *corrective or equitable superior element of the whole body of rules applied by the international arbitrator and which make up the (composite) "legal system" which he is called upon both to apply and to produce.*²⁸⁶

2.65 As an 'internal' public policy in international arbitration public policy has a positive and a negative function. In its negative function, transnational public policy ousts the effects of contravening national and non-national standards. In its positive function, transnational public policy implies self-determinative standards belonging to transnational law in the rules determined by the arbitrator.²⁸⁷ In this sense, the concept has intra-systemic effects, acting as a controlling tool in relation to legal and non-legal provisions regardless of their origin.²⁸⁸

2.66 Transnational public policy is a reference for the construction and development of rules within the transnational legal system, much like the *ordre public* in national law.²⁸⁹ The self-regulatory functions of transnational public policy can be illustrated as follows:

²⁸⁶ See P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series no 3*, at p. 312.

²⁸⁷ D. Hochstrasser, "Choice of Law and "Foreign" Mandatory Rules in International Arbitration", 11(1) *J Int'l Arb* 57 - 86 (1994) at p. 61.

²⁸⁸ For this reason it can be said that the arbitral tribunal has a transnational fora. In this sense, see the dictum by the United States Court of Appeals in *Nat'l Oil Co of Iran v Ashland Oil*, according to which the adoption of a pro-arbitration policy gained special significance in the international context because of the problems found with the conflicts of laws system and, in the words of the court, a *transnational fora*. See United States, Court of Appeals for the Fifth Circuit, 21 May 1987, *Nat'l Oil Co of Iran v Ashland Oil, Inc.*, 817 Federal Reporter 2d Series 326-335 (1987), XIII YBCA 591 - 601 (1998) at p. 601. See also A. Maniruzzaman, "International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview", 7(3) *J Int'l Arb* 53 - 64 (1990) at p. 56; ICC Case no 6474 of 1992, Partial award on Jurisdiction and Admissibility, *Supplier (European country) v Republic of X*, XXV YBCA 279 - 310 (2000) at p. 291, para 61.

²⁸⁹ In the Civil Law public policy has a quasi-constitutional controlling function with regard to the construction and application of domestic rules. See J. Racine, *L'Arbitrage Commercial International et L'Ordre Public* (LGDJ 1999), p. 425 at para 767.

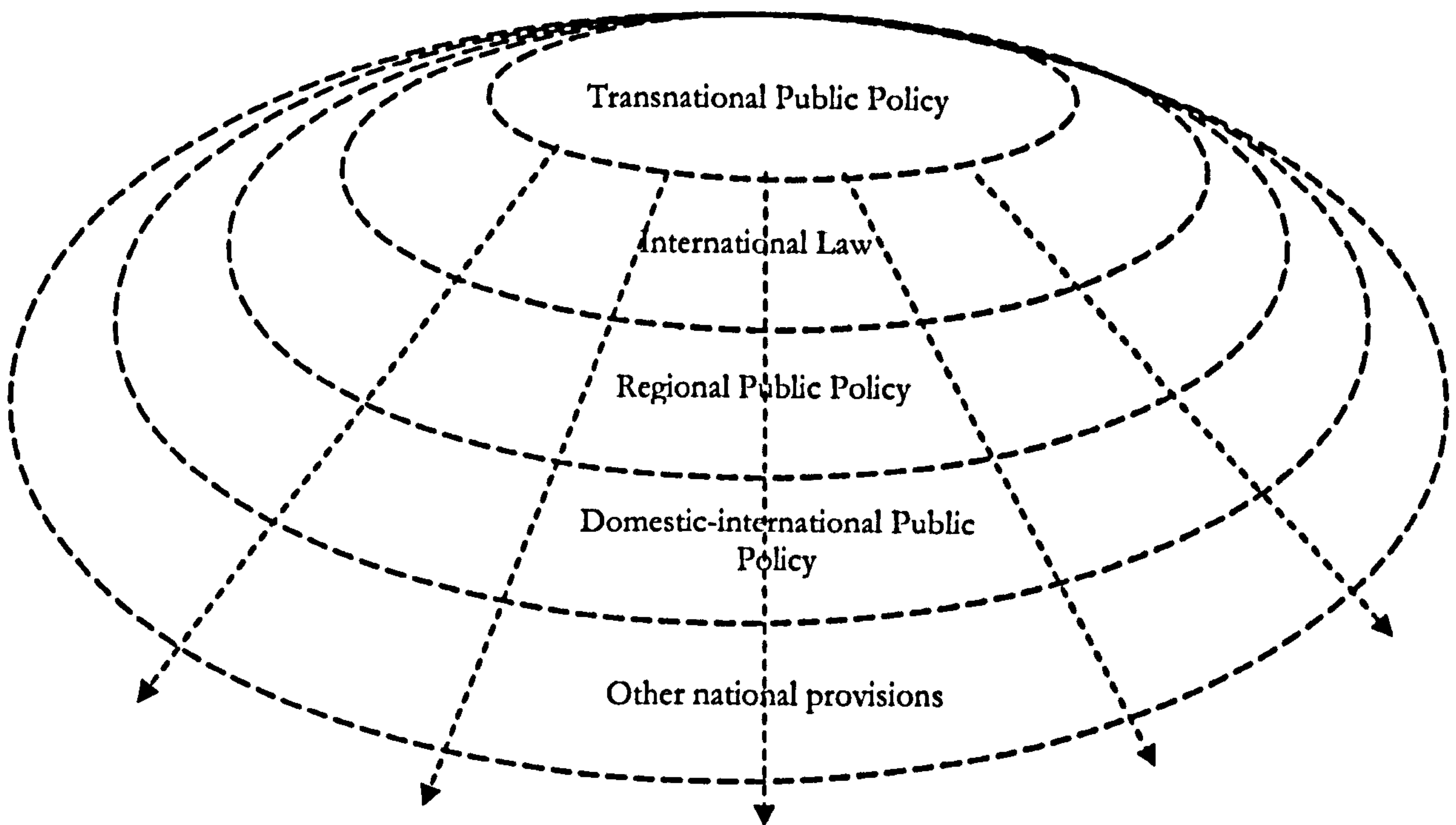


Diagram 2 – Controlling function of transnational public policy with regard to national laws.

2.67 As echoed in *Ganz*, an arbitral tribunal is placed above a national law²⁹⁰ and is not bound by the interests of a particular legal system. The public policy applied by the tribunal is based on “universal standards of accepted norms of conduct that must always apply and provide limitations to public as well as private international relationships and transactions.”²⁹¹

2.68 Where transnational public policy is applied to control the actions of an international organisation or a state or in the international sphere, it has a controlling function in public international law.²⁹² Transnational public policy principles are applied notwithstanding a government or state owned entity’s

²⁹⁰ P. Mayer, “Reflections on the International Arbitrator’s Duty to Apply the Law: The 2000 Freshfields Lecture”, 17(3) *Arb Int* (2001) at p. 235.

²⁹¹ M. Buchanan, “Public Policy and International Commercial Arbitration”, 26 *Ant Bus. L J* 511 (1988) at 511. In the same sense, see D. Burger, “Transnational Public Policy as a Factor in Choice of Law Analysis”, 5 *NYL Sch J Int’l & Comp L* 367(1984).

²⁹² In this sense see M. Blessing, “The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism”, 5(2) *J Int’l Arb* 9 – 82 (1988) at p. 57. In *Parsons & Whittemore (US) v Société Générale de l’Industrie du Papier (RAKTA) (Egypt)*, 508 F 2d at 974, the US court held that “a circumscribed public policy doctrine was contemplated by the [New York] Convention’s framers and the US, in acceding to the Convention meant to subscribe to this “supranational emphasis”. See I YBCA 205 (1976), at p. 205. See also ICSID Case No ARB/81/8, Final Award of 5 June 1990, *Amco Asia Corp v Indonesia*, XVII YBCA 73 – 105 (1992).

claim that they have not been integrated in the legal system, on constitutional grounds or otherwise.²⁹³ An international arbitral tribunal will not permit a respondent government to escape its transnational obligation to arbitrate.²⁹⁴ This position is consistent with the trend prevailing in recent awards concerning investment disputes and State contracts²⁹⁵ and provisions such as Article 42 of the Washington Convention.²⁹⁶

2.69 Transnational public policy is therefore distinguishable from the operation of international law. First, a bilateral treaty may address the concerns of the contracting states and be irrelevant to the wider international community. Second, transnational public policy applies to individuals, corporations, international organizations and States regardless of the ratification of a particular treaty.

2.70 The distinction is particularly relevant where international law is insufficient or contradictory. An example of the latter can be found in the Partial Award on Jurisdiction in ICC case No. 6474,²⁹⁷ where an arbitration tribunal sitting in Switzerland expressly relied on transnational public policy to determine its jurisdiction in a dispute involving the application of international law.

2.71 The case involved a European supplier who had entered into several contracts governed by Swiss law, namely an Agreement of Cooperation and Purchases and a Purchase Contract to supply agricultural products to the Republic of X.²⁹⁸ A dispute arose between the parties, and the supplier, relying on the arbitration clause in the contracts, initiated arbitration proceedings in Switzerland.

²⁹³ Such was the position of the tribunal in ICSID Case No ARB/84/3, Award of 20 May 1992, *SPP (Middle East) Ltd v Egypt (SPP)*, XIX YBCA 51 (1994).

²⁹⁴ See, e.g., ICSID, Case No ARB/82/1, Jurisdictional Decision of 1 August 1984, *Société Ouest-Africaine des Bétons Industriels v Senegal*, 6(1) ICSID Rev – FILJ 46-48 (1991).

²⁹⁵ See I. Shihata and A. Parra, “Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention”, 9(2) *ICSID Rev – FILJ* 183-213 (1994) at p. 212

²⁹⁶ See A. Broches, “The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States”, 136 *Recueil des Cours* (1972) at p. 342.

²⁹⁷ ICC Case No 6474 of 1992, Partial award on Jurisdiction and Admissibility, *Supplier (European country) v Republic of X*, XXV YBCA 279 – 310 (2000).

²⁹⁸ Referred to in the award as “the territory”.

2.72 The ‘territory’ challenged the jurisdiction of the tribunal over the claim on overriding transnational public policy grounds. Paradoxically,²⁹⁹ it contended that the territory was not recognized by the international community and, as such, it would be contrary to transnational public policy for the tribunal to assume jurisdiction “in the light of the superior interest of the international community in refusing to acknowledge in any form whatsoever the existence of the territory as a State.”³⁰⁰ No denial of justice would be caused thereby, it argued, as the Courts of the territory were the natural judges of this dispute. Transnational public policy would mandate a denial of international arbitration on the basis that ‘any dealings whatsoever’ with the territory were prohibited. And if the territory was not recognised, it followed that it could not be a party to arbitration proceedings.

2.73 The tribunal rejected this contention, as it could not find any principle of transnational public policy which would withdraw its jurisdiction. On the contrary, it continued, the defendant was barred from evading the arbitration clause as

denial of jurisdiction in the circumstances would be contrary to that clear principle of transnational public policy which is the principle of good faith.³⁰¹

2.74 The tribunal was clearly influenced by the fact that the issue in dispute was one of jurisdiction. The international rule in question was therefore confined to substantive, rather than jurisdictional public policy.³⁰² As pointed out by the tribunal, the arbitration clauses contained in an international contract should not be disregarded, irrespective of the nature and contents of the contracts themselves. Further, “even in the field of public international

²⁹⁹ As noted in the award, the defendant’s objection and argument appears paradoxical insofar as it amounts to a party attempting to benefit from its own non-recognition by the international community, or even from its own illegality under international law, in order to avoid its contractual obligations.

³⁰⁰ *Ibid*, XXV YBCA 279 – 310 (2000) at p. 282.

³⁰¹ *Ibid*, XXV YBCA 279 – 310 (2000) at p. 287, para 36.

³⁰² The relationship between jurisdictional and substantive transnational public policy rules is addressed in Part Two of the thesis.

law non-recognized States and/ or governments, revolutionary organizations and the like, have on occasion been 'recognized' as exercising *de facto* and effective power, with the consequence that their acts have not and could not be totally ignored as producing juridical effects."³⁰³ Although the tribunal did not address this point directly, giving full effect to international law in the circumstances would bestow the Courts in the unrecognised country, again paradoxically, with *de facto* jurisdiction over the dispute. The only way to abide by the spirit of international law was to invoke the corrective functions of transnational public policy. The rule is however confined to cases where a literal application of international law becomes self-defeating.

2.75 Decided awards provide also several examples where arbitrators have referred to transnational public policy to control the effects of private international law. One such example is found in ICC award No 1110,³⁰⁴ where the sole arbitrator relied on transnational or truly international public policy regardless of the applicable national law. The facts of the award are as follows.

2.76 In 1950, the government of Argentina contemplated an increase in the production of electricity in the region of Buenos Aires. A British company contacted an Argentine engineer who had considerable influence in governmental as well as commercial and industrial circles, to secure orders for electrical equipment. It was understood that the engineer would pay "commissions" to everyone necessary to conclude the contract. A percentage of the latter would be assigned to him, including the amount spent in 'commissions.' With the fall of the Peron government, the engineer fled to Europe. Six years after the first attempts to influence the Argentine government, the British company eventually secured the desired contract.

³⁰³ See ICC Case No 6474 of 1992, Partial award on Jurisdiction and Admissibility, *Supplier (European country) v Republic of X*, XXV YBCA 279 – 310 (2000) at para 19.

³⁰⁴ See ICC award No 1110 of 15 January 1963, *Argentine Engineer v British Company*, 3 Arb Int 282-294 (1994) with note J. Wetter, pp. 277-281. This was the first award relying exclusively in transnational public policy. See also J. Lew, *ibid*, at p. 423; J. Wetter, J. Gillis, "Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No 1110", 10(3) *Arb Int* 277 - 294 (1994).

2.77 The engineer subsequently attempted to claim his percentage of the contract. On 6 July 1959, the parties submitted to arbitration and ICC proceedings were started in France. The sole arbitrator considered allegations that the illegal contract to bribe government officials was contrary to the public policy of the seat of arbitration (France) and that of the place of performance (Argentina) which was also the *lex contractus*.

2.78 Judge Lagergren, remarking that French public policy would probably not consider the subject matter arbitrable, turned to Argentine law which he considered should govern the issue of arbitrability. After an analysis of Argentine public policy, the sole arbitrator found that both laws agreed on condemning this contract. Yet instead of applying French or Argentine law, the arbitrator dismissed his jurisdiction over the case on the grounds that

Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.

and

After weighing all the evidence I am convinced that a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France or, for that matter, in any other civilised country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.³⁰⁵

³⁰⁵ ICC Case No 1110, *ibid*, at p. 52, para 20.

2.79 Transnational public policy rules on arbitrability, rather than any national standard, denied the parties any hope of enforcing the illegal contract. Notwithstanding, the decision in ICC award No. 1110 is not entirely good law today. Whilst the controlling functions of transnational public policy have indeed been put in motion in subsequent awards, Judge Lagergren's considerations on arbitrability have been replaced by the principle of *Kompetenz-Kompetenz*, as shown in ICC Case No. 5622.³⁰⁶

2.80 In this case the Algerian government initiated a tender related to a project in Algeria. The international tribunal found that the contract had been obtained in breach of Algerian law condemning corruption. The Tribunal then pondered whether it should assume jurisdiction in a case involving international corruption³⁰⁷ by considering two possible solutions. It could a) follow the decision of Judge Lagergren³⁰⁸ and find it had no jurisdiction on arbitrability grounds. Or b) follow the decision in ICC case No. 3916³⁰⁹ and assume jurisdiction, given that the nullity of the main contract would not entail *ipso iure* the nullity of the arbitration agreement.

2.81 The tribunal opted for the second solution, adding that corruption is condemned in several international texts originating from the United Nations, the ICC and the European Community and is well established in jurisprudence and arbitral doctrine.³¹⁰ Importantly, it found that the contract was contrary to good morals and transnational public policy³¹¹ and therefore null and void. When considering the effects Algerian law could have on a dispute governed by the laws of a different country, the tribunal was unequivocal in affirming that the issue should be addressed from the standpoint of transnational public

³⁰⁶ ICC Case No 5622, Award of 19 August 1988, *Y v X*, 2 Rev Arb 327 - 342 (1993) (original in French).

³⁰⁷ *Ibid*, at p. 337, paras 167 *et seq*.

³⁰⁸ Citing ICC Case No 1110.

³⁰⁹ Referring to ICC Case No 3916 of 1982, *Iranian party v Greek party*, 111 JDI 930 (1984), Clunet 930 (1984).

³¹⁰ *Ibid*, p. 334, citing A. Redfern and M. Hunter, *International Commercial Arbitration* (Sweet & Maxwell 1986) at p. 132 *et seq*; Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (Oceana 1984), Part II at p. 14., and P. Lalive, "Ordre public transnational (ou réellement international) et arbitrage international", *Rev Arb* 339 (1984).

³¹¹ On this point the tribunal noted that *l'ordre public transnational est ici menacé par des comportements directement hostiles à des principes dont le fondement éthico-juridique est généralement admis*. See ICC Case No 5622, Award of 19 August 1988, *Y v X*, 2 Rev Arb 327 - 342 (1993) at p. 332.

policy. As Algerian law did not only aim to protect the interests of Algeria but also those of the international community in fighting corruption it was therefore vested with the functions of transnational public policy.

2.82 The similar conclusion was reached in ICC Partial Award in Case No. 8420.³¹² The arbitration concerned a contract concluded between a Syrian agent and an Italian supplier according to which the Syrian party would promote the sale of products supplied by defendant. Disputes over the agency agreement were submitted to the sole arbitrator under ICC Rules of Arbitration in Geneva. The supplier objected to the jurisdiction of the tribunal, arguing that the dispute fell under the exclusive jurisdiction of the Italian Labour Court as prescribed by Arts. 409 and 413 of the Italian Code of Civil Procedure (CCP).

2.83 Relying on Art. 190(2)(e) of the Swiss Private International Law Act, the arbitral tribunal found that the public policy to which the arbitrator needs to refer is “transnational universal public policy, even if the approach to this issue has to be of a pragmatic nature depending on the specific case.”³¹³ The tribunal found however that “the mandatory jurisdiction of the Italian courts does not seem to correspond to or to contain in itself one of the fundamental principles of law which are to be applied regardless of the connection of the dispute to any specific country.”³¹⁴ Transnational public policy had thus a controlling function over a national mandatory law.

2.84 Another example can be found in ICC Final Award in Case No. 6248.³¹⁵ The defendant, a firm of building contractors, was acting on behalf of a joint venture contracted with a group of companies for the construction of a project. Claimant, acting as consultant for defendant, would assist defendant in trying to secure saving on costs of the project and in acquiring extensions of the total value of the project in the form of additional works.

³¹² ICC Partial Award in Case No 8420 of 1996, XXV YBCA 328 - 340 (2000).

³¹³ *Ibid*, at p. 224, at para 26 *et seq*.

³¹⁴ *Ibid*, at p. 335, para 28.

³¹⁵ ICC Case No 6248, Final Award of 1990, *Consultant v Contractor*, XIX YBCA 124 - 140 (1994).

- 2.85 The agreement contained an arbitration clause providing for ICC arbitration. A dispute arose between the Parties and the consultant initiated the arbitration claiming payment of sums paid to defendant, in addition to payment from the group for work done under the contract. Three such payments were made by the group to the defendant.
- 2.86 Defendant argued that the claimant was providing cover for the improper activities of its principal, Mr. Z who had, under cover of claimant, neglected the interest of the group and used his position as a consultant to obtain payments from defendant for private gain. The tribunal found there had been secret commission agreements which were against *bonos mores* and the practice in the domain of international commercial arbitration³¹⁶ and transnational public policy.³¹⁷
- 2.87 Transnational public policy may also be applied in essence, regardless of express reliance. One example is found in the arbitration between *Sté des Grands Travaux de Marseille*, a French company, and *Pakistan Industrial Development Corp*, a Pakistani state owned company.
- 2.88 The case concerned a contract for the construction of a pipeline for the transport of gas in Pakistan. After conclusion of the contract and commencement of the arbitration the government of Pakistan issued an Order which had the effect of declaring the rights of the debtor void *ab initio* should it decide to continue with the arbitral proceedings. The sole arbitrator expressly upheld the international prohibition of abuse of rights, finding reliance on the Order “wholly repugnant” to standards of morality binding upon sovereign governments.³¹⁸ The legal solution would be precisely the same had the tribunal stated that the effects of the Order were offensive to transnational public policy.³¹⁹

³¹⁶ Citing ICC Case No 2730, *Clunet* 914 and 930 (1984) and ICC award No 3916, *Clunet* 930 (1984).

³¹⁷ See ICC Case No 6248, Final Award of 1990, *Consultant v Contractor*, XIX YBCA 124 - 140 (1994) at p. 132.

³¹⁸ See ICC Case No 1803, Award of 1972, *Sté des Grands Travaux de Marseille v E Pakistan Industrial Dev Corp*, V YBCA 177 - 185 (1980) at p. 181.

³¹⁹ For other examples of the operation of abuse of rights see ICC Case No 6248, Final Award of 1990, *Consultant v Contractor*, XIX YBCA 124 - 140 (1994) at p. 126 fn 3; Court of

2.89 Another example of the inferred application of transnational public policy can be found in the award by the *ad hoc* tribunal in the *Himpurna* arbitration.³²⁰ The dispute concerned a contract between the claimant and an Indonesian state electricity company to explore and develop geothermal resources in Indonesia. The contract entitled the claimant to build two power plants in Indonesia and sell the power to the Indonesian electricity company. In 1997 there was an economic crisis in Indonesia and respondent failed to purchase the energy supplied.

2.90 In the arbitration, Himpurna made several claims for breach of contract which were granted by the tribunal. At the *quantum* stage, the claimant sought to recover for loss of profits resulting from investments not yet made. The parties invoked several provisions the contract and Indonesian law. Nonetheless, the arbitral tribunal did

not find it necessary to rule on either of these objections, because in this matter it will apply the doctrine of abuse of right as an element of overriding substantive law proper to the international arbitral process.³²¹

2.91 Under the doctrine of abuse of rights a party may not make use of a right to avoid an obligation incumbent on it or the purpose for which the right was conferred³²² beyond the limits of good faith.³²³ The doctrine has been described by the arbitration tribunal in the following manner:

Arbitration in Poland, Case No 69/86, Award of 18 May 1987, *Foreign Trade Enterprise v Employer*, XIV YBCA 183 - 186 (1989); ICC Case No 7314, Final Award of 1995, *Manufacturer v Licensor*, XXIII YBCA 49 - 65 (1998) at p. 57; ICC Case No 3267, Final Award of 28 March 1984, *Construction Company v Member of Consortium*, XII YBCA 87 - 96 (1987) at p. 93.

³²⁰ Ad hoc, Final Award of 4 May 1999, *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara*, XXV YBCA 11 - 442 (2000) at p. 92, para 325.

³²¹ Ad hoc, Final Award of 4 May 1999, *ibid*, XXV YBCA 11 - 442 (2000) at p. 92, para 325.

³²² The doctrine has been applied, for instance, to prevent the abuse of legal formalities or reliance on the nullity of a contract to evade a subsequent payment. See ICC Case No 5622, Final Award of 1988, *Broker v Contractor*, XIX YBCA 105 - 123 (1994) at p. 122.

³²³ A claim based on the abuse of rights theory is only admitted on an exceptional basis, where no other cause of action is available. See Ad hoc, Award of 12 April 1977, *Libyan American Oil Co (LIAMCO) v Libya*, Rev Arb 132-191 (1980), VI YBCA 89 - 118 (1981) at p. 104.

the principle is old; one need only recall Cicero's *summum jus, summa injuria*. To say that the blind application of a rule may lead to iniquitous results is to recognise that the search for justice would fail if the law could do no more than validate relative positions of strength, or consolidate the status quo indefinitely. Thus, the exercise of a particular right may be inhibited if it would abase the law.³²⁴

2.92 Consequently, claimant was denied the right to invoke the contract to claim losses for a hypothetical investment as such reliance would be contrary to the doctrine of abuse of rights. The tribunal proceeded thus in order "to prevent the claimant's undoubtedly legitimate rights from being extended beyond tolerable norms."³²⁵ The controlling functions of the abuse of rights doctrine,³²⁶ it is suggested, were identical in this case to those of transnational public policy.³²⁷

2.93 The self regulatory functions of transnational public policy extend to non-national rules specific to the international trade system and international arbitration, as illustrated below:

³²⁴ Ad hoc, Final Award of 4 May 1999, *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara*, XXV YBCA 11 – 442 (2000) at p. 92.

³²⁵ Ad hoc, Final Award of 4 May 1999, *ibid*, XXV YBCA 11 – 442 (2000) at p. 93.

³²⁶ The doctrine is known as *abus de droit* in France and *Rechtsmissbrauch* in Germany. The precise characterisation of the principle may also vary. For instance, where in Switzerland, Tribunal Fédéral, 11 November 2002, *Z v A and B*, 21(2) ASA Bull (2003) the doctrine of *abus de droit* has been identified as a matter of substantive law in other countries the abuse of rights doctrine has been relied upon to determine the claimant's *locus standi*.

³²⁷ This overlap has been recognised by the courts in the US. See US, *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 Fed Sup Second Series 936-958 (2001) (S D Tex), US Dist LEXIS 23079 (2001), XXVII YBCA 814 – 838 (2002) at p. 836, the court noted that the international "abuse of rights" doctrine is akin to America's "good faith" principle of law and an issue of public policy. See also P. Mayer, "Reflections on the International Arbitrator's Duty to Apply the Law - The 2000 Freshfields Lecture", 17(3) *Arb Int'l* 235 – 248 (2001) at pp. 241 *et seq*.

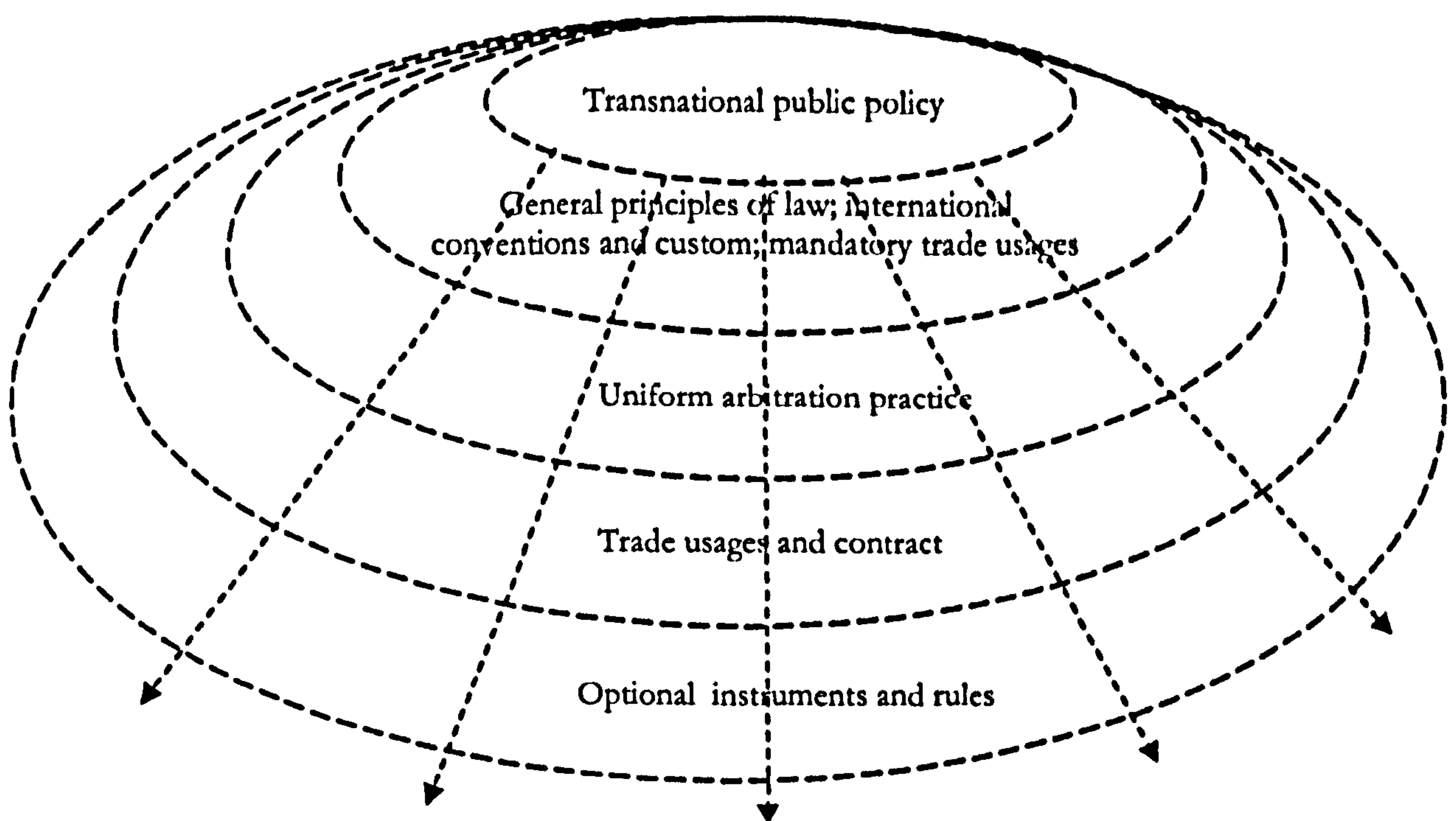


Diagram 3 – Controlling functions of transnational public policy in relation to rules proper to international trade and arbitration.³²⁸

2.94 Transnational public policy rules specific to international commercial arbitration can act, for instance, to enforce the *favor arbitrandum* rule,³²⁹ the principle of *Kompetenz-Kompetenz*,³³⁰ transnational procedure,³³¹ the finality

³²⁸ This diagram is partly based on the sources identified in Fouchard Gaillard Goldman, at pp. 103 *et seq*; and Lord Mustil, “The New Lex Mercatoria: The First Twenty-five Years”, 4(2) *Arb Int* 86 – 119 (1988) at p. 109.

³²⁹ See Ad Hoc, Preliminary Award of 14 January 1982, *Elf Aquitaine Iran v Nat'l Iranian Oil Co*, XI YBCA 97 – 104 (1986) at p. 104; A. Dimolitsa *et al*, “Arbitration Agreements and Foreign Investments: The Greek State between Contractual Commitment and Sovereign Intervention”, 5(4) *J Int'l Arb* 17 – 66 (1988) at p. 35; and J. Veeder, “The 2001 Goff Lecture - The lawyer's Duty to Arbitrate in Good Faith”, 18(4) *Arb Int* 431 – 451 (2002) at p. 439.

³³⁰ See ICC Case No 8938 of 1996, Final Award, *Exclusive Agent (Belgium) v Manufacturer (France)*, XXIVa YBCA 174 - 181 (1999), at p. 176.

³³¹ See UNCITRAL, Award of 17 November 1994, *Banque Arabe d'Investment v Inter-Arab Inv't Guarantee Corp*, p. 23, at para 22. Consider also the rules applied in the appeal system in investment arbitration. See, e.g., ICSID Case No ARB/97/3, Award of 21 November 2000, *Compañía de Aguas v Argentina*, 40 ILM 457-473 (2001), XXVI YBCA 61 - 86 (2001) and ICSID Ad Hoc Committee, Decision of 3 July 2002, *Compañía de Aguas del Aconquija S A and Vivendi Universal v Argentine Republic*, 41 ILM 933 (2002).

of the award.³³² The self-regulatory functions of transnational public policy in relation to international arbitration are further illustrated in Part Two of the thesis.

2.95 In addition to its functions transnational public policy can be seen as a method to determine fundamental standards. This method allows the tribunal to engage in a process of law creation and should be analysed more closely.

2.2. Transnational public policy as a method

2.96 The idea of transnational public policy as a method draws from Langen's doctrinal works on the meaning of transnational law. As Jessup, the author was highly sceptical of the effectiveness of traditional conflict of laws to address the realities of cross-border commerce and sought the development of a "new conception of international commercial law."³³³ Yet, unlike Jessup, Langen focused on the applicable law methodology relied upon by national courts dealing with private disputes.³³⁴

2.97 For a national court, foreign law applies whenever there is a link between the facts of the case and a particular legal system.³³⁵ Given the inadequacy of national law in cases involving more than one country,³³⁶ Langen proposed a return to the substantive connections of Roman law, expressed in the nature of the legal relationship. The example given by the author is the idea of *obligatio est juris vinculum*, which was deemed transnational in essence.

³³² See V. Deshpande, "International Commercial Arbitration: Uniformity of Jurisdiction", 5(2) *J Int'l Arb* 115-130 (1988) at p. 116.

³³³ See E. Langen, *Transnational Commercial Law* (A W Sijthoff Leiden 1973), at p. IX.

³³⁴ The point of departure of national courts was famously described in a *dictum* of the Permanent Court of International Justice in the *Serbian Loans* case: "any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country." See PCIJ., *Serbian Loans* Judgment of 1929, Series A, Nos. 20/21, p. 41, cited in Langen, *ibid*, at p. 2.

³³⁵ This connection is frequently based on the *situs* of a claim or the centre of gravity of a contractual relationship. Langen observed that given the lack of uniformity in conflict of laws the application of foreign law rested mainly on the idea of *comitas gentium*, or reciprocal respect for the laws of other legal systems.

³³⁶ On the *sui generis* nature of international cases see J. Jitta, *La Méthode du droit international privé* (The Hague 1890), at p. 200.

- 2.98 Since private international legal relationships are under the spheres of influence of different systems of law,³³⁷ decision makers would need to explore the common aspects of the laws in contact with the dispute. In other words, to ascertain 'transnational' law.
- 2.99 For Langen, the comparative method offered the potential not only to observe and analyse national laws but, in a functional way, to extract the quintessence of municipal systems. Transnational law is not seen by the author as an autonomous legal system, but rather as a working method to ascertain the applicable law.³³⁸
- 2.100 When relying on the comparative method the national judge would first ascertain the facts with the aid of translators and transnationally valid rules of interpretation. Then undertake a work of law comparison. Only where the laws do not agree with the solution to the case, which is exceptional in international trade law, would conflict of laws come into play.³³⁹
- 2.101 Langen's conception of transnational law as a method later inspired the works of other authors, particularly in the field of international arbitration. At the forefront Gaillard suggested that arbitration tribunals should steer away from the traditional choice of law reasoning and arrive at widely accepted transnational rules by means of a comparative analysis.³⁴⁰
- 2.102 According to Gaillard, the arbitrator should first attend to the methodology suggested by the parties. They may have explicitly or impliedly suggested a comparative analysis of legal systems in contact with the dispute. Then the tribunal should determine whether the rule resulting from this comparison reflects a widely accepted rule and disregard any rules based on a single legal system or regional law.³⁴¹

³³⁷ E. Langen, *Transnational Commercial Law* (A W Sijthoff Leiden 1973), at p. 14.

³³⁸ See E. Langen, *ibid*, at pp. 203 – 204.

³³⁹ See the examples of cases decided on the basis of common principles at E. Langen, *ibid*, at p. 214, fn 30.

³⁴⁰ E. Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?", 17(1) *Arb Int* 59 - 72 (2001) at p. 61. For Gaillard unanimity would not be required for a rule to be deemed transnational. Otherwise general principles of law would be rendered meaningless failing a unanimous acclaim.

³⁴¹ The author gives as an example the French rule pursuant to which a subcontract will be void if certain conditions including the placing of a bond in favour of the subcontractor are not met, disregarded in ICC Case No 7528 of 1994, XXII *YBCA* 125 (1997) or the rule in English law denying the validity of agreements to agree.

2.103 Gaillard's theory partially influenced the method to determine transnational public policy proposed by Lalive. According to Lalive, transnational principles emerge from the analysis of international instruments and the practice of states.³⁴² Amongst them, tribunals deduce universal or generally recognised principles. Only those principles which are really essential and supported by a widespread, if not universal consensus, or possessing a particular imperative nature, deserve to be considered as belonging to transnational public policy.³⁴³

2.104 This test lies very close to the notion of *voie directe*³⁴⁴ in private international law and is similar or even identical to the method relied upon to ascertain trade usages and other a-national rules.

2.105 For Lalive, as the traditional concept of a State's 'international public policy' is largely based on a feeling of law and justice in a given community the same would apply "with regard to transnational public policy and to the international community (of businessmen, or States, or both), so that it may be contended, without verbal precautions, that, in the final analysis, a great deal if not everything is a question of personal feeling or sensitiveness, or of *Weltanschauung!*"³⁴⁵

2.106 Yet is transnational public policy necessarily bound to the cultural or legal background of the arbitrator, as suggested by some authors?³⁴⁶ As the background of the arbitrator is normally confined to a national culture or legal tradition, the establishment of transnational values requires a reference to a supranational source. Yet what determines the essential character of an

³⁴² See P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series no 3*, at p. 308, para 179.

³⁴³ *Ibid*, at p. 289.

³⁴⁴ On this point see also I. Derains, "L'ordre public et le droit applicable au fond du litige dans l'arbitrage international", 3 *Rev Arb* 375-414 (1986); D. Miller, "Public Policy in International Commercial Arbitration in Australia", 9(2) *Arb Int* 167-196 (1993).

³⁴⁵ See P. Lalive, "Ordre public transnational (ou réellement international) et arbitrage international", *Rev Arb* (1984) at p. 310. The Italian courts have followed this method in *Alarcia Castells v Hengstenberge e Procuratore generale presso la Corte di appello di Milano*, XIX RDIPP (1983) at p. 364, where the appeal judge found that "the respect of international public policy is based first and foremost on the need to safeguard a legal and moral minimum which is common to the feeling of several nations."

³⁴⁶ See P. Mayer, "La règle morale dans l'arbitrage international", in *Etudes Offertes à P. Bellet* (Paris 1991), at pp. 379 *et seq.*

emerging international community? The answers to these questions are crucial to the transnational public policy method and warrant a closer analysis.

2.107 In national legal systems public policy contains standards deemed essential by the court. They express a foundation or core, a primary value or interest. A national judge subsumes the principles of public policy from fundamental values in the local community. Those values derive from the Constitution, history, morality and all aspects of that community which define its fundamental character.

2.108 The same holds true with regard to the public policy of the international community. Yet when determining transnational public policy the tribunal considers values which must prevail regardless of a connection with a national or regional system. Transnational public policy is determined by reference to transnational values and their social function in the international community, by what the reasonable member of that community would proclaim as an essential value.

2.109 The purpose and content of transnational public policy is expressed in universal rules of ethics, authoritative arbitral decisions and the preamble of international conventions.³⁴⁷ From those sources the tribunal extracts standards of universal validity. It then formulates a specific rule, confining the content of public policy to the facts of the case.

2.3. Sources of transnational public policy

2.110 The sources of transnational public policy are germane to the international community. An attempt to provide an exhaustive list of sources is therefore necessarily futile. The rules of transnational public policy may be drawn from a plurality of sources depending on the requirements of that community.

2.111 A number of sources of public policy relevant to an international tribunal were identified in the Report of the International Law Association 69th

³⁴⁷ The sources of transnational public policy are analysed in further detail below.

Conference on public policy in arbitration.³⁴⁸ They include the rules of natural law, principles of universal justice, *Ius Cogens* in public international law and the general principles of morality accepted by “civilised nations.” Throughout the report, public policy is exemplified with international case law, international conventions, religious writings,³⁴⁹ reports and memoranda by international bodies, and arbitral decisions.³⁵⁰

2.112 The list was not intended to be exhaustive. Public policy does not have a strictly legal nature and is present whenever essential principles demand application. The researcher should adopt a teleological approach and examine the available transnational sources where standards with the characteristics of transnational public policy are likely to be found.³⁵¹

2.113 According to certain doctrine, a distinction should be made between public and private sources of transnational public policy.³⁵² Public sources would contain norms of *Ius Cogens* applicable between states, the general principles of international law derived from Article 38 of the Statute of the International Court of Justice and applied by arbitrators,³⁵³ international conventions containing widely recognised principles and international embargoes. Private sources of transnational public policy would include

³⁴⁸ See International Law Association, proceedings of the 69th Biennial Conference, London, 25 to 29 July 2000 (ILA, London 2000), at p. 346.

³⁴⁹ The example given was the Moslem Shari’a. See the ILA proceedings of the 69th Biennial Conference, *ibid*, at p. 360.

³⁵⁰ See the ILA report, *ibid*, at p. 371, and Colman J., [1998] *WLR* 770. Consider, however, the Swiss decision in *Hilmarton v OTV*, XIX YBCA 214 (1994).

³⁵¹ O. Lando, “The Lex Mercatoria in International Commercial Arbitration”, 34 *ICLQ* (1985) at p. 752 identified essential transnational rules in international instruments such as the *Vienna Convention of 13 May 1969 on the Law of Treaties*; Article 42 of the *Washington Convention of the World Bank*; some uniform laws (such as those introduced by the *Vienna Convention on the International Sale of Goods*); general principles of law (as in, e.g., ICC Award No 3327 of 1981, cited in *Clunet* 973 (1982)); certain rules, recommendations or codes of conduct enacted by international organizations; the usages of international trade, the general conditions for certain types of contracts and some arbitral “precedents”. See also the sources identified in e.g., Y. Fortier, “The New, New Lex Mercatoria, or, Back To The Future”, 17(2) *Arb Int* 121-128 (2001); B. Goldman, “The Applicable Law: General Principles of Law - the Lex Mercatoria”, in J. Lew (ed.), *Contemporary Problems in International Arbitration* (London 1986), at 113 *et seq*; The principles of the Center for Commercial Law available at www.tldb.de; The UNIDROIT principles, available at <http://www.unidroit.org/english/principles/pr-main.htm> (last visited in September 2004); Bonell, “The UNIDROIT Principles and transnational law”, V(2), *Uniform law review - Revue de droit uniforme* 199 - 218 (2000).

³⁵² See J. Racine, *L'Arbitrage Commercial International et L'Ordre Public* (LGDJ 1999), p. 368, paras 659 *et seq*.

³⁵³ E.g., through the operation of Article 42 of the Washington Convention.

mandatory trade usages and codes of conduct accepted by international organisations.

2.114 The problem with this distinction lies in that the sources of transnational public policy have a hybrid nature, mixed between public and private.³⁵⁴ This becomes evident when one considers investment arbitrations, which often require the application of both public and private standards. The same source may be public or private depending on the facts and the parties in dispute. It is thus preferable to distinguish instead the primary (or direct), and secondary (or indirect) sources of transnational public policy.

2.115 Primary or direct sources are found in every legal or non-legal instrument containing standards with the characteristics of transnational public policy. Principles of social or business ethics and morality found in guidelines, reports and resolutions of international organisations,³⁵⁵ natural law, trans-religious principles,³⁵⁶ the general principles of law mentioned in Article 38 of the Statute of the ICJ, the preamble of international conventions and certain provisions therein, *Ius Cogens*, international custom and authoritative international awards are examples of primary sources. Primary sources are strictly binding.

2.116 Secondary or indirect sources of transnational public policy are corroborated by the intervention of the comparative method. Examples of secondary sources can be found in national principles of law and public policy, regional conventions, common mandatory provisions in national legislation and judicial decisions considering international standards. Standards found in secondary sources are highly persuasive but may be binding where they rely on a direct source of transnational public policy.

³⁵⁴ J. Racine, *ibid*, at p. 376, para 674.

³⁵⁵ See e.g., the publication section in www.worldbank.org, www.imf.org, www.wto.org, www.iccwbo.org, www.ibanet.org, www.ila-hq.org.

³⁵⁶ See, e.g., A. Wilson (ed.), *World Scripture – A Comparative Anthology of Sacred Texts* (Paragon House Publishers 1995); M. Eliade, "Patterns in Comparative Religion", III(1) *Archaeus* 175 – 207 (1999); B. Spinoza, "Tractatus Theologico-Politicus – Treatise on Religion and Politics", in R. Elwes, *The Chief Works of B. Spinoza* (George Bell and Sons, London 1883); S. Twiss, *Comparative Religious Ethics* (Westview Press 2000); C. Wei-hsun Fu and G. Spiegler, *Religious Issues and Interreligious Dialogues* (Greenwood Publishing Group 1989).

(i) Primary sources of transnational public policy

- 2.117 Transnational ethical standards³⁵⁷ affecting social and business life³⁵⁸ are one of the most salient sources of transnational public policy. The major contribution of ethics to the determination of transnational public policy is that, in the absence of strict normative criteria, it provides a compass to the application of essential standards.³⁵⁹
- 2.118 Ethics deals with the laws of free moral action. As explained by Kant,³⁶⁰ ethical laws apply to the human will as affected by desires and instincts observed by experience.³⁶¹
- 2.119 The application of transnational public policy is ultimately based on a formal maxim: to act in accordance with the interests of the international community or, as if by example, to follow standards which would become a universal law recognisable to most individuals and in most jurisdictions. Every public policy standard aims to achieve a universal good by allocating a duty towards the preservation of essential values.
- 2.120 Even though transnational public policy standards need not be “accepted” universally,³⁶² they have a universal esteem. They depart from

³⁵⁷ See e.g., W. Reinicke, *Global Public Policy: Governing Without Government?* (Brookings Institution Press 1998); W. Hitt, *A Global Ethic* (Batelle Press, Ohio 1996); R. De George, *Business Ethics* (Prentice-Hall 1995); W. Hoffman, J. Kamm, R. Frederick and E. Petry (eds.), *Emerging Global Business Ethics* (Quorum Books, 1994); P. Minus (ed.), *The Ethics of Business in a Global Economy* (Kluwer Academic Publishers 1993); T. Donaldson, *The Ethics of International Business* (Oxford University Press 1989).

On transnational business ethics see also www.emich.edu/public/cob/management/ethics/ibe/; www.ethicsweb.ca/resources/international/; www.oecd.org/; <http://www.worldbank.org/wbi/governance/>.

³⁵⁸ Ethical standards have been relied upon since the old *lex mercatoria* as a guidance to commercial tribunals. See G. Malynes, *Lex Mercatoria: Of Arbitrators and their Awards* (1686 edition re-published by Professional Books Limited, Abingdon, 1981) at pp. 305 *et seq.*, extract in 9(3) *Arb Int* 323 - 328 (1993) at p. 325: *that the Arbitrators do not award any thing which is unlawful, is to be understood of things which are evil in themselves, called Malum in se, and of things called evil, because they are upon some respects and considerations prohibited, and therefore termed Malum Prohibitum.*

³⁵⁹ National judges have often resorted to ethics when and advancing fundamental standards. In the *La Jeune Eugenie*, 26 Fed Cas 832, for instance, the Circuit Court of the United States in Massachussets, dealing with slave trade, forcefully declared in 1822 that “no practice whatsoever can obliterate the fundamental distinction between right and wrong.”

³⁶⁰ H. Paton, *The Moral Law or Kant's Groundwork of the Methaphysic of Morals* (Hutchinson's University Library 1955), at p. 13 *et seq.*

³⁶¹ For Kant ethics would have an empirical part (based on the observation of facts) and a non-empirical or *a-priori* part, which he called the methaphysic of morals. The *a priori* or pure part of ethics is concerned with the justification of moral principles, the distinction between “good” and “evil,” or “right” and “wrong.” The relationship between pure and empirical ethics is exactly the same as that between public policy and the facts.

what the average, reasonable man accepts as a universal law, regardless of nationality or cultural, legal, religious or economic background.

2.121 One can find two types of imperatives or standards. Some are conditional, in the sense of being considered good as a means to an end. This end is often of a technical or pragmatic nature. Every national legal system aims to preserve its core characteristics or ideal of justice. All states or companies will aim for economic growth and survival in the international market.

2.122 Other imperatives are unconditional: they should be followed by any moral individual or company but are not envisaged as necessary to a selfish end. As such, the conduct they enjoin is good in itself and not merely a means to an end. An example is the preservation of free trade, the protection of the environment or the principle of *bonos mores* in contractual relationships. Only such principles are absolutely binding and integrated in the concept of transnational public policy. Whilst national public policy (domestic or international) requires companies or individuals to act in accordance with national legal or non-legal standards, transnational public policy ultimately rests on a connection to overarching standards.

2.123 The meta-juridical aims of transnational public policy draw also from widely recognised principles of morality. In international situations reference is often made to a moral law. For example, the ICJ, with respect to Resolution 92 regarding the UN Convention for the Prevention and Punishment of the Crime of Genocide, condemned genocide as “contrary to moral law and to the spirit and aims of the United Nations.”³⁶³ It defined the purposes of the convention as confirming and endorsing the “most elementary principles of morality.” The Genocide Convention had been adopted for a “purely

³⁶² This was the solution advanced by Ago in “Droit des traités à la lumière de la Convention de Vienne”, 134 *Hague Recueil* (1976 III) at pp. 323 concerning international law. Refusal of one country to recognise transnational public policy standards can be analogised with the problem of the persistent objector in public international law. See A. Yassen, “L’interprétation des traités d’après la Convention de Vienne sur le droit des traités”, 151 *Hague Recueil* (1976 III) at pp. 40 – 41. An example is the resistance of South Africa before the abolition of apartheid to recognise the peremptory character of the prohibition of racial discrimination.

³⁶³ ICJ Reports 1951, p. 23.

humanitarian and civilizing purpose”, in the “common interest” of States and thus binding on all States without exception.

2.124 Principles of ethics and morality applicable to state entities, multinational companies and other transnational organisations are often found in guidelines, reports and resolutions originating from international bodies. For instance, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,³⁶⁴ where the UN lays down the basic obligations of transnational companies; or the Guidelines for Multinational Enterprises of the Committee on International Investment and Multinational Enterprises of the Organization for Economic Cooperation and Development,³⁶⁵ are sources of transnational public policy insofar as they express essential values.³⁶⁶

2.125 Such values may be contained in international law³⁶⁷ and custom³⁶⁸ and are part of the law applied by the arbitrator “in the measure that they have been or must be deemed incorporated.”³⁶⁹ Transnational corporations and

³⁶⁴ See UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

³⁶⁵ See also H. Baade, “The Legal Effect of Codes of Conduct for Multinational Enterprises”, in N. Horn (ed.), *Studies in Transnational Economic Law - Legal Problems of Codes of Conduct for Multinational Enterprises Vol 1* (Kluwer 1980); P. Sanders, “Code of Conduct and Sources of Law”, in *Le droit des relations économique internationales, Etudes offertes à B. Goldman* (1982), at p. 281.

³⁶⁶ See L. Matray, “Arbitrage et Ordre Public Transnational”, in *The Art of Arbitration - Liber Amicorum P. Sanders* (Kluwer Law and Taxation 1982), at p. 246.

³⁶⁷ In this sense, see A. Maniruzzaman, “International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview”, 7(3) *J Int'l Arb* 53 - 64 (1990) at p. 55.

³⁶⁸ With similar remarks regarding international custom, see Baxter, “Multilateral Treaties as Evidence of Customary International Law”, 41 *BYIL* (1965/66), at pp. 275 - 300; Shihata, “The Treaty as a Law-Declaring and Custom-Making Instrument”, 22 *Revue égyptienne de droit international* 51 - 90 (1966).

³⁶⁹ G. Naon, “Public Policy and International Commercial Arbitration: An Argentine View”, *ICCA Congress Series no 3*, at p. 12. Emphasis added. See also P. Lalive, “Transnational (or Truly International) Public Policy”, *ICCA Congress Series no 3*, at p. 268, citing a German and an Italian decision applying, as a matter of public policy, the essential values recognised by an international convention which had not been ratified by the state. See, for Germany, Supreme Court, 22 June 1982, *G H v E K*, 59 BGHZ 82, and for Italy, Tribunal of Turin, 25 March 1982, *Repubblica dell' Ecuador - Casa della cultura ecuadoriana v Danusso*, 18 RDIPP 625 (1982) (concerning the applicability of the principles in the UNESCO Convention on the illicit import, export and transfer of ownership of cultural goods). The inclusion of public international law as a source of transnational public policy is subject to a few reservations. Whereas public international law has primacy over national public policy, transnational public policy has a controlling function over some aspects of public international law. See the commentary by B. Goldman to the case of the French Court of Appeal, 12 July 1984, *RAE v Southern Pacific Properties Ltd and Southern Pacific Properties (Middle East)*, *Clunet* (1985), at pp. 129, 142, 154, cited by P. Lalive, *ibid*, at p. 268, fn 26. An example

other business enterprises, their officers and persons in their employment will be bound to respect generally recognized duties contained in United Nations embargoes³⁷⁰ and other international instruments.³⁷¹

2.126 Transnational public policy is often expressed in the preamble of international conventions. Consider, *e.g.*, the charter of the United Nations.³⁷² It states the international community's mission

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small

would be the adoption of an international treaty in breach of an essential principle contained in the law of nations.

³⁷⁰ See G. Sacerdoti, "Embargo irakeno, effetti sui contratti in corso ed efficacia delle clausole per arbitrato internazionale", 3 *Riv dell'Arb* 361 - 379 (1993).

³⁷¹ Such as the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the United Nations Convention against Transnational Organized Crime; the Convention on Biological Diversity; the International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; the Declaration on the Right to Development; the Rio Declaration on the Environment and Development; the Plan of Implementation of the World Summit on Sustainable Development; the United Nations Millennium Declaration; the Universal Declaration on the Human Genome and Human Rights; the International Code of Marketing of Breast milk Substitutes adopted by the World Health Assembly; the Ethical Criteria for Medical Drug Promotion and the "Health for All in the Twenty-First Century" policy of the World Health Organization; the Convention against Discrimination in Education of the United Nations Education, Scientific, and Cultural Organization; conventions and recommendations of the International Labour Organization; the Convention and Protocol relating to the Status of Refugees; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development.

³⁷² Published at <http://www.un.org/aboutun/charter/preamble.htm>.

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained

to promote social progress and better standards of life in larger freedom

to practice tolerance and live together in peace with one another as good neighbours

to unite our strength to maintain international peace and security

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples

2.127 In light of those fundamental objectives, transnational public policy has prohibited, *e.g.*, the illicit trafficking of weapons or toxic substances, the maintenance of a mercenary army and any action offensive to *ius cogens*, international law, the jurisdiction of international tribunals or the regular functioning of international trade.³⁷³

2.128 The primary sources of transnational public policy include also the general principles mentioned in Article 38 of the Statute of the ICJ and the norms of *Ius Cogens*.³⁷⁴ The norms of *Ius Cogens* impose obligations *erga omnes* and are contained in the jurisprudence of the International Court of Justice. Their imperative nature has been described by the International Law Commission³⁷⁵ following the Barcelona Traction case, and include:

³⁷³ Essential interests which are normally the reserve of international bodies thus find their way into the standards applied by the arbitrator, regardless of whether they have been received by the applicable law.

³⁷⁴ See, *e.g.*, R. Kolb, *Théorie du ius cogens international* (Presses Universitaires de France, 2001).

³⁷⁵ See Part I of the ILC draft Articles on State Responsibility, reproduced in Brownlie, *Basic Documents in International Law* (4th Ed. Oxford 1995), at pp. 426-37. See also A. De Hoogh,

a) serious breaches of international obligations of essential importance for the maintenance of international peace and security, such as those prohibiting aggression;

b) serious breaches of international obligations of essential importance for safeguarding the right of self-determination of peoples, such as those prohibiting colonial domination;

c) serious breaches of international obligations of essential importance for safeguarding the human being, such as those prohibiting apartheid or racial discrimination, genocide or slavery;

d) serious breaches of international obligations of essential importance for safeguarding preservation of the environment, including norms prohibiting widespread pollution of the seas or the atmosphere.

2.129 It may be difficult at times to distinguish public international law from transnational public policy. The treaty where the public policy principle is contained may also be part of the applicable international law.³⁷⁶ Yet it is a recognised principle that international law accepts the normal operation of public policy.³⁷⁷ Whereas the operation of an international treaty has a

"The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective", 42 *Aust J of Public and Int'l Law* 183-214 (1991); M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, Oxford University Press 1997), at p. 15.

³⁷⁶ According to P. Lalive, , "Transnational (or Truly International) Public Policy", *ICCA Congress Series no 3*, at p. 284, the *Pyramids* case (Court of Appeal of Paris, 12 July 1984, *R A E v Southern Pacific Properties Limited and Southern Pacific Properties (Middle East)*, Clunet 129 (1985) exemplifies how difficult it is to distinguishing the two concepts, as the protection of cultural goods and of the environment is simultaneously part of transnational public policy and the UNESCO Convention of 16 November 1972 on the protection of the cultural and natural heritage.

³⁷⁷ I. Brownlie, *Principles of Public International Law* (3rd ed., 1984), at p. 555. On the relationship between public international law and public policy see T. Rensmann, "Anational Arbitral Awards", 15(2) *J Int'l Arb* 37-66 (1998) at p. 37; Fouchard, Gaillard, Goldman, at p. 40; Ad hoc, Award on the Merits of October 10 1973, *British Petroleum Co (Libya) Ltd v Libya*, V YBCA 143-157 (1980) at p. 150.

controlling function in relation to national law,³⁷⁸ transnational public policy exerts a controlling function in international law³⁷⁹ and regardless of that treaty.

2.130 In turn, natural law may also be, *ex hypothesis*, a source of transnational standards. Its inclusion within the primary or direct sources of public policy is not pacific, as the concept is understood in different ways in the common and civil law families.

2.131 The reasons in favour of including natural law in the sources of transnational public policy are threefold. First, considerations of natural law have an attenuating effect upon national law. Second, they reflect basic principles of the international community. Lastly, they can be ascertained by an inductive process, by reference to both positive law and precedent.

2.132 There are also reasons for excluding natural law from the sources of transnational public policy. There is still great uncertainty over the content and definition of natural law. Whereas in the civil law, natural law deals with substantive standards, in the common law natural law deals only with fundamental procedural standards. For this reason, the proposal by the representative of Cyprus to include the notion in the text of the model law was not accepted by the UNCITRAL working group.³⁸⁰

2.133 The first position seems however warranted as the operation of natural law is not restricted by common and civil law divide or the construction of its sources. In any event, the principles drawn from the idea of natural law may

³⁷⁸ See P. Lalive, *ibid*, at pp. 267 *et seq*.

³⁷⁹ On this point, see A. Maniruzzaman, "International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview", 7(3) *J Int'l Arb* 53 - 64 (1990) at p. 55. See also ICSID Case No. ARB/81/8, Final Award of 5 June 1990, *Amco Asia Corp v Indonesia*, XVII YBCA 73 - 105 (1992). See also P. Lalive, *ibid*, at p. 269, para 35, and M. Hunter, G. Conde e Silva, "Transnational Public Policy and its Application in Investment Arbitrations", 4(3) *J W I* 368 (2003) at pp. 372 and 378. According to Article 2 of the Resolution of the *Institut de droit international* on the "The Proper Law of the Contract in Agreements between a State and a Foreign Private Person," adopted in its Session in Athens in 1979, 58(2) *AnnIDI* (1979) at p. 195, the parties may choose as the proper law of the contract either one or several domestic legal systems or the principles common to such systems, or the general principles of law, or the principles applied in international economic relations, or international law, or a combination of those sources of law, *subject to the operation of public policy* [emphasis added]. See also 58(2) *AnnIDI* (1979) at p. 193.

³⁸⁰ See H. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, Deventer - Boston - The Hague, 1994), at pp. 993 - 994.

well have found their way into the different legal systems regardless of the terminology used.

2.134 Other public policy standards can be traced back to principles shared by all religions. Although most religious principles essentially deal with metaphysics, they have influenced the ethics, law and public policy of the international community. Examples of shared religious principles can be found in the distinction between good and evil,³⁸¹ the prohibition to lie, deceive,³⁸² defraud or steal³⁸³ and the respect for life and nature.³⁸⁴

2.135 Authoritative arbitration awards are another primary source of transnational public policy. An award is authoritative where it contains transnational standards considered as binding by arbitration tribunals. When analysing international arbitration awards, it is not necessary for the arbitrator to make explicit reference to 'transnational public policy', being sufficient that the standard applied has the characteristics and the effects of transnational public policy, such as the ousting of a national provision, the invalidity of a contractual arrangement.

2.136 Take for example the award in *S D Myers Inc -v- The Government of Canada*³⁸⁵ where the tribunal found that:

The Preamble to the NAFTA, the NAAEC and the international agreements affirmed in the NAAEC suggest that specific provisions of

³⁸¹ This basic distinction is present in Judeo-Christianism: Talmud, Kiddushishin, Bible, Mathew 7.16-20, Galatians 5.19-23; Buddhism: Majjhima Nikaya i.415, Ambalatthika-Rahulovada Sutta, Sutta Nipata 92; Islam: Hadith of Tirmidhi and Ibn Majah, Qu'ran 5.100 and 47.31; Hinduism: Mahabharata Shanti Parva 37.11, 14; Confucianism, Book of History 5.9, Book of Ritual 7.2.20.

³⁸² See Judeo-Christianism, Proverbs 12.22, Talmud Baba Metzia 49, Psalm 101.7; Sikhism, Adi Granth, Maru Solahe, M.3, p. 1062; Islam, Qur'an 61.2-3, Hadith of Muslim, Buddhism, Dhammapada 176 and 306, Maharatnakuta Sutra 27; Jainism, Upasakadasanga Sutra; Hinduism, Laws of Manu 4.256.

³⁸³ Taoism, Treatise on Response and Retribution 5; Judeo-Christianism, Exodus 20.15, Amos 8.4-8; Islam, Qur'an 83.1-3; Jainism, Akalanka Tattvartharajavartika 7.27; Buddhism, Sutta Nipata 119-21.

³⁸⁴ See e.g., Sikhism, Adi Granth, Majh Ashtpadi 1 M.3, p.118; Islam, Qu'ran 6.38; Taoism, Tao Te Ching 51; Buddhism, Khuddaka Patha; Hinduism, Atharva Veda 12.1.

³⁸⁵ The awards in this case can be found at, *inter alia*, www.appletonlaw.com, www.dfait-maeci.gc.ca, and www.naftalaw.org, last visited November 2005. For a commentary see J. Hunter and G. Conde e Silva, "Transnational Public Policy and its Application in Investment Arbitrations", 4(3) *J W I* 367 – 378 (2003) at p. 370.

the NAFTA should be interpreted in light of the following general principles:

- Parties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states;
- Parties should avoid creating distortions to trade;
- environmental protection and economic development can and should be mutually supportive.³⁸⁶

or

The Tribunal considers that the interpretation of the phrase like circumstances in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns.³⁸⁷

2.137 The result would have been the same had the tribunal explicitly declared that both the protection of the environment and the regular functioning of the markets are endorsed by transnational public policy.

(ii) Secondary sources of transnational public policy

2.138 Given the controlling functions of public policy, one must move away from a collection of national sources when considering the requirements of the international community. The comparative analysis of national sources in search for a general consensus is fraught with difficulties and may not reveal the content of transnational public policy.³⁸⁸ The method is ultimately circular. The practice of states is only a source of transnational public policy where it conforms with the fundamental requirements of the international community.

³⁸⁶ *Ibid*, at para 220.

³⁸⁷ *Ibid*, at para. 250.

³⁸⁸ See the Introduction to the thesis above.

2.139 Secondary sources have however an important role as they corroborate the observance of transnational principles in national legal systems. Their content must correspond however to that found in the primary sources of public policy and requires the intervention of the comparative method.

2.140 With such reservation, transnational public policy may be expressed in the principles of law and public policy³⁸⁹ recognised in the overwhelming majority of legal systems. Those principles have been restated in compilations produced by international organizations such as UNIDROIT or CENTRAL.

2.141 Transnational public policy may also be contained in the public laws of nation states.³⁹⁰ At first glance, national public laws would not reflect an essential interest of the international community. The operation of public law regulates the activities of the state or the relationship between private entities and the state and as such is restricted by the idea of territoriality.³⁹¹ The principle of territoriality implies that the public law of a nation state has effects only within the borders of that state.³⁹² The application of national

³⁸⁹ See, e.g., R. Schlesinger, "Research on the General Principles of Law Recognized by Civilized Nations", 51 *AJIL* (1957), at 734 *et seq.* An example of the application of general principles of law recognized by civilized nations to public policy is the decision by the Tribunal Fédéral, 13 November 1998, *X SA, et al v Z SA*, XXV YBCA 443-534 (2000), para 8, where the Swiss court made reference to "fundamental legal or moral principles that are recognized in all civilized countries, to the point that their violation should be seen as a violation of public policy". General public policy principles are contained, e.g., in the International Declaration of Human Rights or in treatises on equity. One example of one such principle is the idea of *pacta quoe contra leges constitutiones, vel contra bonos mores, nullam vim habere indubitati juris ets* (which prohibits agreements leading to, or encouraging wrong). For a comprehensive analysis of the general principles of law relevant to international dispute resolution, see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953).

³⁹⁰ On the definition of public law see P. McConnaughay, "Reviving the "Public Law Taboo" in International Conflict of Laws", 35 *Stan J Int'l L* 255 (1999); Ulpian, Digest, 1.1.1.2; II. Jolowicz, *Roman Foundations of Modern Law* (1957), at p. 49. On the relationship between public law and public policy see S. Donahey, "Punitive Damages in International Commercial Arbitration", 10(3) *J Int'l Arb* 67 – 78 (1993) at p. 74 and See Belgium, Court of Appeal of Brussels, 6 December 2000, *Génie Mécanique zaïrois et crts Sarl v AIG Europe et crts s a*, *Journal des Tribunaux* (2001) at p.572.

³⁹¹ See A. Pillet, *Traité pratique de droit international privé* (J. Allier/Sirey, Grenoble – Paris 1923), at p. 109 *et seq* and P. Mancini, "De l'utilité de rendre obligatoires pour tous les États, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de règles générales du Droit international privé, pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles", *Clunet* 221 – 239 and 285 – 304 (1874), at p. 296.

³⁹² In the common law, the act of state doctrine may effectively depart from this view. See L. Henkin, "Act of State Today: Recollections in Tranquility", 6 *Colum J Transnat'l L* 175 (1967) at p. 178.

public law rules would be excluded from the scope of transnational public policy³⁹³ as the latter has a controlling function with regard to public law.³⁹⁴

2.142 Yet in certain circumstances the content of public law may be identical to that of transnational public policy. This occurs with respect to certain standards expressed in national constitutions³⁹⁵ and provisions designed to protect the environment or international trade. Those provisions may well be sensitive to the interests of the international community.

2.143 Judicial case law may also be a secondary source of transnational public policy. The extent upon which national judicial decisions are a source of transnational public policy depends on whether they pursue, in essence, transnational interests.

³⁹³ Yet see the case by the Swiss Federal Tribunal, *Ungrad v Ungrad*, Sem Jud 102 (1981) at p. 216, XXXVII ASDI 254 (1981) at p. 419, cited by P. Lalive, , "Transnational (or Truly International) Public Policy", *ICCA Congress Series no 3*, at p. 264, fn. 11.

³⁹⁴ For examples see ICC Case No 6474 of 1992, Partial award on Jurisdiction and Admissibility, *Supplier (European country) v Republic of X*, XXV YBCA 306 (2000), at para 137 and ICC Case No 6998, Award of 1994, *Hotel Monaco v Joint Venture Co.*, XXI YBCA 54 – 78 (1996) at pp. 70 -71, para. 58, where the tribunal found that arbitrators should avoid giving effect to State policies that do not correspond to widely accepted values. On the application of public law by arbitration tribunals see further A. Maniruzzaman, "International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview", 7(3) *J Int'l Arb* 53-64 (1990).

³⁹⁵ On the relevance of constitutional law to the notion of public policy see, e.g., US, *People v Hawkins*, 157 NY 1, 12, 51 NE 257, 260 (1898); and *Mertz v Mertz*, 271 NY 466, 472, 3 NE 2d 597, 599 (1936); followed by *Intercontinental Hotels Corp (Puerto Rico) v Golden*, 15 NY 2d 9, 203 NE 2d 210, 254 NYS 2d 527 (1964), where the United States courts held that public policy should be equated with the Constitution and local laws, and that there would be no public policy other than that contained in the Constitution, statutes or judicial records. In Spain, Title VI of the preamble to Law 36/1988 On Arbitration of 5 December 1988 states that "the notion of public policy must be interpreted in light of the principles of our Constitution." The German Bundesgerichtshof made a similar reference to constitutional standards when defining international public policy: "Leave to enforce foreign awards will only be refused when the arbitral proceedings have been affected by a serious shortcoming touching upon the fundamental principles of economic and constitutional life." See Germany, Bundesgerichtshof, 18 January 1990, XVII YBCA 503 (1992) at p. 505. Similarly the Court of Appeal of Hamburg found that breach of public policy leads to a manifest violation of the fundamental principles of German law, in particular of its constitutional principles. See also the decision of the Oberlandesgericht Hamburg, 30 July 1998, XXV YBCA 714 – 716 (2000) at p. 716. See also Spain, Supreme Court, 17 February 1998, *Unión de Cooperativas Agrícolas Epis-Centre v La Palentina SA*, XXVII YBCA 533 - 539 (2002) at p. 538. On the relationship between constitutional law and public policy see further H. Grigera Naón, "Public Policy and International Commercial Arbitration: The Argentine Perspective", 3(2) *J Int'l Arb* 7-28 (1986) at p. 9; H. Momcinovic, "Uncostitutional Acts and Arbitration", 3 *Croatian Arb Yb* 191-200 (1996); G. Recchia, "L'arbitrato in materia di opere pubbliche e norme costituzionali", 6(3) *Rivista dell'Arbitrato* 504 - 512 (1996). See also, by implication, ICC Case No 6320, Final Award of 1992, *Owner v Contractor*, XX YBCA 62 (1995) at p. 96.

2.144 As mentioned above, the comparative analysis of national sources in search for a general consensus is fraught with difficulties and may not be sufficient to elevate a standard to the level of transnational public policy. Secondary sources are contingent to the primary sources of transnational public policy.

2.2. Conclusion to Chapter and Part I

2.145 Transnational public policy is, by its content and functions, the public policy of the international community. Drawing from a plurality of transnational sources,³⁹⁶ transnational public policy overarches the normative pyramid and is placed in a multi-levelled notion of public policy.

2.146 National courts have relied on transnational public policy as a part of, or justification for, their own public policy in international cases. International tribunals apply transnational public policy as a standard proper to international arbitration. Transnational public policy has controlling functions over the arbitral process, municipal and international law.

2.147 The thesis examines the assertion of transnational public policy as a method. It suggests that the comparative method should be left to a second plane in search for the primary or direct sources of transnational public policy.

³⁹⁶ In the sense defined by Jessup. As noted by Lalive, "this is indeed a "transfrontier" topic in various senses of the term, since it overlaps both private international law and involves, in particular, the difficult and changing question of the relationship between the law of nations and municipal law in the sphere of international economic relations." See P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series no 3*, at p. 310.

PART TWO

.....

CONTENT OF TRANSNATIONAL PUBLIC POLICY

Practical application of the thesis

- 0A.1.** Part Two of the thesis explores the content of transnational public policy in different areas of the law. Transnational public policy in international arbitration is categorised as jurisdictional, procedural or substantive.
- 0A.2.** Although a distinction is traditionally made between substantive and procedural public policy, a tripartite categorization is warranted. Jurisdictional transnational public policy controls the powers of the tribunal and the standing of the parties. It stands in the balance between procedure and substance and should be included in the notion of public policy.
- 0A.3.** The inclusion of procedural yardsticks in the notion of public policy may seem surprising to a Common Law lawyer. During the preparatory works of the European Convention on State Immunity 1972³⁹⁷ there was a lengthy discussion raised by the United Kingdom delegation regarding the scope of the notion of public policy included in the French version of the Convention. It was suggested that where the term “ordre public” was sufficient to include fundamental rules of procedure the English text had to include the expression “no adequate opportunity to present his case”.³⁹⁸ It was found necessary to make it clear that the notion was not limited to substantive law.
- 0A.4.** In the common law a breach of fundamental principles of procedure is normally dealt with under the heading of due process and not public policy. Yet as remarked by the Canadian Courts, the principles of due process affect both procedural and substantive fairness and as such overlap with the notion of public policy.³⁹⁹ This has been the position of the courts in most civil law jurisdictions.⁴⁰⁰

³⁹⁷ *Europ T S No 74 (Basle)*.

³⁹⁸ See H. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, Deventer - Boston - The Hague, 1994), at p. 978.

³⁹⁹ See Canada, Superior Court of Justice, 22 September 1999, *Re Corporacion Transnacional de Inversiones, S A de C V et al v STET International, S p A et al*, XXVI YBCA 323 - 324 (2001) at p. 324.

⁴⁰⁰ See, e.g., Switzerland, Tribunal Fédéral, 30 December 1994, *Agency A and Bank B v X*, 2 ASA Bulletin 217-226 (1995); 10(10) IAR E-1 - E-7 and E-8 - E-14 (1995), XXI YBCA 172 - 180 (1996) at p. 173; Spain, Tribunal Supremo, 17 February 1998, *Unión de Cooperativas Agrícolas Epis-Centre (France) v La Palentina SA (Spain)*, XXVII YBCA 533 - 539 (2002). France, Cour d'Appel Paris, 22 September 1995, *Dubois & Vanderwalle v Boots Frites BV*, 1 Rev Arb (1996) with note E. Gaillard, pp. 100-109; Germany, Bundesgerichtshof, 15 May 1986, *German charterer v Romanian shipowner*, XII YBCA 489 - 491 (1987).

0A.5. As seen in Chapter 4, positive transnational public policy will imply principles of procedure in the rules governing the arbitration as necessary to ensure conformity with fundamental notions of procedural justice. The inclusion of a procedural category of transnational public policy is therefore warranted.⁴⁰¹

0A.6. Substantive transnational public policy deals with the limits imposed on party autonomy and the law governing the merits.⁴⁰² There is a breach of substantive public policy where a legal or non-legal rule is irreconcilable with the fundamental standards of the international community.⁴⁰³ Transnational substantive public policy is veered towards the protection of the international trade system and other transnational interests.⁴⁰⁴

⁴⁰¹ A procedural category of public policy was identified in Recommendation 1(c) of the ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 19(2) *Arb Int* 249 - 263 (2003). Similarly, see Point 1(c) of the ILA Resolution 2/2002, adopted in the the 70th Conference of the International Law Association held in New Delhi, India, 2-6 April 2002 which refers to a "procedural international public policy." See also *Fouchard Gaillard Goldman* at p. 646; C. Brunner, "Procedural Public Policy as a Ground for Setting Aside International Arbitral Awards," 18(3) *ASA Bull* 566 - 581 (2000); P. Bernardinin, "Italy", J. Paulson (ed), *ICCA Handbook on Commercial Arbitration* (Kluwer 2000), at p. 49; J. Ancel, "Measures Against Dilatory Tactics: The Cooperation Between Arbitrators and the Courts", *ICCA Congress series No 9* at p. 410; P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series No 3* at p. 261; M. Rubino-Sammartano, "International and Foreign Arbitration", 5(3) *J Int'l Arb* 85 - 96 (1988) at p. 94, Lahne and Schwebel, "Public Policy and Arbitral Procedure," *ICCA Congress Series No 3* at pp. 205 *et seq.*

⁴⁰² See, for instance, the decision of the Swiss Tribunal Fédéral, 30 December 1994, *State Agency A and State Owned Bank B v Consultant X*, 2 *ASA Bull* 217-226 (1995), 10 *IAR* E-1 - E-7 and E-8 - E-14 (1995); Tribunal Fédéral, 9 January 1995, *Inter Maritime Management SA (Switzerland) v Russin & Vecchi (US)*, XXII *YBCA* 789 - 799 (1997) at p. 796, 9 *IAR* D-1 - D-13 (1995); *Westacre Investment v Jugoimport-SDPR Holdings Co Ltd et al* [1998] 2 *Lloyd's Rep* 111, XXIII *YBCA* 836 (1998) at p. 837. See also G. Born, *International Commercial Arbitration* (2nd ed, Kluwer 2001), at p. 568; W. Park, "Judicial Controls in the Arbitral Process", 5(3) *Arb Int* 230 - 274 (1989) at p. 568; H. Grigera Naón, "Public Policy and International Commercial Arbitration: The Argentine Perspective", 3(2) *J Int'l Arb* 7-28 (1986) at p. 14.

⁴⁰³ See, e.g., Swiss Tribunal Fédéral, 18 September 2001, *Özmak Makina Ve Elektrik Sanayi A S (Turkey) v Voest Alpine Industrieanlag enbau GmbH (Austria)*, 20(2) *ASA Bull* 311 - 320 (2002) at p. 315.

⁴⁰⁴ The proceedings of the 69th Biennial Conference of the International Law Association, London, 25 to 29 July 2000 (ILA, London 2000), at pp. 356 *et seq.*, distinguish four types of substantive public policy rules namely: mandatory rules or *lois de police*; rules of general application, such as unlawful relief; rules of specific application, such as those pertaining to competition law; activities contrary to good morals or public order, such as slavery, piracy, terrorism, smuggling or drug trafficking; and rules breaching the interests or foreign relations of a state whose public policy is applied. Examples of the latter category include the effects of international sanctions and boycott legislation and the effects of contracts that injure a friendly foreign government or contravene rules relating to public control over foreign investment.

0A.7. The distinction between jurisdictional, procedural and substantive public policy is not however strict. Some rules of rules public policy have an eclectic nature and may belong to more than one category. One example is international notion of estoppel.

0A.8. The doctrine of estoppel for want of bona fides has been recognised as rule of public policy by the national courts⁴⁰⁵ and several authors. At the forefront, Lalive cites estoppel as a rule belonging to the public policy of arbitration tribunals.⁴⁰⁶ The doctrine of international estoppel has been invoked by international tribunals in various forms over a period of a century and a half.⁴⁰⁷ Although there have been occasions on which it has been held to be inapplicable to particular facts, its jurisprudential basis remains unchallenged.⁴⁰⁸ The doctrine is based on the principle *non concedit venire contra factum proprium*⁴⁰⁹ and is only successful “when very special

⁴⁰⁵ See, e.g., Hong Kong SAR, *China Nanhai Oil Joint Services Corporation v Gee Tai Holdings Limited* (1995) XX YBCA 671-680, at p. 677, para 20; England, *Westacre Investments, Inc v Jugoimport - SDPR Holding*, (1999) XXIVa YBCA 753 - 776 (CA) at p. 769, para 43 per LJ Waller, citing *Interdesco SA v Nullifire Ltd* [1992] 1 Lloyd's Rep 180 Phillips J and *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295.

⁴⁰⁶ See P. Lalive, “Transnational (or Truly International) Public Policy”, *ICCA Congress Series No 3*, at p. 307, para 171; J. van den Berg, *The New York Convention* (Kluwer 1981) at p. 185 who recognised estoppel as a principle emanating from a party's general obligation to arbitrate in good faith overriding the formalities required by Article II(2) NYC; and D. Howell, “Issue Estoppel Arising out of Foreign Interlocutory Court Proceedings in International Arbitration”, 20(2) *J Int'l Arb* 153 - 168 (2003) at p. 155, identifying estoppel as a public policy rule.

⁴⁰⁷ See, e.g., Mexico-US Claims Commission, *Cuculla Case*, 3 Int Arb 2873 (1868); the *Salvador Commercial Co Arbitration*, USFR 838 (1902) at p. 866; Ad hoc, *United States v Great Britain*, 3 UNRIAA 1767 (1937) at p. 1790.

⁴⁰⁸ The international doctrine of estoppel relevant to transnational public policy should be distinguished from the notion of estoppel in the Common Law. See the article by L. Cadiet, “La renonciation à se prévaloir des irrégularités de la procédure arbitral”, 1 *Rev Arb* 3 - 38 (1996) at p. 26. Note also the distinction drawn by the Court of Final Appeal of the HK SAR between estoppel in the English law of equity and the broader notion of estoppel as a want of bona fides corresponding to a public policy point in arbitration law. See Hong Kong SAR, *Hebei Imp & Exp Corp v Polytek Engineering Comp Ltd* (Court of Final Appeal, 9 February 1999), (1999) XXIVa YBCA 652 - 677, Judgments of Mason NPJ at p. 666 and Justice Litton PJ at p. 673. International estoppel may be relied upon in the absence of technical municipal law requirements such as reliance or an intent to deceive or defraud. See I. MacGibbon, “Estoppel in International Law,” 7 *Int'l & Comp L Q* 468 - 479 (1958) at p. 478.

⁴⁰⁹ See E. Gaillard, “A Foreign View of the New Swiss Law on International Arbitration”, 4(1) *Arb Int* 25 - 31 (1988) at p. 26; and E. Gaillard, “L'interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international (le principe de l'estoppel dans quelques sentences arbitrales)”, *Rev Arb* 241 (1985).

circumstances come into play that would make assertion of the claim a violation of good faith.”⁴¹⁰

0A.9. In the *Himpurna v Republic of Indonesia* award,⁴¹¹ the respondent was barred from invoking it had no power under its law to prevent an Indonesian state-controlled entity from seeking an injunction in the Indonesian courts incompatible with the terms of reference. The tribunal grounded the finding of estoppel in the government’s duty to show due diligence in the exercise of its powers.⁴¹² Estoppel applied here as a rule of jurisdictional public policy.

0A.10. The estoppel doctrine may also be applied as a fundamental rule of procedure, to guarantee the proper administration of justice. Consequently, parties are estopped from invoking a rule of procedure where there is a clear intent to delay the proceedings on frivolous grounds.⁴¹³

0A.11. In addition, the same doctrine was put in motion in another award as a rule of substantive public policy, to prevent a government from escaping liability for the actions of its armed forces by alleging that rogue elements were not following orders.⁴¹⁴

⁴¹⁰ See ICC Case No. 6230, Final Award of 1990, XVII YBCA 164 – 177 (1992) at p. 174. See also, in the same sense, ICC Case No 7453, Final Award of 1994, XXII YBCA 107 - 124 (1997) at p. 120.

⁴¹¹ Ad Hoc, Interim Award of 26 September 1999 and Final Award of 16 October 1999, *Himpurna California Energy Ltd v Republic of Indonesia*, 15 Mealey’s IAR A-1 - A-20 and B-1 - B-20 (2000).

⁴¹² Although the award referred to international law, the controlling functions of transnational public policy were clearly present.

⁴¹³ E.g., after a party fails knowingly to request in due time the challenge of the arbitrator. See J. Ancel, “Measures Against Dilatory Tactics: The Cooperation Between Arbitrators and the Courts”, *ICCA Congress Series No 9*, at pp. 410 – 421, p. 420. See also *Fouchard Gaillard Goldman*, at p. 457; Hong-Kong SAR, *China Nanhai Oil Joint Services Corporation v Gee Tai Holdings Limited* (1995) XX YBCA 671-680 (13 July 1994, Hong Kong High Court (Kaplan J)) at p. 677. The international notion of estoppel may not apply where substantive transnational public policy is raised. The Tribunal in ICC Case No 6248, Final Award of 1990, *Consultant v Contractor*, XIX YBCA 124 - 140 (1994) rejected the contention that a party could be estopped from invoking the nullity of an immoral contract. The tribunal based this decision on the protection of a weaker third party. See however ICSID, Award 8 December 2000, *Wena Hotels Limited v Arab Republic of Egypt*, 41 ILM 896 (2002) and B. Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective*, in *International Arbitration - 60 Years of ICC Arbitration – A look at the future* (ICC Publication No 412, 1984), at 272.

⁴¹⁴ See, e.g., ICSID Case 87/3, Award of 27 June 1990, *Asian Agricultural Products v Republic of Sri Lanka*, 6 ICSID Rev - FILJ 526 (1991).

0A.12. Most rules of public policy have however a distinct jurisdictional, procedural or substantive nature and can be confined to one of those categories. We will explore each of them in turn.

Chapter 3

JURISDICTIONAL TRANSNATIONAL PUBLIC POLICY

- 3.1. Governing principles
- 3.2. Controlling functions
- 3.3. The *res judicata* effect of arbitration awards
- 3.4. Conclusions

3.1. This chapter deals with the principles of transnational public policy overseeing the jurisdiction of arbitration tribunals.

3.1. Governing principles

3.2. Public policy rules on the jurisdiction of arbitration tribunals are relevant to both arbitration tribunals and national courts.

3.3. In national courts jurisdictional rules may be relevant at three stages.⁴¹⁵ Before the arbitration has begun, a party may challenge the validity of the arbitration clause.

3.4. The court may then have to determine whether there has been a *prima facie* reference to arbitration. After the tribunal has rendered its decision, the courts of the seat or of the place of enforcement may need to decide whether the tribunal has exceeded its jurisdiction.

3.5. Arbitration tribunals must take into account jurisdictional public policy throughout the arbitral proceedings.

⁴¹⁵ Lew, Mistelis, Kroll, at p. 330.

3.6. Jurisdictional issues may be decided in a preliminary award or at a later stage and can be raised by the tribunal *ex officio*.⁴¹⁶ The decision of the tribunal normally turns on whether it has a mandate to decide the jurisdictional point and the effects of a national procedural law on the arbitration. Jurisdictional transnational public policy is governed by the following principles:

- the binding force of agreements (*pacta sunt servanda*);
- the principle of effectiveness (*ut res magis valeat quam pereat*);
- the pro-arbitration bias (*favor arbitrandum*);
- the doctrine of *Kompetenz-Kompetenz*;
- prohibition of multiple recoveries (*non bis in idem*); and
- the binding effect of previous decisions (*res judicata*).

3.7. Those principles may have a different strength in investment arbitrations. The jurisdiction of investment tribunals is determined by the content of the relevant investment treaty⁴¹⁷ and considerations of public international law not always present in commercial arbitrations.

3.8. As seen throughout the chapter, the self-regulatory functions of transnational public policy play an essential part in the assumption of jurisdiction by an arbitration tribunal. Whereas a national court will base its jurisdiction on state sovereignty, international tribunals have no forum and

⁴¹⁶ See, e.g., ICC Case No 1110, Award of 1963, *Argentine engineer v British Company*, 3(3) Arb Int 282-294 (1994) with note J. Wetter, pp. 277-281; Arbitration Court of the Bulgarian Chamber of Commerce and Industry Case No 60/1980, Award of 1 October 1980, *Bulgarian creditor v German debtor*, IV Arbitration Practice 151 - 162 (1987); ICC Case No 4402, Partial Award of 17 March 1983, *Bahamian Company and Luxemburg Company v French Company et al*, IX YBCA 138 - 141 (1984); ICC Case No 5294, Final Award of 22 February 1988, *Danish firm v Egyptian firm*, XIV YBCA 137 - 145 (1989); ICC Case No 4629, Final Award of 1989, *European Contractor v Middle Eastern Contractor*, XVIII YBCA 11 - 33 (1993); ICC Case No 8423, Final Award of 1994, *Portuguese Company v French parent Company and French subsidiary*, XXVI YBCA 153 - 166 (2001); ICSID Case No ARB/95/3, Award of 10 February 1999, *Goetz v The Republic of Burundi*, 15(2) ICSID Rev - FILJ 457 - 527 (2000); ICC Case No VB/99130, Award of 18 April 2000, 4 Rev Arb 1019 - 1020 (2002).

⁴¹⁷ See, e.g., Washington Convention Article 25.

assert their mandate without necessarily referring to a state law.⁴¹⁸ As stated in ICC Case No 10623,

an agreement to submit disputes to international arbitration is not anchored exclusively in the legal order of the seat of the arbitration. Such agreements are validated by a range of international sources and norms extending beyond the domestic seat itself.⁴¹⁹

3.9. The arbitration agreement, contained in a contract or international treaty,⁴²⁰ is the primary source of the tribunal's powers.⁴²¹ As illustrated by the tribunal in *Waste Management Inc v Mexico*:

The essential constituent elements which constitute the institution of arbitration are the existence of a conflict of interests, and an agreement expressing the will of the parties or a legal mandate, on which the constitution of an Arbitral Tribunal is founded. This assertion serves to confirm the importance of the autonomy of the will of the parties, which

⁴¹⁸ ICC Case No 8938, Final Award of 1996, *Exclusive Agent v Manufacturer*, XXIVa YBCA 174 – 181 (1999) at p. 176, para 4, and ICC Case of 1982, *Dow Chemical France et al v Isover Saint Gobain*, IX YBCA 131 (1984). See also the award discussed by the Italian Corte di Cassazione, 9 May 1996, *SAEPA and SIAPE v Gemanco srl*, XXII YBCA 737 (1997), at p. 742 where the arbitration agreement was governed by the *lex mercatoria*, “a body of rules of law based on the usages of international commerce.”

⁴¹⁹ ICC Case No 10623, Award of 7 December 2001, *S v State X*, 21(1) ASA Bull 82 – 111 (2003) at p. 83, para 129.

⁴²⁰ In investment arbitrations the investor consents to arbitration with his arbitration request and the host State is deemed to have consented to arbitrate by virtue of accession to the treaty. See A. Van den Berg (ed.), “Arbitration of Investment Disputes: The First NAFTA Award - Introductory comments on the Ethyl Corporation Case”, 16(3) *J Int'l Arb* 139 - 140 (1999) at p. 139.

⁴²¹ ICC Case No 10623, Award of 7 December 2001, *S v State X*, 21(1) ASA Bull 82 - 111 (2003) at p. 83, para 128 and K. Böckstiegel, “Public Policy and Arbitrability”, *ICCA Congress Series No 3*, at p. 178. The need for consent will extend to all parties in the arbitration. See ICC Case No 7453, Final Award of 1994, *Agent (US) v Principal (Germany) and Managing director of principal (Germany)*, XXII YBCA 107 – 124 (1997) at p. 112, para 10. Consider also *SPP (Middle East) Ltd and Southern Pacific Properties Ltd v The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels*, IX YBCA 51 - 104 (1984), 23 ILM 1048 (1984), Clunet 235 (1994); and Ad Hoc, Award of 17 November 1994, *Banque Arabe d'Investment v Inter-Arab Inv't Guarantee Corp*, XXI YBCA 13 – 39 (1996) at p. 18, para 7. The notion that the jurisdiction of arbitral tribunals is grounded on party autonomy holds true where a national law provides for mandatory arbitration. In international affairs the application of a particular law results from the parties' deliberate contacts with a legal system.

is evinced by their consent to submit any given dispute to arbitration proceedings. Hence, it is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends.⁴²²

3.10. The requirement of consent to the arbitration agreement⁴²³ is met by the parties' compliance with formalities laid down in a national law.⁴²⁴ Formal requirements guarantee that the parties have waived their right of access to the courts in favour of the administration of justice by an international tribunal. Those requirements normally belong to the domestic-international public policy of a country.

⁴²² See ICSID Case no ARB(AF)/98/2, Award of 2 June 2000, *Waste Management Inc v The United Mexican States*, 15(1) ICSID Rev-FILJ 211-240 (2000). The parties to this arbitration were required to show they had waived their right to court proceedings under Article 1121 of NAFTA.

⁴²³ See ICC Case No 7929, Interim Award of 1995, *Manufacturer & Subsidiary v Building supplier*, XXV YBCA 312 – 323 (2000) at p. 316; Zurich Chamber of Commerce, Preliminary Award of 25 November 1994, XXII YBCA 211 – 221 (1997) at p. 218. Parties' consent may be vitiated by fraud, mistake, misrepresentation or some other ground. Consent may be expressed when agreeing to the arbitration clause or its assignment. See, e.g., ICC Case No 6363, Final Award of 1991, *Licensor v Licencee*, XVII YBCA 186 – 211 (1992) at p. 194. Consent may be implied also where the party takes steps in the arbitration, e.g., by signing the terms of reference under the ICC rules or presenting arguments in defence of a claim. Parties may jointly withdraw their consent at any time during the arbitration. See Nigeria, Arbitration and Conciliation Decree 1988 Article 37; Zimbabwe Arbitration Act 1996 Article 30; Thailand, Arbitration Act 2002 S. 21; China, Arbitration Law 1994 Article 49; Singapore, Arbitration Act 2001 (revised 2002) S. 37(1); Greece, Law 2735 of 1999 on International Commercial Arbitration Article 30; Germany, Arbitration Law 1998 Section 1053; Peru, General Arbitration Law No. 26572 of 1996 Article 41; Mexico, Commercial Code Article 1447. See also V. Fischer-Zernin and A. Junker, "Arbitration and Mediation: Synthesis or Antithesis?", 5(1) *J Int'l Arb* 21 – 40 (1988) at p. 21, fn 1; K. Tashiro, "Conciliation or Mediation during the Arbitral Process – A Japanese View", 12(2) *J Int'l Arb* 119 – 134 (1995) at p. 121. Where the parties so agree, the settlement agreement may be registered in an award rendered by the arbitrators. See, e.g., ICSID Case No ARB/95/3, Award of 10 February 1999, *Goetz v Burundi*, XXVI YBCA 24 – 46 (2001); Iran-US, Award on Agreed Terms for Claims of Less Than \$250,000, *United States v Iran*, XVI YBCA 282 – 285 (1991) at p. 284; England, Arbitration Act 1996 S. 51; UNCITRAL Model Law Article 30; Germany, ZPO Article 1053. See however WIPO Case No D99-0001, Panel Decision of 14 January 2000, *World Wrestling Federation Entertainment, Inc v Michael Bosman*, XXVII YBCA 189 – 193 (2002) at p. 190. A final award is obligatory in the event of a settlement under the Swedish Arbitration Act S. 27 and Article 29 of the Brazilian Law No 9.307 of 1996. Agreed awards are enforceable under the New York Convention. See UNCITRAL Model Law Article 30(2); Germany, ZPO Section 1053 and Greece, Law 2735 of 1999 on International Commercial Arbitration Article 30; and G. Lörcher, "Enforceability of Agreed Awards in Foreign Jurisdictions," 17(3) *Arb Int* 275 – 286 (2001).

⁴²⁴ See, e.g., Switzerland, PILA Article 178(1); France, NCCP Articles 1443 and 1449. The New York Convention, for instance, provides in Article II that the arbitration agreement shall be in writing, which includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Article 7(2) of the UNCITRAL Model law extends the notion of "agreement in writing" to other means of telecommunication which provide a record of the agreement.

3.11. One may enquire whether formal requirements should be included in the notion of transnational public policy. It is suggested they should not. From the perspective of the tribunal, the observance of formal requirements merely evidences the intention of the parties to see their dispute resolved by arbitration.⁴²⁵ As stated in Lew, Mistelis and Kroll,

There is no justification to submit arbitration agreements to stricter form requirements than other contractual provisions. Arbitration is no longer considered a dangerous waiver of substantial rights. In fact the selection of arbitration is not an exclusion of the national forum but rather the natural forum for international disputes. Form requirements do not necessarily promote legal certainty; they are often the source of additional disputes.⁴²⁶

3.12. Those disputes often result from the uncertainty surrounding which law governs the arbitration agreement.⁴²⁷ Yet, from the standpoint of transnational public policy, arbitration agreements are subject to a strong policy favouring

⁴²⁵ See, e.g., UNCITRAL Model Law, Article 7(2); Germany, ZPO Section 1031(2) to (4); Switzerland, Article 178(1); England, Arbitration Act 1996, Section 5.

⁴²⁶ Lew, Mistelis, Kroll, at p. 132, para 7-9.

⁴²⁷ Given the principle of separability contained, e.g., in UNCITRAL Model Law, Article 16(1); England, Arbitration Act Section 7; Switzerland, Article Private International Law Act 178(3); Netherlands, Code of Civil Procedure Article 1053; Sweden, Arbitration Act Section 3; China, Arbitration Law, Section 19(1). On the topic see Craig, Park and Paulsson, *ICC Arbitration* (1990 2nd ed.) at p. 65; P. Sanders, "L' autonomie de la clause compromissoire", *Hommage à F. Eisemann* (1978), at p. 42; France, Cour de cassation, 7 May 1963, *Dalloz* (1963) at p. 545, with note J. Robert; Court of Appeal of Bermuda of 7 July 1989, *Sojuznefteexport v Joc Oil Ltd*, XV YBCA 385 -435 (1990) at p. 414, para 76; ICC Case No 8938, Final Award of 1996, *Exclusive Agent v Manufacturer*, XXIVa YBCA 174 - 181 (1999) at p. 176, para 4; ICC Case No 7528, Partial Award of 1993, *Sub-contractor v Contractor*, XXII YBCA 125 - 131 (1997) at p. 127; Russian Maritime Arbitration Commission Case No 24/1984, Award of 16 April 1985, XIV YBCA 209 - 212 (1989) at p. 210; ICC Case No 6149, Interim Award of 1990, XX YBCA 41 (1995); and ICC Case No 4131, Interim Award of 1982, *Dow Chemical France et al v Isover Saint Gobain*, IX YBCA 131 (1984). On the topic see also J. Lew, "The Law Applicable to the Form and Substance of the Arbitration Clause" and Blessing, "The Law Applicable to the Arbitration Clause", *ICCA Congress series No 9*, at pp. 114 and 168, respectively. In ICC Case No 10623, Award of 7 December 2001, *S v State X*, 21(1) ASA Bull 82 - 111 (2003) at pp. 83 *et seq* the tribunal found that the standard to be applied to the validity of the arbitration agreement was anchored in a range of sources and norms extending beyond one legal system. For a commentary on this case see A. Crivellaro, "Note - Award of 7 December 2001 in Case No 10623", 21(1) ASA Bull 60 - 81 (2003).

arbitration⁴²⁸ and presumptively valid.⁴²⁹ Tacit or oral arbitration agreements are not *per se* offensive to transnational public policy.⁴³⁰

3.13. The arbitration agreement confines the mandate of the arbitration tribunal.⁴³¹ The proper construction of the arbitration agreement has prevented arbitration tribunals from deciding *ultra vires*,⁴³² e.g., the admissibility of a counterclaim⁴³³ or the inclusion of related contracts in the arbitration.⁴³⁴

⁴²⁸ See *Fouchard Gaillard Goldman*, at p. 268, para 488; Hong Kong SAR, *Lucky-Goldstar International (HK) Limited v Ng Moo Kee Engineering Limited* [1993] 2 Hong Kong Law Reports 73 (HKLR), XX YBCA 280 (1995); US, *HZI Research Center, Inc (US) v Sun Instruments Japan Co, Inc (Japan)*, 1995 US Dist LEXIS 13707, XXI YBCA 830 (1996); Germany, Kammergericht Berlin, 15 October 1999, 3 Int ALR N-30 (2000), 1 RPS 13 (2000); France, Cour de Cassation, 14 December 1983, *Epoux Convert v Société Droga*, Rev Arb 483 (1984) 484; France, Cour d'appel de Paris, 14 February 1985, *Société Tuvomon v Société Amaltex*, Rev Arb 325 (1987); China, Supreme People's Court, 16 August 2000, *CNIEC Henan Corporation v Liaoning Bohai Nonferrous Metals I/E*, 4 Int ALR N-11 (2001). See also Geneva Chamber of Commerce and Industry (CCIG), Interim Award of 27 August 1999, *A v B*, 19(2) ASA Bull 265 - 275 (2001); ICC Case No 6998, Final Award of 1994, *Hotel v Joint Venture*, XXI YBCA 54 - 78 (1996) at p. 65 *et seq.*

⁴²⁹ See G. Born, *International Commercial Arbitration* (2nd ed. 2001), at pp. 155 *et seq.*

⁴³⁰ E.g., in Court of Arbitration Attached to the Chamber of Foreign Trade, Case No 12, Award of 1974, I YBCA 127 - 127 (1976), the tribunal found that the parties had validly entered into an unwritten arbitration agreement. This is also the implication in the UNCITRAL Report, doc A/CN.9/460, at paras 20-31. Such agreements are common in trade practice. Consider, e.g., an oral or tacit agreement to arbitrate disputes concerning a written purchase order, written sales confirmation, general conditions, forms of salvage, brokers' notes, bills of lading and other instruments transferring rights and obligations to non-signatory third parties.

⁴³¹ ICC Case No 7639, Final Award of 1994, *Sponsor v Contractor*, XXIII YBCA 66 - 79 (1998) at p. 75. See also ICC Case No 6268, Final Award of 18 May 1990, *Seller v Buyer*, XVI YBCA 119 - 126 (1991) at p. 126.

⁴³² See, e.g., Chamber of National and International Arbitration of Milan Case No 1398, Final Award of 18 March 1999, *Licensee v Licensor*, XXV YBCA 382 - 387 (2000) at p. 383; ICC Case No 6233, Final Award of 1992, *Owner of Lebanese Company v African Company*, XX YBCA 58 - 61 (1995) at p. 58; ICC Case No 4367, Interim Award of 16 November 1984, *Supplier v Buyer*, XI YBCA 134 - 139 (1986) at p. 138; Japan Shipping Exchange, Award of 2 August 1979, *Charterer v Shipowner*, X YBCA 85 - 88 (1985) at p. 86; AAA, Award No 1569 of 3 August 1981, *Pollux Marine Agencies Inc v Louis Dreyfus Corp*, 1(1) Maritime Arbitration Award Digest 19-20 (1981). See also ICC Case No 7453, Final Award of 1994, *Agent v Principal and Managing director of principal*, XXII YBCA 107 - 124 (1997); ICC Case No 3493, Award 16 February 1983, *SPP (Middle East) Ltd v Egypt*, IX YBCA 111 - 123 (1984) at pp. 115 - 116.

⁴³³ See, e.g., Iran-US Claims Tribunal, Award No 548-367-2 of 28 June 1993, *Kaysons International Corporation v Government of the Islamic Republic of Iran et al*, at para. 76; Award No 535-354-1 of 16 Oct. 1992, *Plicoflex Inc v Islamic Republic of Iran et al*, at para. 20; and Award No 15-90-2 of 8 December 1982, *Reliance Group Inc v National Iranian Oil Company et al*, all published in 1 Iran-US CTR 384, 385.

⁴³⁴ See, e.g., ICC Case No 6149, Interim Award of 1990, *Seller v Buyer*, XX YBCA 41 - 57 (1995); ICC Case 3779, Award of 13 August 1981, *Seller v Buyer*, IX YBCA 124 - 130 (1984) at p. 125.

3.14. As a general rule, however, arbitration agreements tend to be construed widely. It is generally accepted, for instance, that the terms ‘all disputes’ read in association with the terms ‘in connection with’ express the common will of the parties to give a wide scope to the arbitration clause.⁴³⁵ A similar conclusion has been reached with regard to the term ‘investment’ in investment treaties.⁴³⁶ It is generally recognised that the parties have a wide discretion to establish for themselves that their transaction involves an ‘investment.’⁴³⁷ As seen in chapter 2 above the scope of the arbitration agreement includes, in all circumstances, matters of transnational public policy.

3.3. Controlling functions

3.15. Jurisdictional rules belong to transnational public policy where they control the effects of a national law or the agreement between the parties. Arbitrators have relied on a number of public policy rules at the jurisdictional stage of the arbitration.

Rule J1: The arbitral tribunal has jurisdiction to determine its jurisdiction.

3.16. The jurisdiction of arbitration tribunals is governed by the principle of *Kompetenz-Kompetenz* (or competence-competence). The principle was first

⁴³⁵ See, e.g., ICC Case No 6474, Partial Award on Jurisdiction and Admissibility of 1992, *Supplier v Republic of X*, XXV YBCA 11 - 432 (2000) at p. 309, para 157. On the distinction between the words “dispute” and “disagreement” see ICC Award of 1984, 2(1) *J Int’l Arb* 75 - 78 (1985) at p. 76.

⁴³⁶ E.g., Article 25 of the Washington Convention confines the jurisdiction of a tribunal to “disputes” arising directly out of an “investment”.

⁴³⁷ The investment treaty may provide examples as to what constitutes an “investment.” See, e.g., Article 1(d) of the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment; available at <<http://www.sice.oas.org/bits/panusa1.asp>>, which provides that an investment means “every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts”. The discretion of the parties is not however unlimited. See, e.g., ICSID Case No ARB/03/4, *Empresas Lucchetti SA and Lucchetti Perú SA v Republic of Peru*, 2005 WL 756797, where the tribunal found it had no jurisdiction to hear the dispute as Claimant had not been able to demonstrate there had been a consent to arbitration under the relevant BIT.

established by the International Court of Justice⁴³⁸ to prevent national courts from interfering with its jurisdiction. As noted in the TOPCO award, *Kompetenz-Kompetenz* is “a customary rule, which has the character of necessity, derived from the jurisdictional nature of the arbitration, confirmed by case law more than 100 years old and recognized unanimously by the writings of legal scholars.”⁴³⁹

- 3.17. Its adoption by international arbitration tribunals has been recognised in international treaties,⁴⁴⁰ national laws⁴⁴¹ and court decisions.⁴⁴² The principle implies that the arbitral tribunal, rather than a national court, must decide a dispute concerning its jurisdiction.

⁴³⁸ See the *Case concerning the Arbitral Award made by the King of Spain on December 23, 1906*, in ICJ (1960) at p. 192; and the *Nottebohm Case*, in ICJ (1953) at p. 111; and Art. 35(6) in the statute of the ICJ which states that in the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the Court.

⁴³⁹ See Ad Hoc, Award of 19 January 1977, *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic*, 104 Clunet 350-389 (1977), with introduction by P. Lalive, “Un grand arbitrage pétrolier entre un Gouvernement et deux sociétés privées étrangères”, 17 ILM 3-37 (1978), cited in *Lew, Mistelis, Kroll*, at p. 334, para 14-18. In the TOPCO case there was no national provision governing the competence of the arbitrator. See also Ad Hoc, Award on Re-opening of 1 August 1974, *British Petroleum Co (Libya) Ltd v Libya*, 53 ILR 297-388 (1979). Extracts of the award in G. Wetter, *The International Arbitral Process* (Dobbs Ferry, 1979) Vol. I, pp. 432-440 and Vol. II, pp. 610-622.

⁴⁴⁰ See the European Convention on International Commercial Arbitration of 1961; the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID); the French-Iranian Arbitration and Conciliation Rules for Contracts, of 4 May 1977.

⁴⁴¹ See, e.g., UNCITRAL Model Law, Article 16(1): “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.” See also Brazil, Law 9.307 of 3 September 1996, Article 8 Sole Paragraph; England, Arbitration Act 1996 section 30; Germany, Arbitration Law 1998, section 1040; India, Arbitration and Conciliation Act 1996, section 16; Russian Federation, Law on International Arbitration 1993 Article 16; Switzerland, PIL Act Article 186(1).

⁴⁴² See, e.g., India, Delhi High Court, 23 July 1999, *Brawn Laboratories Limited v Fittydent International GmbH*, 2 Arbitration Law Reporter 64-71 (2000); ECJ Case C-190/89, 25 July 1991, *Marc Rich & Co A G v Società Italiana Impianti P A*, Official Journal C 220, 23 August 1990, p. 5- 7, 3 Arb Int'l 251-257 (1991), XVII YBCA 233 - 278 (1992) at p. 246 - 247; Switzerland, Tribunal Fédéral, 26 January 1987, *Shobokshi v Saiecom SA*, 109 La Semaine Judiciaire 230 -231 (1987); Hong Kong, High Court 29 October 1991, *Fung Sang Trading v Kai Sun Sea Products Ltd*, XVII YBCA 289 - 304 (1992) at p. 298. See also Switzerland, Tribunal Fédéral, *Fomento de Construcciones y Contratas SA v Colon Container Terminal SA*, 127 III (2001), at p. 279 *et seq*; C. Oetiker, “The Principle of Lis Pendens in International Arbitration”, 18(2) *Arb Int* 137 - 146 (2002).

3.18. *Kompetenz-Kompetenz* is grounded on the need to guarantee a neutral forum for the resolution of international disputes. As stated in the preliminary *ad hoc* award in case *Elf Aquitaine Iran v National Iranian Oil Co*,

The rationale behind the principle of the arbitrator's competence over the competence is a widely recognized need to establish a system of law providing enterprises engaged in activities in other countries under contract with the government of that country or with an institution or company under the control of that government with access to a tribunal or other organ completely independent of the parties and of their respective governments, in the event that disputes that cannot be settled by negotiation should arise.⁴⁴³

3.19. This has led several arbitration tribunals to uphold the power to determine their own jurisdiction as a rule of international arbitration from which no derogation is permitted.⁴⁴⁴ In other words, to enforce it as a rule of transnational public policy.

3.20. One example of the controlling functions of *Kompetenz-Kompetenz* can be found in ICC Case No. 3572, *Deutsche Schachtbau (DST) v Rakoil*,⁴⁴⁵ where the defendant was precluded from relying on an action instituted in the courts of R'as Al Kaimah to decide the jurisdiction of the tribunal.

3.21. The dispute concerned a concession agreement concluded between the government of R'as Al Khaimah and an exploration company to explore for oil and gas in the territorial waters of R'as Al Khaimah. In April 1979, defendants filed a suit with the R'as Al Kaimah court against DST and the original operator requesting that the agreements be set aside and that DST and the original operator be restrained from continuing with the reference to

⁴⁴³ *Ad hoc*, Preliminary Award of 14 January 1982, *Elf Aquitaine Iran v Nat'l Iranian Oil Co*, Rev Arb 401-421 (1984), XI YBCA 97 - 104 (1986) at p. 101

⁴⁴⁴ See Lew, Mistelis, Kroll, at pp. 332 *et seq.* See also ICC Case No 1512, Second Preliminary Award of 14 January 1970, *Indian cement Company v Indian cement Company*, V YBCA 174 - 176 (1980), at p. 174, where *kompetenz-kompetenz* was described as a well-established principle in international arbitration "based on obvious reasons of justice and convenience, and on the needs of the international business community."

⁴⁴⁵ See ICC Case No 3572, Final Award of 1982, *Deutsche Schachtbau- und Tiefbohr GmbH v Rakoil*, XIV YBCA 111 - 121 (1989), at pp. 116 - 117, para 13.

arbitration. The court issued an order to that effect. Considering the court order, the tribunal found that the action instituted in the courts of R'as Al Khaimah could not stay the jurisdiction of the arbitration tribunal to proceed with the arbitration and to award on the merits of the case.

3.22. Similarly, in ICC Case No 10623⁴⁴⁶ the tribunal ousted the effects of an injunction by the Supreme Court of respondent State X to stay the arbitral proceedings pursuant to the code of civil procedure of that state. In the award the tribunal held that it was

not bound to suspend the proceedings as a result of the particular injunctions issued by the Supreme Court and the First Instance Court and that, in the particular circumstances of the case, it is under a duty to proceed with the arbitration.⁴⁴⁷

3.23. According to the arbitrators, State X would be in “clear breach of the fundamental principle of competence-competence”⁴⁴⁸ if it obliged the tribunal to stay its proceedings in deference to court proceedings specifically instituted to determine the tribunal’s jurisdiction.

3.24. To decide otherwise, the tribunal added, would have serious consequences to international arbitration, creating an intolerable precedent to parties attempting to avoid the effects of the arbitration agreement.⁴⁴⁹

3.25. Another example of the controlling functions of jurisdictional public policy is found in ICC Case No. 10623.⁴⁵⁰ During the arbitration, the tribunal was asked to consider the effects of a Court Order providing for the stay of the arbitral proceedings pending the determination of respondent’s objections to

⁴⁴⁶ See ICC Case No 10623, Award of 7 December 2001, *S v State X*, 21(1) ASA Bull 82 – 111 (2003).

⁴⁴⁷ ICC Case No 10623, *ibid*, 21(1) ASA Bull 82 – 111 (2003), at p. 82, para 124 (place of arbitration in state X).

⁴⁴⁸ ICC Case No 10623, *ibid*, 21(1) ASA Bull 82 – 111 (2003), at p. 90.

⁴⁴⁹ The observation of this general principle may also prompt an investment arbitration tribunal to annul certain obligations imposed on a foreigner by a local decision which violates international law. See the dictum in ICSID Case No ARB/81/8, Final Award of 5 June 1990, *Amco Asia Corp v Indonesia*, XVII YBCA 73 – 105 (1992) at p. 87.

⁴⁵⁰ See ICC Case No 10623, Award of 7 December 2001, *S v State X*, 21(1) ASA Bull 82 – 111 (2003) at pp. 83 *et seq.* See also A. Crivellaro, “Note – Award of 7 December 2001 in Case No 10623”, 21(1) ASA Bull 60 – 81 (2003).

jurisdiction in the national courts. The tribunal declined to give effect to such order, holding that

An international arbitral tribunal is not an organ of the state in which it has its seat in the same way that a court of the seat would be. The primary source of the Tribunal's powers is the parties' agreement to arbitrate. An important consequence of this is that the Tribunal has a duty vis à vis the parties to ensure that their arbitration agreement is not frustrated. In certain circumstances, it may be necessary to decline to comply with an order issued by a court of the seat, in the fulfilment of the Tribunal's larger duty to the parties.⁴⁵¹

- 3.26. To proceed otherwise, the tribunal concluded, would "undermine the parties' agreement to submit their disputes to international arbitration and constitute a denial of justice."⁴⁵²

Rule J2: Lack of standing may not be invoked after the conclusion of a valid arbitration agreement.

- 3.27. Once arbitration has been agreed upon the parties must perform their agreement,⁴⁵³ as required under the principle of *pacta sunt servanda*.⁴⁵⁴ The arbitration agreement grants the arbitration tribunal jurisdiction over the dispute.⁴⁵⁵ International law⁴⁵⁶ and national provisions⁴⁵⁷ bind the courts to refer the parties to arbitration.⁴⁵⁸

⁴⁵¹ ICC Case No 10623, *ibid*, at p. 83.

⁴⁵² ICC Case No 10623, *ibid*, at p. 85, para 138.

⁴⁵³ See Ad hoc, Award of April 1982, VIII YBCA 94 – 117 (1983) at p. 114.

⁴⁵⁴ The principle of *pacta sunt servanda* has been included in the notion of public policy by several authors. On this point see P. Mayer and A. Sheppard, Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, commentary to Recommendation 1(e), 19(2) *Arb Int* 249 – 263 (2003) at p. 256.

⁴⁵⁵ See, e.g., Zimbabwe, Decisions of 18 and 26 January 2000, *Waste Management Services v City of Harare*, XXV YBCA 535 - 556 (2000).

⁴⁵⁶ See the Geneva Protocol on Arbitration Clauses of 1923; OHADA Treaty Article 23; Amman Arab Convention Article 23; European Convention 1961 Article VI(3); New York Convention Article II(3) and G. Herrmann, "The 1958 New York Convention: Its Objectives and Its Future," *ICCA Congress Series No 9*, at pp. 15 - 24.

⁴⁵⁷ See, e.g., UNCITRAL Model Law Article 8; Belgium, Judicial Code Article 1679; China, Arbitration Law, Article 4; Germany, Code of Civil Procedure Article 1032; India, Arbitration

3.28. Transnational public policy precludes a party to that agreement from subsequently relying on a change in the national law,⁴⁵⁹ immunity from suit,⁴⁶⁰ a unilateral repudiation of the contract or some other act of its own will.⁴⁶¹ This is particularly so where the dispute involves states or state entities.

3.29. The tribunal in ICC Case. No. 1939, for instance, relied on this rule to reject the state entity's contention that a national law had restrained its capacity to proceed with the arbitration. As held by the tribunal,

international public policy would be strongly opposed to the idea that a public entity, when dealing with foreign parties, could openly,

and Conciliation Act 1996, Article 8(1); Netherlands, Arbitration Act 1986 Article 1022(1); Russian Federation, Law on International Commercial Arbitration 1993 Article 8; England, Arbitration Act, section 9(4); Switzerland, PIL Article 7; France, NCPC Article 1458.

⁴⁵⁸ See e.g., US, *Sphere Drake Insurance Limited (UK) v Clarendon National Insurance Company (US)*, 263 Federal Reporter, Third Series (2nd Cir 2001) pp. 26-34, 2001 US App LEXIS 19202; India, *Owners, etc "Baltic Confidence" v State Trading Company of India, et al* (2002) XXVII YBCA 478 - 481; Australia, *Eisenwerk Hensel Bayreuth v Australian Granites Limited*, 14 Mealey's IAR C-1 - C-6 (1999) (Court of Appeal); Switzerland, Bundesgerichtshof, 19 December 1997, *Compañía de Minas Buenaventura SA v ICC Arbitral Tribunal*, 13(9) Mealey's IAR C-1 - C-7 (1998); Italy, Corte di Cassazione, 17 May 1995, *ICEC v Italchimica et al*, XXIII YBCA 719 - 722 (1998). See also US Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 U.S. 614, 629, 87 L Ed 2d 444, 105 S Ct 3346 (1985). See also US, *Dean Witter Reynolds, Inc v Byrd*, 470 US 213 (Supreme Court 1985) at p. 221: "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, a concern which "requires that [courts] rigorously enforce agreements to arbitrate." A national judge may complement the arbitration agreement where, e.g., before the arbitration has begun the parties fail to include in their agreement the method for appointing the arbitrators. Some courts will refuse recognition of foreign judicial decisions declining to enforce arbitration agreements. See, e.g., Switzerland, ATF 124 III 83 consid. 5b p. 87. Sparingly, courts in the common law will grant anti-suit injunctions precluding the parties from initiating court proceedings abroad. See, e.g., Singapore, *WSG Nimbus Pte Ltd v Board of Control For Cricket in Sri Lanka* (Singapore High Court, 13 May 2002) available at website <http://www.lawnet.com.sg>; US, *Supercanal Int'l SA v Elias* (SD Florida, 23 April 2001), 19(3) ASA Bull 592 - 597 (2001); England, *The Angelic Grace* [1995] 1 Lloyds Rep 87. This type of restraining orders are unknown to the civil law.

⁴⁵⁹ See ICSID Case No ARB/82/1, *Société Ouest-Africaine des Bétons Industriels v Senegal*, 6(1) ICSID Rev - FILJ 46-48 (1991) and the discussion in M. Hunter and G. Conde-c-Silva, "Transnational Public Policy and its Application in Investment Arbitrations", 4(3) *JWI* 367 - 378 (2003). This holds true in relation to Constitutional law. See ICC Case No 7263, Interim Award of 1994, *Ministry of Defence (Country X) v Contractor (US)*, XXII YBCA 92 - 106 (1997) at p. 95, where the tribunal reached its conclusion "rightly based on general principles and specific rules concerning international arbitration relied upon by both parties."

⁴⁶⁰ See K. Berger, *International Economic Arbitration* (Kluwer Law 1993), at p. 186.

⁴⁶¹ This will extend to situations where a legal person attempts to rely on irregularities committed, by action or omission, by its own organs or representatives. See ICC Case No 3896 of 1982, *Framatome v Iranian Agency of Atomic Energy*, Clunet 58 (1984). And regardless of whether claimant or respondent alleges the lack of capacity. See ICC Case No 7263, Interim Award of 1994, *Ministry of Defence (Country X) v Contractor (US)*, XXII YBCA 92 - 106 (1997).

knowingly, and willingly, enter into an arbitration agreement, on which its co-contractor would rely, only to claim subsequently, whether during the arbitral proceedings or on enforcement of the award, that its own undertaking was void.⁴⁶²

- 3.30. Although the tribunal used the term “international public policy”, the controlling functions of the decision indicate that in effect reference was being made to a supra-national public policy.⁴⁶³ A similar conclusion was drawn with regard to the *Dalico* case by P. Lalive:

the impossibility for a Contracting State to maintain, after the event, that it did not have the capacity to enter into an arbitration agreement comes fully within the scope of what is called transnational or truly international public policy and that, on this issue at least, the international public policy of *Dalico* case law coincides with transnational public policy.⁴⁶⁴

- 3.31. Another example can be found in the Award on Jurisdiction in ICC case 3896.⁴⁶⁵ In that arbitration there was a dispute between a French construction company and an Iranian governmental organization. The respondent argued that Article 139 of the Iranian Constitution, which made the submission to arbitration of disputes concerning state property conditional upon the approval of the Council of Ministers and notification to Parliament, rendered the relevant arbitration agreement void.

⁴⁶² See the Award in ICC Case No 1939, *Italian company v African state-owned entity*, cited in Y. Derains, “Le statut des usages du commerce international devant les juridictions arbitrales”, *Rev Arb* 122 - 145 (1973) and 109 *JDI* 971 - 977 (1982).

⁴⁶³ See also the Award in *Erich Benteler KE and Another v Belgium*, X YBCA 37-38 (1985), where the arbitral tribunal held that “a State which has signed an arbitration clause or agreement would be acting contrary to international public policy if its subsequently relied on the incompatibility of such an obligation with its internal legal system.”

⁴⁶⁴ See P. Lalive, “Transnational (or Truly International) Public Policy”, *ICCA Congress Series No 3*, at p. 257, and *Rev Arb* (1973) at p. 145 and Y. Derains, “Les tendances de la jurisprudence arbitrale internationale”, *Clunet* 829 (1993), especially pp. 851-852. See also A. Dimolitsa, “Separability and Kompetenz-Kompetenz”, *ICCA Congress series No 9*, at p. 227; and J. Robert, *Le phénomène transnational* (Association Française d'Arbitrage, LGDJ 1988).

⁴⁶⁵ See ICC Case No 3896, Award on jurisdiction of 30 April 1982, *Framatome S.A. v Atomic Energy Organization of Iraq (AEOI)*, 111 *Clunet* 58 (1984).

3.32. The tribunal held that “there is a general principle, which today is universally recognized in relations between states as well as in international relations between private entities (...), whereby the Iranian state would (...) be prohibited from reneging on an arbitration agreement entered into by itself or, previously, by a public entity.”⁴⁶⁶

Rule J3: An arbitration tribunal must follow its own judgment.

3.33. The tribunal’s duty to decide in accordance with its own judgment derives from the prohibition of denial of justice and the “clear principle of transnational public policy which is the principle of good faith.”⁴⁶⁷ An arbitration tribunal should not defer any issue in dispute to a statute or national court,⁴⁶⁸ even if that may require non-compliance with a court order.⁴⁶⁹ As stated in ICC Case No 10623,

an arbitral tribunal should not go so far as to frustrate the arbitration agreement itself in the interests of ensuring enforceability. Such an outcome would be, to say the least, a paradox.⁴⁷⁰

⁴⁶⁶ ICC Case No 3896, *ibid*, 111 *Clunet* 58 (1984). In the same sense see ICC Case No 1526, Award of 1968, *Clunet* 1915 (1974) with note Y. Derains; ICC Case No 2521, Award of 1975, *JDI* 997 (1976) with note Y. Derains; ICC Case No 4381, Award of 1986, *Clunet* 1102 (1986) with note Y. Derains; ICC Case No 5103, Award of 1988, *JDI* 1206 (1988) with note A. Alvarez, cited in B. Hanotiau, “The Law Applicable to Arbitrability”, *ICCA Congress Series No 9*, at p. 152.

⁴⁶⁷ See ICC Case No 6474 of 1992, Partial Award on Jurisdiction and Admissibility, *Supplier v Republic of X*, XXV *YBCA* 279 – 311 (2000) at p. 287, para 36. See also ICC Case No 4695, Interim Award of 1984, XI *YBCA* 149 - 158 (1986) at p. 158.

⁴⁶⁸ See J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) at pp. 149 *et seq*.

⁴⁶⁹ See ICC Case No 10623, Award of 7 December 2001, *S v State X*, 21(1) *ASA Bull* 82 – 111 (2003) at p. 87, para 143. The tribunal concluded that to proceed otherwise would amount to “a denial of justice and fairness to the parties.” See also *Ad hoc*, *Himpurna California Energy Ltd v Republic of Indonesia*, Interim Award of 26 September 1999, 15 *Mealey’s IAR* A-1 - A-20 (2000) and Procedural Order of 7 September 1999, transcribed at para 73 of the award. On the topic see further H. van Houtte, “Parallel Proceedings Before State Courts and Arbitration Tribunals. Is There a Transnational *lis pendens* Exception in Arbitration or Jurisdiction Conventions?”, P. Karrer (ed.), *Arbitral Tribunals or State Courts Who Must Defer to Whom? Conference in Zurich of January 28, 2001* (ASA Special Series No 15, 2001); D. Reichert, “Problems with Parallel and Duplicate Proceedings: The *Litispence* Principle and International Arbitration”, 8(3) *Arb Int* 237 - 256 (1992).

⁴⁷⁰ ICC Case No 10623, Award of 7 December 2001, *S v State X*, 21(1) *ASA Bull* 82 - 111 (2003).

- 3.34. Another corollary of the tribunal's duty is that it must not delegate its decision-making powers to someone else,⁴⁷¹ including the assistants to the tribunal⁴⁷² or an expert in areas outside his expertise.⁴⁷³

3.3. The *res judicata* effect of arbitration awards

Rule J4: International awards in conformity with transnational public policy are binding on the parties.

- 3.35. The parties must comply with an international arbitration award where it settles the issues in dispute and a request for reconsideration or annulment by an arbitral tribunal has not been filed within prescribed time-limits.⁴⁷⁴ The award then brings to fruition the arbitration agreement and becomes binding on the parties.
- 3.36. The *res judicata* effect of international awards is founded on the principle of public policy that the public interest is served by finality in arbitration and a rule of private justice prohibiting the re-opening of the issues in dispute.⁴⁷⁵ This rule has two important consequences. First, arbitration tribunals are bound by their own decisions.⁴⁷⁶ Second, absent a breach of transnational public policy, arbitration tribunals must recognise the *res judicata* effect of international awards rendered by other arbitration tribunals.⁴⁷⁷

⁴⁷¹ See Canon V(c) of the AAA Code of Ethics for Arbitrators in Commercial Disputes.

⁴⁷² See C. Partasides, "The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration", 18(2) *Arb Int* 147 - 164 (2002) at p. 147.

⁴⁷³ See Iran-US Chamber One Award No 314-24-1 in Case No 24, concerning the Statement of K. Ameli of 20 August 1987, available at *Iran-United States Claims Tribunal: Selected Awards*, at para 4.

⁴⁷⁴ Such appeal system is available, e.g., in ICSID, LMAA and FOSFA arbitrations and under the Iran-US claims tribunal.

⁴⁷⁵ D. Howell, "Issue Estoppel Arising out of Foreign Interlocutory Court Proceedings in International Arbitration", 20(2) *J Int'l Arb* 153 - 168 (2003) at p.155.

⁴⁷⁶ See ICC Case No 3267, Final Award of 28 March 1984, XII YBCA 87 - 96 (1987). Yet, as noted in Ad hoc, Award of 5 February 1988, *Wintershall AG v Qatar*, XV YBCA 30 - 53 (1990) at para 85 the *res judicata* effect of a partial final award in no sense deprives the parties of the ability to agree to an interpretation of a partial award nor the clarification of a decision or the giving of a decision on points which an award has left undecided.

⁴⁷⁷ In arbitral practice parallel proceedings will often take place in multiparty, multicontract arbitrations. See B. Hanotiau, "Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues", 18(3) *J Int'l Arb* 253 - 360 (2001). Where the arbitrators decline to set an arbitration on foot on the grounds of *lis pendens*, national courts will be inclined to find

3.37. An example of the latter is found in ICC Case No 6233. The tribunal was asked to determine the effects of two awards rendered by other arbitration tribunals on the subject matter of the arbitration. The arbitrators held that

the request which was submitted to the arbitral tribunal may not lead, directly or indirectly, to changing the awards that were rendered. The arbitral tribunal must indeed respect the *res judicata* effect of the two awards.⁴⁷⁸

3.38. Another example can be found in CIETAC Award of 4 May 1996, where the tribunal held that

(...) taking into account this tribunal's findings on the validity of the Stockholm award, it is not possible for this tribunal to make a new decision on the same issue or to review the Stockholm award. The Stockholm award has to be accepted. Any other solution would be contrary to basic principles of international arbitration.⁴⁷⁹

3.39. An international award creates an estoppel *per rem judicatam*,⁴⁸⁰ precluding further arbitral proceedings on the same subject matter. Once the arbitration proceedings come to an end and a final award is rendered the losing party is under an implied duty to comply with the award.⁴⁸¹

the arbitration agreement inoperative or incapable of being performed in relation to that arbitration. See, e.g., England, *Fowler v Merrill Lynch* (1985) X YBCA 499 - 503 at p. 499 (QBD (Commercial Court), 10 June 1982).

⁴⁷⁸ ICC Case No 6233, Final Award of 1992, *Owner of Company v State*, XX YBCA 58 - 61 (1995) at p. 61.

⁴⁷⁹ CIETAC, Award 4 May 1996, *Award on Quality Dispute of Laser Processing Machine System*, 94 CIETAC Awards 563-570 (1996) at p. 570. The tribunal examined whether the notices of the Stockholm arbitration and the Stockholm award were effectively given to both parties and was satisfied that they were. In conclusion, the tribunal did not find any defects that would render the Stockholm award null and void or unrecognisable under the New York Convention.

⁴⁸⁰ See R. Goode, "The Role of the Lex Loci Arbitri in International Commercial Arbitration," 17(1) *Arb Int* 19 - 40 (2001) at p. 35.

⁴⁸¹ It is estimated that around 98% of international awards are either voluntarily complied with or enforced and only 5% of awards are denied enforcement by the courts. See A. van den Berg, "The New York Convention of 1958 - Its Intended Effects, Its Interpretation, Salient Problem Areas," *ASA Special Series No 9*, at p. 25.

- 3.40. The award has international effect as long as it conforms with transnational public policy. The *res judicata* principle subsists therefore where the losing party argues that a particular domestic-international public policy renders the award unenforceable and the latter remains enforceable in another jurisdiction.
- 3.41. As remarked by the courts in India, it is impossible “to know in what Court or in what country [enforcement] proceedings are likely to be brought; and this fact emphasises once again how important it is that international awards should be truly international in their validity and effect.”⁴⁸²
- 3.42. The dictum of the court reflects a world-wide trend towards the harmonization of public policy⁴⁸³ and limiting the scope of judicial intervention in commercial arbitration.⁴⁸⁴ Courts have repeatedly held that a clear violation of the law,⁴⁸⁵ contradictory decisions⁴⁸⁶ or a manifestly wrong

⁴⁸² India, *Brace Transport Corp Monrovia v Orient Middle East Lines*, (1996) XXI YBCA 552 -556 (Supreme Court of India Civil Appeals No. 5438-39, 10 December 1993) at p. 555.

⁴⁸³ As noted by the US courts, the Art. V(2)(b) public policy defence “must be construed in the light of the overriding purpose of the Convention, which is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” See Chief Judge Feinberg in US, *Waterside Ocean Navigation Co, Inc v International Navigation Ltd*, 737 F.2d 150, 152 (2d Cir 1984) [references omitted].

⁴⁸⁴ As noted by the court in Canada, British Columbia Court of Appeal, *Quintette Coal Limited v Nippon Steel Corp et al*, (1991) 1 Western Weekly Reports, 219, note by Tetley in [1993] *Lloyd's Maritime and Commercial Law Quarterly*, 238 (24 October 1990). Indeed, provided public policy remains unaffected, national courts have shown a willingness to read an enforcement bias in the New York Convention. See, e.g., HK SAR, *China Nanhai Oil Corp v Gee Tai Holdings Co Ltd*, (1995) XX YBCA 671 – 680, at p. 679 (High Court of Hong Kong 1994); England, *Tongyuan International Trading Group v Uni-Clan Limited*, XXVI YBCA (2001) 886 – 892, at p. 892 (QBD Commercial Court 2001); Bermuda, *Sojuznefteexport v Joc Oil Ltd*, XV YBCA 384 - 435 (1990) at p. 398 (Court of Appeal of Bermuda, 7 July 1989); US, *Parsons & Whittemore Overseas Co v Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir 1974); Italy, Corte di Appello Milan, 24 March 1998, *Virgilio De Agostini, et al v Milloil SpA, et al*, XXV 734 – 750 (2000) at p. 748, para 10; Spain, Tribunal Supremo 5 May 1998, *ETS Louis Zanatta v Pillanet*, XXVII YBCA 540 - 542 (2002) at p. 541, para 31; Netherlands, Court of Appeal, 14 July 1995, *Sneek Hardhout Import BV v Karl Schlüter KG*, XXI YBCA 643 - 648 (1996) at p. 647; and A. van den Berg, *The New York Convention*, 267-268. See however the discussion in Cairo Regional Centre for International Commercial Arbitration, Award of 4 June 1990, case no. 12/1989, published in M. Alam Eldin (ed.), *Awards of the Cairo Regional Centre for International Commercial Arbitration* (Kluwer 2000), pp. 7-12, at p. 11 and El-Koshari, “Public Policy Under Egyptian Law”, *ICCA Congress series No 3*, at p. 321.

⁴⁸⁵ See, e.g., Switzerland, ATF 116 II 634 consid. 4a p. 637.

⁴⁸⁶ See, e.g., France, Cour de Cassation, 14 June 2000, *Inter-Arab Investment Guarantee Corporation - IAIGC v Banque Arabe et Internationale d'Investissements*, 15(10) Mealey's IAR B-1 - B-2 (2000), XXVI YBCA 270 -272 (2001) at p. 272; Switzerland, Tribunal Fédéral, 30 January 2002, *XSA v Y*, 20(2) ASA Bull 328 – 336, at p. 332.

finding of facts⁴⁸⁷ is not sufficient to breach public policy.⁴⁸⁸ As noted by the Swiss Supreme court,

The scope of the ground for appeal relying on the violation of public policy is strongly limited. It does not include violation of the law or incorrect application of the law or even arbitrariness (...). Nor do a manifestly erroneous interpretation of the facts, appreciation of evidence or even application of the law suffice by themselves to justify the annulment of a decision.⁴⁸⁹

3.43. Parties often invoke a breach of a national public policy merely to obtain a reversal of the decision of the arbitrator. Yet, when in doubt as to whether the award should be enforced, courts tend to restrict national public policy in accordance with the spirit of the New York Convention.⁴⁹⁰

3.44. Where no new evidence is available courts undertake a *prima facie* review of the award to ensure that the arbitrator has dealt with the public policy point. Considerations of finality discourage the re-litigation of issues already determined by the arbitrators by adducing evidence not shown to have been unavailable during the arbitration.⁴⁹¹ Where new evidence is available, the standard of review is based on one of two methods. Depending on the nature of the breach, the court will either undertake an examination of public policy

⁴⁸⁷ As exemplified in Luxembourg, Cour d'Appel, 28 January 1999, *Sovereign Participations International SA v Chadmore Developments Ltd*, XXIVa YBCA 714 - 723 (1999) at p. 721, this will hold true where there is an accusation that the arbitrators wrongly evaluated certain documents or did not consider them at all.

⁴⁸⁸ R. Briner, "Switzerland", in I. Paulsson, *ICCA International Handbook on Commercial Arbitration*, Supp 27 (Kluwer 1998) at p. 35.

⁴⁸⁹ See Switzerland, Tribunal Fédéral, 13 November 1998, *X SA, et al v Z SA*, XXV YBCA 443 -534 (2000) at p. 514, para 7. See also ATF 116 II 534, note 4.

⁴⁹⁰ As noted by A. van den Berg in his monograph, the interpretation of public policy "has moved from an earlier parochialism to the present attitude in favour of international commercial arbitration." See A. van den Berg, *ibid*, at p. 368. The restrictive interpretation of national public policy aims to close a "back door route to inviting the court to look at the merits of the case," see Singapore, *Hainan Machinery Imp & Exp Corp v Donald & McCarthy Pte Ltd*, XXII YBCA 771 - 779 (1997) at p. 779, para 23 (High Court, 29 September 1995), as "the whole point of arbitration is that the merits of the dispute will not be reviewed in the courts." See US, *Int'l Standard Electric Corp v Bidas Sociedad Anonima*, 745 Fed Sup (1990) pp. 172-182, XVII YBCA 639 -652 (1992) at p. 645, para 13 (USDC 1990). In the same sense see France, Cour d'appel Paris, 16 January 2003, *Société des télécommunications internationales du Cameroun (Intelcam) v SA France Télécom*, 1 Rev Arb (2003).

⁴⁹¹ England, *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 4 All ER 570, [1998] 3 WLR 770, XXIII YBCA 836-879 (1998).

on the basis of the award without reviewing the reasoning of the tribunal⁴⁹² or carry out a full review of the facts relevant to public policy.⁴⁹³ The extent of review is confined by the parties' substantial burden of proof in resisting enforcement of the award.⁴⁹⁴

- 3.45. Whichever method is adopted a national judge only scrutinises the effects⁴⁹⁵ produced by the enforcement of the award insofar as necessary to ascertain a departure from public policy.⁴⁹⁶ Where transnational public policy has been breached a fresh arbitration may begin since the parties remain under an obligation to settle their dispute by means of an international award.⁴⁹⁷

3.4. Conclusion

- 3.46. International commercial arbitration tribunals give effect to the principles of transnational public policy when asserting their jurisdiction. Transnational public policy exerts a controlling function over the tribunal, the parties and national law to ensure that the arbitration agreement is performed.

⁴⁹² See France, Paris Court of Appeal, 27 October 1994, *Lebanese Traders, Distributors & Consultants v Reynolds*, Rev Arb 709 (1994).

⁴⁹³ Two famous examples are France, Cour d'appel Paris, 30 September 1993, *European Gas Turbines SA v Westman International Ltd*, Rev Arb 359 (1994), XX YBCA 198 (1995) and Switzerland, Cour de Justice Canton of Geneva, 17 November 1989, *Hilmarton v OTV*, XIX YBCA 214 (1994).

⁴⁹⁴ See US, *Dandong Shuguang Axel Corporation, Ltd v Brilliance Machinery Company, et al*, 2001 US Dist LEXIS 7493, XXVII YBCA 617 – 625 (2002) at p. 621 (USDC 2001).

⁴⁹⁵ That is, to determine whether the arbitrator has commanded the parties to breach public policy. See US, *George Watts & Son, Inc v Tiffany*, 2001 WL 376322 (7th Cir. 2001).

⁴⁹⁶ See Germany, Bundesgerichtshof, 23 April 1959, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* 30/12, at pp. 94 *et seq*: "it is irrelevant if the arbitral tribunal wanted to circumvent German law or if it applied the law erroneously; this is because in so far as the review under public policy is concerned only the facts and the result matter." See also France, Cour d'Appel Paris, 30 September 1993, *Euro'n Gas Turbines SA v Westman Int'l Ltd*, XX YBCA 198 – 207 (1995) at p. 202; Switzerland, Tribunal Fédéral, 22 October 2002, *X Inc v Y*, 21(2) ASA Bull 382 (2003), where review of the award was excluded as a breach of public policy could not be establish without interpreting the contract and giving weight to the evidence submitted during the arbitration.

⁴⁹⁷ See M. Sturzenegger, "ICSID Arbitration and Annulment for Failure to State Reasons: The Decision of the Ad Hoc Committee in Maritime International Nominees Establishment v. The Republic of Guinea," 9(4) *J Int'l Arb* 173 – 198 (1992) at p. 184; England, *Husmann Ltd v Ahmed Pharaon*, [2003] EWCA Civ 266; France, Cour de Cassation, 10 June 1997, *OTV v Hilmarton*, XXII YBCA 696 - 698 (1997); Italy, *Getreide Import Gesellschaft mbH v Casillo and Casillo*, *Rivista di Diritto Internazionale Privato e Processuale* (1985) at p. 359.

Chapter 4

PROCEDURAL TRANSNATIONAL PUBLIC POLICY

4.1. Due process

(i) Equality between the parties

(ii) Opportunity to present one's case

(iii) *Contradiction*

(iv) Composite rules

4.2. Procedural good faith

4.3. Conclusion

4.1. An international arbitration is based on party autonomy.⁴⁹⁸ The freedom of the parties to compose the arbitral procedure is constrained only by fundamental principles of due process⁴⁹⁹ imposed by national courts⁵⁰⁰ and international tribunals.⁵⁰¹ As stated by one author:

Such principles, under names which vary and with differences in detail, are universally recognized and largely accepted as part of transnational public policy. (...) Observance of these

⁴⁹⁸ See, e.g., UNCITRAL Model Law, Article 19; Brazil, Law No 9.307 Article 21; UK, Arbitration Act 1996 S. 34(1); Germany, ZPO Article 1042(3) and (4); India, Arbitration Ordinance S. 19(2) and (3); Russian Federation, Law 5338-1 Article 19(1) and (2); Switzerland, PIL Article 182(2) and (3); *Fouchard Gaillard Goldman*, at p. 650.

⁴⁹⁹ The rules due process do not apply to the administrative decisions of arbitration institutions or an *acte de police de l'instance arbitrale*. See, e.g., France, Tribunal de Grande Instance of Paris, 28 March 1984, *Rev Arb* 142 (1985) and the discussion in J. Art, "Challenge of Arbitrators: is an institutional decision final?" 2(3) *Arb Int* 261 - 265 (1986). The tribunal is merely assisted by the arbitration institution in its administrative capacity. See Geneva Chamber of Commerce and Industry, Institutional Decision of the Arbitration Committee of 10 February 2000 in Proceedings No 130, 18(2) *ASA Bull* 303 - 306 (2000) at p. 305.

⁵⁰⁰ See, e.g., Canada, *Re Corporacion Transnacional de Inversiones, SA de CV et al and STET International, SpA. et al*, (1999) 45 OR (3d) 183, affirmed (2000) 49 OR (3d) 414, OJ No 3408; Luxemburg, Cour d'Appel, 28 January 1999, *Sovereign Participations International SA v Chadmore Developments Ltd*, XXIVa YBCA 714 - 723 (1999); F. Mantilla-Serrano, "Towards a Transnational Procedural Public Policy," 24(1) *Arb Int* 333 - 353 (2004).

⁵⁰¹ See *Fouchard Gaillard Goldman*, at p. 650 and J. Moitry, "Right to a Fair Trial," 6(2) *J Int'l Arb* 115 - 122 (1989) at p. 122.

principles of fairness and due process is strictly reviewed by the courts when the parties decide to lodge a recourse.⁵⁰²

4.2. International tribunals have upheld procedural transnational public policy by recourse to the following principles:

- the principle of equality between the parties
- the principle of *contradiction (audiatur et altera pars)*
- the principle of impartiality
- procedural good faith

4.3. Procedural transnational public policy is not unaffected by the characteristics of arbitration. The strict rules of procedure found in national procedural laws do not apply in international arbitration proceedings.⁵⁰³ The arbitral procedure depends more on the place where the arbitration is held than the background of the members of the tribunal and legal counsel.⁵⁰⁴

4.4. As a general tendency, parties from the Common Law are more likely to expect an adversarial type of proceedings.⁵⁰⁵ Parties from Civil Law jurisdictions may be more accustomed to an inquisitorial type of procedure.⁵⁰⁶ The most significant difference between those two procedural systems⁵⁰⁷ is

⁵⁰² M. Mernissi, "Identifying and Applying the Law Governing the Arbitration Procedure," *ICCA Congress series no 9*, at p. 390.

⁵⁰³ See, e.g., ICC Case No 7626, Final Award of 1995, *Technical know-how buyer v Engineer seller*, XXII YBCA 132 - 148 (1997) at p. 135.

⁵⁰⁴ See *Redfern and Hunter* (4th ed.), at p. 320, para 6-10.

⁵⁰⁵ Common law systems all derive from England and include Canada, Australia, New Zealand, South Africa, India, the United States, as well as Israel, Singapore, and Bermuda.

⁵⁰⁶ Civil law systems originated from the European continent and are derived either directly from Roman law, or rather the law of the Roman Empire codified in the Justinian Code, or the canon law of the Roman Catholic Church, itself substantially derived from Roman law. They include France, Germany, Italy, Spain, and virtually all other European countries and, in a borrowing or migration of legal systems, those of Latin America, Japan, and China. On this point see the draft *UNIDROIT Principles and Rules of Transnational Civil Procedure* (2000), Study LXXVI – Doc. 7, at p. 4, available at www.unidroit.org.

⁵⁰⁷ The distinction between civil and common law systems is misleading as their similarities clearly outweigh the differences. All legal systems recognise, in some form or another, e.g., the notion of due process, the notice requirement, rules for formulation of claims, the establishment of facts through proof, provisions for expert testimony and rules for deliberation and decision. Further, there are different variations of the adversarial or inquisitorial system within those countries. For instance, in the US, partly because of the jury system, lawyers will expect a greater latitude in the presentation of a case and for the exploration of potentially

that the judge in inquisitorial systems, rather than the advocates in the common law, is responsible for developing the evidence and the articulation of the legal concepts governing the decision.

4.5. The judge in adversarial proceedings “listens to the evidence and arguments of the parties, and decides between them; he does not make his own inquiries as to the facts, or adopt conclusions of fact not proposed by either party; nor does he propose or adopt arguments or conclusions of law differing from those which the parties put forward,”⁵⁰⁸ unless there is an express consent of the parties. Parties from the civil law expect the arbitrator to be in charge of the ascertainment of evidence, while retaining the right to request the intervention of a witness or the production of relevant documents. In most civil law systems the party will expect to be ordered to produce any relevant document.⁵⁰⁹

4.6. In turn, parties from common law countries expect to be entitled to discovery. Although the extent of this right may vary from country to country, parties from those jurisdictions are generally permitted to request from one another the gathering and disclosure of evidence.

4.7. Generally, arbitrators have a more inquisitorial approach than the judge in the common law. An international tribunal is more likely to actively augment the parties’ presentation of facts, by requesting written submissions, holding pre-hearing conferences or directing the examination of witnesses or

relevant information and evidence than is customary in other common law systems. It can be noted however that American administrative adjudications, conducted by professional judges without juries, closely resemble court proceedings in other countries. See the draft *UNIDROIT Principles and Rules of Transnational Civil Procedure* (2000), Study LXXVI – Doc. 7, at p. 4, available at www.unidroit.org. Also, the American system operates through a cost rule under which each party, including a winning party, ordinarily pays that party’s own lawyer and cannot recover that expense from a losing opponent. In most all other countries, except Japan and China, the winning party, whether plaintiff or defendant, recovers at least a substantial portion of the costs. This is also the tendency in arbitration. Another major difference in the US procedural system is that political affiliation plays an important part in the selection of judges. In other countries this selection is made on the basis of professional standards. This may partly explain the liberal attitude of American lawyers towards the impartiality of party-appointed arbitrators.

⁵⁰⁸ See LJ Staughton, “Common Law and Civil Law Procedures: Which is the More Inquisitorial? A Common Lawyer’s Response,” 5(4) *Arb Int* 351 - 356 (1989) at p. 352.

⁵⁰⁹ In some civil law countries, however, a party may not be compelled to produce a document that will establish its own liability.

experts.⁵¹⁰ Parties may expect relevant evidence to be produced either directly from the other party or at the tribunal's discretion.⁵¹¹

4.8. Tribunals, particularly in specialist arbitrations, will have greater freedom to rely on their own skill and expertise than a national judge.⁵¹² The primary task of the tribunal is to seek the truth from the facts.⁵¹³ Where a point of law is to be decided, the arbitrator is normally not confined to the material submitted by the parties and may adopt a solution which has not been proposed by them.⁵¹⁴

4.9. The principles of public policy gain a different intensity where the arbitration gathers elements from adversarial, inquisitorial proceedings,⁵¹⁵ or a mix of both systems.⁵¹⁶

4.1. Due process

4.10. This section deals with the requirements of due process in arbitration proceedings. Due process requires that the parties are treated equally and given an opportunity to be heard and deal with the case of their opponent. We will deal with each principle in turn.

⁵¹⁰ See *Redfern and Hunter* (4th ed.), at p. 380, paras 6-113 *et seq.*

⁵¹¹ This is increasingly the practice in international arbitration. On this point, see H. Holtzmann, *Fact-finding by International Tribunals* (Transnational Publishers 1991) at p. 101.

⁵¹² Parties retain however the burden to prove any arguments or claims brought forth during the proceedings. See, e.g., CIETAC, Award of 7 March 1990, *Award on Dispute over Quality of Frozen Crabs and Salt Shrimp*, 26 CIETAC awards 133-139 (1990) at p. 139.

⁵¹³ Consider, e.g., the dictum of the tribunal in CIETAC, Award of 16 December 1990, *Award on Dispute over Barter Trade for Manufacturing Equipment for Iron Wire with Electroplating Zinc*, 61 CIETAC awards 338-346 (1990) at p. 346.

⁵¹⁴ On this point see LJ Staughton, "Common Law and Civil Law Procedures: Which is the More Inquisitorial? A Common Lawyer's Response," 5(4) *Arb Int* 351 - 356 (1989) at p. 355. According to the author, where the procedure includes adversarial elements it is advisable that the arbitrator informs the parties that he will adopt a view of the law or facts which have not been put forward by either party as this may bring into force the principle *audi alteram partem*.

⁵¹⁵ See F. Dugdale, *Introduction to Legal Method* (3rd ed, Sweet and Maxwell 1990), at p. 67 and H. Yu and P. Molife, "The Impact of National Law Elements on International Commercial Arbitration," 4(1) *Int'l ALR* 17 - 23 (2001).

⁵¹⁶ See *Lew, Mistelis, Kroll*, at p. 533, para 21-34.

(i) Equality between the parties

Rule P1: Parties must be treated with equality in the arbitration.

- 4.11. The principle of equality between the parties is found at the heart of due process. When determining whether the parties are treated equally the tribunal enquires whether its decision constrains both parties in the same measure, in light of their relative position and the procedural history of the arbitration.
- 4.12. Equality requires, for instance, that all correspondence in the arbitration be communicated simultaneously to both parties in order to allow them an opportunity to adduce their comments. The same rule may bar claimant or respondent to always have the last word,⁵¹⁷ grant the parties an opportunity to present at least the same number of witnesses⁵¹⁸ or determine the suitability of an order for security for costs.
- 4.13. As a procedural principle, equality does not extend to a decision on the merits. As noted by the International Court of Justice in the *North Sea Continental Shelf* cases, “equity does not necessarily imply equality.”⁵¹⁹ Yet, it may have an indirect impact on the substantive decision⁵²⁰ by allowing, e.g.,

⁵¹⁷ See Iran-US Case No 44, Order of Chamber Three of 26 July 1991, *Ebrahimi v Iran*, XVII YBCA 382 – 388 (1992) at p. 387.

⁵¹⁸ Where factual or expert witness statements are to take place in written form or at an evidentiary hearing.

⁵¹⁹ *ICJ Reports* 49 (1969) at para. 91.

⁵²⁰ The distinction between substantive and procedural justice is often difficult to strike. Consider, e.g., the discussion in Iran-US Case No A27, Full Tribunal Award No 586-A27-1 of 5 June 1998, available at www.kluwerarbitration.com, *Iran-United States Claims Tribunal: Selected Awards*, at p. 30 of the award, paras 65 *et seq.* In order to determine whether there has been a departure from a fundamental rule of procedure, the merits of the dispute may have to be considered.

a late submission,⁵²¹ the late filing of a counterclaim,⁵²² or the production of *amicus* briefs.⁵²³

(ii) Opportunity to present one's case

Rule P2: Each party shall be given an opportunity to present its case.

4.14. The principle according to which a party is entitled to be heard is grounded on the self-regulatory function of transnational public policy. An arbitral tribunal must, to a minimum, be receptive to the parties' case.⁵²⁴

4.15. As echoed by the ICSID *ad hoc* Committee in *Wena Hotels*:

It is fundamental, as a matter of procedure, that each party is given the right to be heard (...). This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.⁵²⁵

4.16. The duty of the tribunal is limited to giving the parties 'an opportunity' to present their case at all stages of the arbitration. The requirement can thus be met where a party chooses not to participate in the proceedings.⁵²⁶

⁵²¹ *E.g.*, in light of previous decisions of the tribunal. See Iran-US Case No 832, Award No 580-832-3 of 23 April 1997, *David v Iran*, available at www.kluwerarbitration.com, *Selected Iran-US Claims Tribunal Awards*, at p. 8, para 9, and the authorities cited therein. See also ICC Case No 9302 of 1998, *Manufacturer D v Agent S*, XXVIII YBCA 54 - 67 (2003) at p. 57.

⁵²² See Iran-US Claims Tribunal Case No 357, Award No 473-357-1 of 12 March 1990, *Time International v National Iranian Oil Co and Ahwaz Pipe Mill Co ATTI*, available at www.kluwerarbitration.com, *Selected Iran-US Claims Tribunal Awards*, at p. 15.

⁵²³ See Ad Hoc, Decision of the Tribunal 17 October 2001 on Petitions for Intervention and Participation as Amici Curiae, *United Parcel Service of America, Inc v Government of Canada*, available at http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp.

⁵²⁴ See R. David, *Arbitration in International Trade* (Kluwer 1985) at p. 291; B. Cremades, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration," 14(2) *Arb Int* 157 - 172 (1998) at p. 168.

⁵²⁵ See ICSID, Annulment Proceedings of 28 January 2002, *Wena Hotels Limited v Arab Republic of Egypt*, 41 ILM 933 (2002).

⁵²⁶ See, *e.g.*, ICSID Case No ARB/93/1, Award of 21 February 1997, *American Manufacturing & Trading, Inc v Zaire*, 12(4) Mealey's IAR A-1 - A-20 (1997); CIETAC, Award of 14 July 1990, *Award on Dispute concerning Payment for Diesel-Engine Water-Pumps*, 38 CIETAC Awards 214-219 (1990) at p. 218.

- 4.17. The precise content of the tribunal's duty is only determinable in light of the principle of equality and the procedural framework of the arbitration. Concerns with the proper administration of justice, cost efficiency and expediency⁵²⁷ may lead the tribunal to exclude from the file, *e.g.*, irrelevant documents,⁵²⁸ or fresh post-hearing submissions.⁵²⁹
- 4.18. The opportunity to present one's case does not extend to the right to an oral hearing.⁵³⁰ Parties may have a full opportunity to submit their arguments by other means. This is the rule in document based arbitrations.⁵³¹

(iii) *Contradiction*

Rule P3: Each party shall be given an opportunity to deal with the case of its opponent.

- 4.19. Due process requires that parties in the controversy must have an opportunity to correct or contradict any relevant statement prejudicial to their view.⁵³² The principle of *contradiction* is implied in the *audi alteram*

⁵²⁷ To the extent these considerations do not affect the principle of equality or the tribunal's duty to decide. See *Ad hoc*, Final Award of 4 May 1999, *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara*, 14 Mealey's IAR A-1 - A-58 (1999) at para 210. On this point see also M. Saville, "The Origin of the New English Arbitration Act 1996: Reconciling Speed with Justice in the Decision-making Process", 13(3) *Arb Int* 237 - 252 (1997).

⁵²⁸ Consider, *e.g.*, the procedural decision of the tribunal in Iran-US Claims Tribunal Case Nos 815, 816, 817 (593-815/816/817-2) Partial Award of 30 June 1999 and Final Award of 28 November 2000, *Sabet v Iran*, XXVI YBCA 606 - 664 (2001) at p. 639: "Claimants did not give an adequate explanation for their delay in submitting the documents, and that if the Tribunal were to admit these documents, it would have to give the Respondent an opportunity to comment on them, thus delaying resolution of these claims, the Tribunal concludes that the character and contents of the documents do not justify disrupting the orderly conduct of the proceedings in these Cases. The documents in question are therefore not admitted into evidence."

⁵²⁹ See Iran-US Claims Tribunal Case No 828, Chamber One Award No. 522-828-1 of 21 October 1991, *General Petrochemicals Corp v Karkhanejat Towlidi*, available at www.kluwerarbitration.com, *Iran-United States Claims Tribunal: Selected Awards*, p. 24, para 41.

⁵³⁰ Nor to one party's request for an additional oral hearing not included in the procedural timetable. See ICC Case No 4975, Final Award of 1988, *Main contractor v Subcontractor*, XIV YBCA 122 - 136 (1989) at pp. 125 - 126.

⁵³¹ As found by the courts in Canada, relying exclusively on written pleadings does not contravene natural justice. See Canada, *Silverberg v Hooper*, [1990] JE 90-437 (SC); Y. Fortier, "The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration - "A Few Plain Rules and a Few Strong Instincts", in *ICCA Congress Series no 9*, at p. 401.

⁵³² The principle of *contradiction* has a more restrictive scope than the general right to be heard.

*partem*⁵³³ rule of natural justice and present in both the common and civil law⁵³⁴ and arbitral practice.⁵³⁵

4.20. As a rule of due process, the extent of *contradiction* must be ascertained in light of the procedural framework of the arbitration.⁵³⁶ It is established however that where a party is allowed to amend a claim or introduce a new claim the other party must have a reasonable opportunity to respond to the new factual and legal issues raised in that claim.⁵³⁷

4.21. Where the tribunal is to conduct its own investigations into the facts, the principle is breached if the parties are not given a reasonable opportunity to present their case⁵³⁸ in relation to the results of such investigations.⁵³⁹ Where factual or expert witness statements are to take place, natural justice demands

⁵³³ *Hear both sides.*

⁵³⁴ LJ Staughton, "Common Law and Civil Law Procedures: Which is the More Inquisitorial? A Common Lawyer's Response", 5(4) *Arb Int'l* 351 – 356 (1989) at p. 355.

⁵³⁵ See ICSID, Ad Hoc Committee Annulment Proceeding of 28 January 2002, *Wena Hotels Limited v Arab Republic of Egypt*, 41 ILM 933 (2002); ICC Case No 6268, Final Award of 18 May 1990, XVI YBCA 119 - 126 (1991) at p. 126. See also Ad hoc, Interim Award of 26 September 1999 and Final Award of 16 October 1999, *Himpurna California Energy Ltd v Republic of Indonesia*, 15 Mealey's IAR A-1 - A-20 and B-1 - B-20 (2000) and the interim order of the tribunal transcribed at para 60 of the award. See also, e.g., Geneva Chamber of Commerce and Industry Case No 130, Decision of 10 February 2000, *X v Y and others*, 18(2) ASA Bull 303 - 306 (2000) at p. 305; Iran-US Case No 46, Order of Chamber Three of 26 July 1991, *Ebrahimi v Iran*, XVII YBCA 382 - 388 (1992); ICC Case No 7047, Final Award of 1994, *Consultant v State agency and State owned bank*, 2 ASA Bull 301-357 (1995), XXI YBCA 79 - 98 (1996) at p. 82, para 6.

⁵³⁶ See, e.g., ICSID Annulment Decision of 3 May 1985, *Klöckner Industrie-Anlagen GmbH v Cameroon*, XI YBCA 162 - 184 (1986) at p. 166.

⁵³⁷ See, e.g., Iran-US Claims Tribunal Case No 389, Chamber Two Final Award No 579-389-2 of 20 March 1997, *Westinghouse Electric Corporation v Iran Air Force*, available at www.kluwerarbitration.com, *Iran-United States Claims Tribunal: Selected Awards*, at p. 21, para 44, where claimant's request to introduce amended claim was judged inadmissible on those grounds. In the cases where amendments have not been permitted, prejudice to the other party was clear and was almost always the reason given. See, e.g., Iran-US Claims Tribunal, Award No 315-115-3 of 10 September 1987, *Reliance Group, Inc v Iran*, 16 Iran-US CTR 257, 259 (claim for lost profits raised only at the Hearing); Iran-US Claims Tribunal Award No 323-409-1 of 2 November 1987, *Harris Int'l Telecommunications, Inc v Iran*, 17 Iran-US CTR 31, 57 (amendment made at the hearing that raised new factual and legal arguments to which the other party had no sufficient opportunity to respond); Iran-US Claims Tribunal, Decision No DEC 87-11045-1 of 7 July 1989, *International Tel & Tel Corp v Iran*, 22 Iran-US CTR 213 (substitution of a new claimant); and Iran-US Claims Tribunal, Award No 133-340-3 of 11 June 1984, *Cal-Main Foods, Inc v Iran*, 6 Iran-US CTR 52, 60. See also ICC Case No 6573, Final Award of 1991, *Seller v Carrier*, XX YBCA 110 - 125 (1995) at p. 125, para 68.

⁵³⁸ Where site inspection is required, each party is entitled to the presence of its legal representatives.

⁵³⁹ This was the view of the Commercial Court in England, *Minmetals Germany GmbH v Ferco Steel Ltd*, [1999] 1 All ER (Comm) p. 315 *et seq*, in relation to an arbitration held in China, noting that Art. V of the Convention protects the requirements of natural justice reflected in the *audi alteram partem* rule.

that parties should be given the opportunity to challenge the veracity or accuracy of the witnesses' testimony.

(iv) Composite rules

4.22. Due process includes also the observance of the notice requirement, the general duty of arbitrators to remain impartial and the prohibition of *ex parte* communications. We will analyse each of those rules in turn.

Rule P4: Parties must have adequate notice of the relevant procedural steps in the arbitration.

4.23. The notice requirement is essential to the proper and fair conduct of the arbitration.⁵⁴⁰ Article V(1)(b) of the New York Convention allows a party to avoid the effects of the award if it “was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” This rule is absorbed by Article V(2)(b) of the convention to the extent it is received by public policy.

4.24. The notice requirement is indelibly knit to the exercise of fundamental procedural rights. It extends to the right to be informed of the commencement of the arbitration⁵⁴¹ and of all significant procedural steps in the arbitration, such as the appointment of the arbitrator(s),⁵⁴² the date, time, place⁵⁴³ and subject matter of the hearing(s), the witnesses presented therein, and any procedural orders or awards. Further, all elements of proof invoked by a party on which the arbitrator is likely to found his decision must be properly communicated to the other party.⁵⁴⁴

⁵⁴⁰ See *Lew, Mistelis, Kroll*, at p. 711, para 26-83.

⁵⁴¹ WIPO Case No D2000-0044, Decision of 16 March 2000, *Educational Testing Service v TOEFL*, available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0044.html> at para 5.

⁵⁴² According to A. van den Berg, “Consolidated Commentary on New York Convention”, VIII *YBCA* 351 – 351 (1983), due process requires the name of the arbitrator to be included in the notice, in order to provide the notified party to exercise the right to challenge the arbitrator.

⁵⁴³ See, e.g., UNCITRAL Rules Article 25(a).

⁵⁴⁴ See C. Kessedjian, “Principe de la contradiction et arbitrage”, *Rev Arb* 382 (1995).

- 4.25. An express notice is not always required. This was a salient issue in *Compañía de Aguas del Aconquija v Vivendi*.⁵⁴⁵ In the arbitration, claimant alleged that the tribunals' decision to join the issues of jurisdiction and merits came unannounced and therefore it had not had a fair and full opportunity to be heard at every stage of the proceedings. In the annulment proceedings, the ICSID ad hoc Committee held that even if the parties were indeed surprised by the tribunal, the decision was not unprecedented in international decision making and express notice was not warranted.
- 4.26. The parties had had an ample opportunity to consider and present written and oral submissions on the issues, and the oral hearing was conducted to enable each party to present its case. In addition, as the tribunal's analysis of issues was clearly based on the materials presented by the parties, there was no departure from any fundamental rule of procedure.
- 4.27. The notice must be effective and timely. The formalities required for the notice are normally contained in a procedural order of the tribunal, the law of the seat⁵⁴⁶ or the parties' agreement.⁵⁴⁷ Article 4 of the LCIA rules provides, for instance, that the notice must in writing and served by registered postal, courier service or facsimile, telex, email or any other means of communication that provide a record of its transmission.⁵⁴⁸ The rules contain also provisions dealing with a change of address and the dates of receipt or dispatch.⁵⁴⁹ Breach of such rules does not amount to a breach of public policy where the notice is effectively communicated to the parties by other means.
- 4.28. A proper notice must also be timely. The requirement has grounded the decision of one arbitration tribunal to deny the admission of evidence relevant

⁵⁴⁵ ICSID, 3 July 2002, *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, 41 ILM 933 (2002) at paras 82 – 85.

⁵⁴⁶ See, e.g., UNCITRAL Model Law Article 3; Belgium, Judicial Code Article 1683; England, Arbitration Act 1996 S. 76; Russian Federation, Law 5338-1 on International Commercial Arbitration Article 3.

⁵⁴⁷ See, e.g., ICC Rules Article 3; GAFTA Rules S. 21; LMAA Terms S. 27; NAI Rules Article 4; WIPO Rules Article 4.

⁵⁴⁸ LCIA Rules Article 4(1).

⁵⁴⁹ See LCIA Rules Article 4(2) to (4).

to a hearing where the evidence was only submitted the evening before the hearing.⁵⁵⁰ The notice must allow a party sufficient time to build its defence.

4.29. This principle requires that the notice must not be misleading, upon a reasonable construction of the notice and the circumstances of the case. A strict test was followed, *e.g.*, by the French Courts in *Brasoil*, where the construction by one party of the content of a notice was deemed to lead to a breach of due process by the tribunal.⁵⁵¹

4.30. In *Brasoil*, the claimant alleged that defendant had fraudulently withheld documents and filed a request for reconsideration of a previous partial award on the grounds of procedural fraud. The defendant argued that the request was inadmissible in principle and filed an extensive submission on the merits of claimant's fraud claim. Claimant objected to the submission, arguing it went beyond the issue of inadmissibility in principle.

4.31. The tribunal subsequently set a one day hearing to discuss the issue of admissibility in principle of the request for reconsideration. At the hearing, the tribunal invited the parties to make submissions as to the factual existence of fraud. Claimant protested that it was not ready to discuss the factual existence of fraud, as it had understood the hearing had been set to discuss the issue of admissibility in principle of the request. In its procedural order the tribunal denied the request for reconsideration on the grounds that fraud had not been proven. Claimant brought annulment proceedings to the Paris Court of Appeal. The Court held that the claimant had not had an adequate opportunity to present its case⁵⁵² and set aside the award.⁵⁵³

⁵⁵⁰ See ICC Case No 4237, Award of 17 February 1984, X YBCA 52 - 60 (1985) at p. 56. Similarly, see ICC Case No 6573, Final Award of 1991, *Seller v Carrier*, XX YBCA 110 - 125 (1995) at p. 125, para 68, where the tribunal refused to accept evidence submitted in the course of the hearing as it had closed the evidentiary proceedings seven months earlier, expressly ruled that thereafter no further documents would be accepted in evidence and there was no explanation why the documents were not timely submitted. As a result of the late submission, the tribunal clarified, defendant had no effective possibility of verifying and, if appropriate, challenging the statement's contents.

⁵⁵¹ See France, Court of Appeal Paris, 1 July 1999, *Braspetro Oil Services Company (Brasoil) v The Management and Implementation Authority of the Great Man-Made River Project (GMRA)*, 14(8) Mealey's IAR 24 - 25 (1999).

⁵⁵² See France, Court of Appeal Paris, 1 July 1999, *Braspetro Oil Services Company (Brasoil) v The Management and Implementation Authority of the Great Man-Made River Project (GMRA)*, 14(8) Mealey's IAR 24 - 25 (1999) at p. 25; confirmed by the Cour de Cassation, 11 December 2001, *GRMA v Brasoil*, 1 Rev Arb 201 - 201 (2002).

4.32. A similar situation arose in *Paklito v Klochner*,⁵⁵⁴ where the tribunal dismissed a party's protest that it had understood the oral hearing to be a preliminary hearing and not a full hearing. The award was refused enforcement by the Supreme Court of Hong Kong for breach of due process.⁵⁵⁵

4.33. The construction of public policy in the above cases is extremely controversial and restricted to specific facts. The position of the courts may however lead tribunals to develop in future guidelines as to the format and content of notices introducing the different procedural steps of the arbitration.

Rule P5: Arbitrators must remain impartial throughout the proceedings.

4.34. In international undertakings it is absolutely necessary "to ensure in the event of disputes a neutral jurisdiction, whose perceived impartiality cannot be put in doubt."⁵⁵⁶ The maxim according to which the arbitrator should not act as "a judge in his own case"⁵⁵⁷ and remain impartial towards the parties and the subject matter in dispute is universally recognised.⁵⁵⁸ In essence, impartiality relates to an actual or apparent state of mind and is required to ensure that justice is done.⁵⁵⁹

⁵⁵³ The Court held that tribunal's 'order' was in substance a final award and therefore in breach of the Article 25 of the ICC rules, which provide for the scrutiny of the award by the ICC Court.

⁵⁵⁴ See CIETAC, *Paklito Investment Ltd v Klochner East Asia Ltd*, unreported, New Gazette, March 1993, at p. 20.

⁵⁵⁵ For the facts of the case see L. Chen, "Some Reflections on International Commercial Arbitration in China", 13(2) *J Int'l Arb* 121 - 162 (1996) at pp 136 - 137.

⁵⁵⁶ See ICC Case No 4695, Interim Award of November 1984, XI *YBCA* 149 - 158 (1986) at p. 157.

⁵⁵⁷ *Nemo debet iudex in propria sua causa*.

⁵⁵⁸ See, e.g., Thailand, Arbitration Act 2002 Section 19; Singapore, Arbitration Act 2001 Section 3(a); Costa Rica, Law on Alternative Resolution of Disputes 2000 Article 13(a); Greece, Law 2735 of 1999 Article 12; OHADA, Article 12; Ireland, Arbitration Act 1954 Article 39, Germany, Arbitration Law 1998 Article 1036; Brazil, Law No 9.307 of 1996 Article 13 sixth para; England, Arbitration Act 1996, Ss 1 and 24; NAFTA Article 1115; Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards 2002, 19(2) *Arb Int'l* 213 - 215 (2003) at p. 214, Recommendation 1(e). See also ICSID, Annulment Proceedings of 28 January 2002, *Wena Hotels Limited v Arab Republic of Egypt*, 41 *ILM* 933 (2002); CIETAC, Award of 14 July 1990, *Award on Dispute concerning Payment for Diesel-Engine Water-Pumps*, 38 CIETAC Awards 214-219 (1990) at p. 218.

⁵⁵⁹ See *Lew, Mistelis, Kroll*, at p. 261, para 11-19.

- 4.35. Allegations of partiality may arise where there is an identity between the party and the arbitrator, where the arbitrator is a legal representative of one of the parties to the arbitration⁵⁶⁰ or a member of the supervisory board or a director of one of the parties or one of its affiliates,⁵⁶¹ or has a significant financial interest in one of the parties or the outcome of the case.⁵⁶² The requirement of impartiality may also not be met where the arbitrator has expressed a concrete⁵⁶³ legal opinion on the matter in dispute.⁵⁶⁴
- 4.36. Impartiality is based on a strict criterion. Save for cases of admission, an arbitrator's state of mind can only be inferred. Thus the standard to be met is not actual impartiality but the appearance of impartiality.⁵⁶⁵
- 4.37. This test is illustrated by the award of an *ad hoc* tribunal deciding a challenge to one of the arbitrators.⁵⁶⁶ The arbitrator had on a different occasion been a legal advisor on an unrelated matter to the government of Country A, which had been politically involved with claimant. Having considered a number of standards applied in several jurisdictions in contact with the dispute, the tribunal turned to the formulation of an autonomous test.⁵⁶⁷ According to the award, partiality occurs where there are objective

⁵⁶⁰ On this point see Craig, Park and Paulsson, *ICC Arbitration* (3rd ed.) at para 13-03. See also point 1.1 of the Non-Waivable Red List in the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration 2003.

⁵⁶¹ Where the affiliate is directly involved in the matter in dispute.

⁵⁶² See point 1.3 of the Non-Waivable Red List in the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration 2003.

⁵⁶³ Point 2.1.1. of the IBA Guidelines on Conflicts of Interest includes the giving of legal advice and expert opinions on the dispute to a party in the Waivable Red List. According to Point 1.4. of the Guidelines, however, parties would be unable to waive this requirement if the advice or opinion is given regularly and a significant financial interest is derived therefrom.

⁵⁶⁴ See *Lew, Mistelis, Kroll*, at p. 260. According to the authors this must be distinguished from a mere abstract opinion or an earlier publication. In this sense, see also Point 3.5.2. of the IBA Guidelines on Conflicts of Interest. Indeed, it cannot be expected of arbitrators to come to matters before them without any previous exposure or personal views. As stated by the tribunal in *Ad hoc, Challenge Decision of 11 January 1995, Country X v Company Q*, XXII YBCA 227 - 242 (1997) at p. 233, proof that the decision maker's mind is a complete *tabula rasa* would be evidence of lack of qualification, not lack of bias.

⁵⁶⁵ See *Lew, Mistelis, Kroll, ibid*, at para 11-15.

⁵⁶⁶ See *Ad hoc, Challenge Decision of 11 January 1995, Country X v Company Q*, XXII YBCA 227 - 242 (1997).

⁵⁶⁷ Although the test developed by the tribunal was inspired in the standard 'justifiable doubts' contained in the UNCITRAL rules, the same wording is included in the overwhelming majority of rules and laws. See AAA Rules Article 8(1); CRCICA Article 9; CIETAC Article 29; LCIA Article 10(3); CCIRF Para 2(1); NAI Article 19; Stockholm Institute Article 17(2); WIPO Article 24; UNCITRAL Model Law Article 12; Belgium Article 1690; Belgium, Judicial Code Article 1690; Brazil, Law 9.037 Article 14(1); Singapore, Arbitration Act 2001; Germany ZPO 1036; New Zealand, Arbitration Act 1996 S. 14; England, Arbitration Act

doubts as tested by the standard of a fair minded, rational, objective observer.⁵⁶⁸ The questions to be placed are: a) would an objective observer say, on the basis of the known facts, that there is a reasonable apprehension of partiality on the part of the arbitrator and b) is it ascertainable by that person and so serious as to warrant the removal of the arbitrator?

4.38. The tribunal proceeded thus:

As to the level of knowledge and experience attributed to the “reasonable”, “fair minded”, “objective” or “normally reacting” person one might describe the appropriate bench mark as being the reaction of the well informed but disinterested commercial person assessing the matter without specific expertise but aware of the political background against which the matter arises and of the nature of a lawyer's professional services.⁵⁶⁹

4.39. On the facts, it was decided that the party was unable to prove a close nexus between the opinion granted and the facts in dispute and, as the lawyer had in his mind the interests of his client and not his personal opinion, the challenge should be rejected.

4.40. In light of the waiver rule, the proposed test has the virtue of switching the focus of the tribunal to the eyes of the reasonable commercial man aware of the circumstances leading to the arbitrator's impartiality. The general adoption of this test is in tune with policy considerations underlying the removal of arbitrators in commercial arbitrations. A challenge on the grounds of impartiality should not be upheld simply to avoid controversy. Otherwise challenges would be resorted to for their *in terrorem* effect.⁵⁷⁰ In addition, the

1996 S. 24(1)(a); India, Arbitration and Conciliation Act 1996 S. 12(1); Netherlands, Arbitration Act 1996 Article 1033; Russian Federation, Law 5338-1 Article 12; Iran, Law on International Arbitration 1997 Article 14; Mexico, Commercial Code Article 1439. The test proposed by the tribunal can be applied to the words “reasonable”, “doubts” or any other standard on impartiality.

⁵⁶⁸ This test is also applied in England. See *ASM Shipping Limited of India v TTMI Limited of England* [2005] All ER(D) 271, following the House of Lords in *Porter v Magill*.

⁵⁶⁹ See Ad hoc, Challenge Decision of 11 January 1995, *Country X v Company Q*, XXII YBCA 227 - 242 (1997) p. 234 para 23 and p. 236 at para 30.

⁵⁷⁰ *Ibid*, at p. 231.

test on impartiality must bar frivolous challenges by a party aimed at disrupting the normal functioning of arbitral proceedings.

4.41. Thus, an allegation of impartiality will fail where an arbitrator has forcefully dissented in a previous or preliminary award. Or where a party appointed arbitrator⁵⁷¹ engages in *ex parte* communications with the appointing party during the selection process.⁵⁷² Similarly, the choice of a venue for the hearings different from the seat of arbitration will not be evidence of impartiality.⁵⁷³

4.42. The requirement of impartiality can only be fulfilled the arbitrators are free from any external influence which may affect their judgment. Consequently, it is essential that the parties are able to challenge the biased arbitrator.⁵⁷⁴ Most arbitration laws⁵⁷⁵ and rules⁵⁷⁶ provide for the specific procedure leading to the challenge. The issue should first be raised with the tribunal or the arbitration institution, as the case may be, before being brought to the national courts.

⁵⁷¹ The expression "party appointed" arbitrator refers exclusively to the mode of appointment of the arbitrators and that it may not be understood as conveying any idea of dependency, allegiance or accountability of an arbitrator in relation to the appointing party. See Ad hoc, Challenge Decision of 15 April 1993, *Contractor v State Agency*, XXII YBCA 222 – 226 (1997) at p. 223.

⁵⁷² Provided the case is not discussed in detail and the arbitrator does not behave as a representative of the party in the proceedings See *Lew, Mistelis, Kroll*, at p. 260, para 11-16. Consider also the distinction between neutrality under Canon VII of the AAA Code of Ethics and the concept of impartiality, discussed at para 11-11.

⁵⁷³ ICC Case No 10623, Award of 2001, *S v X* 21(1) ASA Bull 82 - 111 (2003) at p. 85, para 137, note A. Crivellaro, 21(1) ASA Bull 60 - 81 (2003).

⁵⁷⁴ The challenge is directed at the individual arbitrator and not the tribunal. A challenge to a party appointed arbitrator does not extend to the presiding arbitrator, even where both party appointed arbitrators have chosen to withdraw from office. See Ad hoc, Challenge Decision of 15 April 1993, *Contractor v State Agency*, XXII YBCA 222 – 226 (1997) at p. 225.

⁵⁷⁵ Italy, CCP Article 815; Greece, Law 2735 of 1999 Article 12(2); Sweden, Arbitration Act 1999 Section 8; Hong Kong SAR, Rules of the Supreme Court Order 73 Section 2; Belgium, Judicial Code 1998 Article 1690(1); Germany, Arbitration Law Article 1036(2); New Zealand, Arbitration Act 1996 Article 12(2); Oman, Law of Arbitration Article 18; Brazil, Law No 9.307 of 1996 Article 14; India, Arbitration and Conciliation Act 1996 Article 12(3); Kenya, Arbitration Act 1995 Article 13(3).

⁵⁷⁶ See, e.g., AAA Rules Article 8; CIETAC Rules Article 29; PCA Rules For Arbitration of Natural Disputes and/or the Environment Article 10; ICAC Rules Article 7; DIS Rules Section 18(1); CRCICA Article 10(1); LCIA Rules Article 10; NAI Rules Article 19; ICC Rules Article 11; SIAC Rules Article 12(1); WIPO Rules Article 24; SMA Rules, Section 9; AIA Rules Article 15.

4.43. Impartiality requires also that arbitrators are granted a reasonable degree of immunity.⁵⁷⁷ This rule, widely recognised in international arbitration,⁵⁷⁸ serves a wider public interest in guaranteeing that arbitral justice can function properly.⁵⁷⁹ The arbitrators' decision must not be over clouded by the threat of a law suit on frivolous grounds.⁵⁸⁰

4.44. National legal systems granted arbitrators varying degrees of immunity.⁵⁸¹ As a general rule, arbitrators will not be liable in national courts for any action which does not have the effect of intentionally perverting the course of justice. This does not include situations where the arbitrator has acted in bad faith.⁵⁸² Even the United States, a country widely seen as favouring the absolute immunity of arbitrators, hold an arbitrator liable for flagrant, wilful misconduct.⁵⁸³

Rule P6: The tribunal must not engage in *ex parte* communications on issues relevant to the dispute.

4.45. The prohibition of *ex parte* communications⁵⁸⁴ derives from the duty of the arbitrator to remain impartial, the principle of equality between the parties

⁵⁷⁷ See "Final Report on the Status of the Arbitrator" of the ICC Commission Working Party on this subject (P. Fouchard, Chairman), 7(1) *ICC Ct Bull* (1996) at p.27.

⁵⁷⁸ See generally J. Lew (ed.), *The Immunity of Arbitrators* (Lloyd's of London Press 1990).

⁵⁷⁹ See *Fouchard Gaillard Goldman*, at pp. 588-589.

⁵⁸⁰ The issue of immunity of arbitrators was discussed at length in the *travail préparatoire* of the UNCITRAL Working Group responsible for drafting the model law. The Working Group found that although it was unquestionable that arbitrators should be immune from suit, the precise extent of immunity required was far too controversial to be included in a Model Law. See the Report of the Secretary General of UNCITRAL, "Possible features of a model law on international commercial arbitration," Fourteenth Session, 19-26 June 1981, UN Doc A/CN.9/207, at p. 70.

⁵⁸¹ See, e.g., US, *Feichtinger v Conant*, 893 P 2d 1266 (1995) and *Austern v Chicago Bd Options Exchange Inc*, 898 F 2d 882 (2d Cir 1990); France, Court of Appeal Paris, 29 May 1992, *Consorts Rouny v SA Holding*, 1992 Rtd Com 588, note by J. Dubarry and E. Loquin, *Rev Arb* 408 (1996); Canada, *Zittler v Sport Maska Inc*, 1985 CA 386; England, *Arenson v Arenson*, [1977] AC 405 (HL 1974) and Arbitration Act 1996 Section 29. See also C. Hausmaninger, "Civil Liability of Arbitrators—Comparative Analysis and Proposals for Reform," 7 *J Int'l Arb* 7 (1990); Final Report on the Status of the Arbitrator, Appendix II, *Comparative Synthesis of Current Substantive Law in Various Countries*, 7(1) *ICC Bull* 27 - 37 (1996).

⁵⁸² England, Arbitration Act Ss. 25 and 29(1) and (3); Australia, International Arbitration Act 1974 S. 28.

⁵⁸³ See *Fouchard Gaillard Goldman*, at p. 597.

⁵⁸⁴ See, e.g., AAA ICDR Rules Article 7; CPR Rules S. 7(4); WIPO Rules Article 21. See also IBA, *Ethics for International Arbitrators* (1986), Article 5.

and the notice requirement.⁵⁸⁵

4.46. The rule applies before and after the arbitral proceedings have begun. At the stage of selection and appointment of the arbitrator, *ex parte* discussions between the arbitrator and one of the parties are in breach the arbitrator's duty of impartiality where they involve the merits of the dispute.⁵⁸⁶ Yet, it is generally admitted that during the selection process parties may have separate contacts with the prospective arbitrator, as long as the discussion does not go beyond background, qualifications and general views.

4.47. As provided in Article 8 (Bis 1) of the CRCICA Rules

Ex parte communications with any arbitrator or with any candidate for appointment as party appointed arbitrator shall be limited to the general nature of the dispute, the anticipated proceedings, the candidate's qualifications, availability, independence and the suitability of candidates for selection as presiding arbitrator if parties are authorized to participate in his selection.

4.48. After the commencement of arbitration proceedings all members of the tribunal are barred from *ex parte* communications on issues relevant to the dispute.⁵⁸⁷ There will be no breach of natural justice however if an arbitrator discusses, *e.g.*, seating arrangements at a hearing or an unrelated computer problem with one of the parties.⁵⁸⁸

⁵⁸⁵ See C. Koch, "The Sixteenth ICCA Congress - May 12-15, 2002, London", 19(6) *J Int'l Arb* 609 - 620 (2002) at p. 614.

⁵⁸⁶ See Y. Derains and E. Schwartz, *A Guide to the New ICC Rules of Arbitration 1998* (Kluwer 1998) at p. 120. See also US, *Metropolitan Property & Cas Ins Co v JC Penney Cas Ins Co*, 780 F Supp 885, 893 (D Conn 1991) and *M&A Elec Power Coop v Local Union No 702, International Brotherhood of Electrical Workers, AFL-CIO*, 977 F 2d 1235, 1237-38 (8th Cir 1992).

⁵⁸⁷ On this point see Y. Derains & E. Schwartz, *ibid.*

⁵⁸⁸ This was the view, *e.g.*, of the courts in US, *Totem Marine Tug & Barge, Inc v North Am Towing, Inc*, 607 F2d 649, 650, 652-653 (5th Cir 1979) and *Remmey v PaineWebber Inc*, 32 F3d 143, 149 (4th Cir 1994), cited in H. Holtzmann and D. Donovan, "United States", J. Paulsson (ed.), *International Handbook on Commercial Arbitration* (1999), Suppl 28 at p. 56, fns 256 and 257.

4.2. Procedural good faith

- 4.49. Parties to arbitration proceedings must comply with the general principle of good faith. Good faith intervenes as a rule of transnational public policy where it becomes necessary to prevent an abuse of the arbitration process.⁵⁸⁹ This occurs where a party interferes with the tribunal's duty to decide freely and fairly.

Rule P7: Parties must not submit fraudulent evidence in the proceedings.

- 4.50. Transnational public policy comes into play where the evidence presented during the proceedings is tainted by some form of fraud and has a bearing on the tribunal's decision.⁵⁹⁰
- 4.51. Some national arbitration laws contain a provision permitting the setting aside of an award based on fraudulent evidence.⁵⁹¹ Article 1068 of the Netherlands Arbitration Act, for instance, provides that

1. Revocation of the award can take place only on one or more of the following grounds:

⁵⁸⁹ On the existence of a general principle of good faith in arbitral proceedings see B. Hanotiau, "Complex Multicontract-Multiparty Arbitration", *Arb Int* 369 (1998), cited in V. V. Veeder, "The 2001 Goff Lecture - The lawyer's Duty to Arbitrate in Good Faith," 18(4) *Arb Int* 431 – 451 (2002) at p. 439. According to A. van den Berg, *The New York Convention* (Kluwer 1981) at p. 185, the parties' general duty to arbitrate in good faith is enshrined in the New York Convention. See also ICC Case No 6149, Award of 1990, XX YBCA 41 – 57 (1995) at p. 48, para 21.

⁵⁹⁰ Consider, e.g., HK SAR, *JJ Agro Industries Ltd v Texuna Int'l Ltd* (12 August 1992 - Supreme Court of Hong Kong, High Court), XVIII YBCA 396 - 402 (1993) at p. 398, where "the fraud consisted of kidnapping a witness for Texuna in the arbitration forcing him to make a false affidavit retracting material evidence favouring Texuna in the arbitration, causing false affidavits to be sworn as to the circumstances in which Mr. Savla's false affidavit was made and relying on the false affidavit in the arbitration and causing the arbitrator to rely on them."

⁵⁹¹ See US, Arbitration Act, 9 USC S. 10 (permitting judicial annulment of an arbitral award procured by corruption, fraud or undue means); Singapore, International Arbitration Act S. 24(a); New Zealand, Arbitration Act 1996 Article 34(3); India, Arbitration Ordinance S. 34(1); England, Arbitration Act 1996 S. 68(g); Belgium, Article 1704(3)(a); Luxemburg, Code Of Civil Procedure Article 1023(10); Bermuda, International Conciliation and Arbitration Act 1993 Article 27; Austria, International Arbitration Act Article 19; Canada, Alberta Arbitration Act 1991 S. 45(i); Thailand, Arbitration Act 1987 S. 26(1) (fraud by a party); Indonesia, Code of Civil Procedure Article 643(10). See also Romania, Law No 105 of 1992 Article 168 which provides that an award will be refused enforcement if "the decision is the result of a fraud in the procedure."

- (a) the award is wholly or partially based on fraud which is discovered after the award is made and which is committed during the arbitral proceedings by or with the knowledge of the other party;
- (b) the award is wholly or partially based on documents which, after the award is made, are discovered to have been forged;
- (c) after the award is made, a party obtains documents which would have had an influence on the decision of the arbitral tribunal and which were withheld as a result of the acts of the other party.

4.52. Although procedural fraud may appear in statutory law as a separate ground to resist enforcement it is absorbed by the notion of procedural public policy. The issue was raised during the *travaux préparatoires* leading to the UNCITRAL Model Law. According to paragraph 297 of the Commission Report

It was understood that the term ‘public policy’, which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording ‘the award is in conflict with the public policy of this State’ was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.⁵⁹²

4.53. As pointed out by some national delegates, the separate statutory provisions prohibiting procedural fraud found in some jurisdictions were

⁵⁹² See UNCITRAL, Commission Report, Doc A/40/17, para 297 cited at J. Paulsson (ed.), *International Handbook on Commercial Arbitration*, Suppl. 11 (January/1990) at p. 180; and the discussion in *Commentary on the Articles of the Model Law: Part II of the Committee's Consultative Document on the Model Law, Dated October 1987*, available at 6(1) *Arb Int* 49 - 62 (1990) at p. 61. In the same sense see G. Herrmann, “UNCITRAL adopts Model Law on International Commercial Arbitration,” 2(1) *Arb Int* 2 - 10 (1986) at p. 8; and A. Sheppard, “Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,” 19(2) *Arb Int* 217 - 248 (2003) at p. 223.

explained by the fact that Common Law countries did not recognise a general doctrine of *ordre public* in relation to arbitration procedures⁵⁹³ as known to the civil law.⁵⁹⁴ The delegates consequently proposed a revision of Article 34 of the Model Law. The proposal foundered since no generally acceptable formula could be devised.⁵⁹⁵ Notwithstanding, procedural fraud has been subsequently recognised by the courts in the Common Law as a matter of public policy.⁵⁹⁶

4.54. Decided awards reveal two categories of procedural fraud, namely perjury⁵⁹⁷ and forgery.⁵⁹⁸ An arbitration tribunal will impose a high threshold of evidence in relation to procedural fraud.⁵⁹⁹ As held by the Iran-US Claims

⁵⁹³ This category of public policy was however known in the United States. See US, *Biotronik v Medford Medical Instrument Co* (1976) 415 F Supp. 133, II YBCA 250 - 250 (1977) at p. 250 (12 May 1976, USDC), and *Waterside Ocean Navigation Co v Int'l Navigation Ltd*, 737 F 2d 150 (2d Cir. 1984), 2(1) J Int'l Arb 82 - 85 (1985) at p. 83 (18 June 1984, USCA, Second Circuit).

⁵⁹⁴ For examples of cases in the civil law recognising procedural public policy see France, Cour de Cassation, 19 December 1995, *Sté Westman International Ltd v Sté European Gaz Turbines*, Rev Arb 49 (1996); Switzerland, Tribunal Fédéral, 11 November 2002, 21(2) ASA Bull (2003); Spain, Tribunal Supremo, 17 February 1998, *Unión de Cooperativas Agrícolas Epis-Centre v La Palentina SA*, XXVII YBCA 533 - 539 (2002) at p. 538; Germany, Bundesgerichtshof, 15 May 1986, XII YBCA 489 - 491 (1987) at p. 490.

⁵⁹⁵ On this point see *Commentary on the Articles of the Model Law: Part II of the Committee's Consultative Document on the Model Law, Dated October 1987*, available at 6(1) Arb Int 49 - 62 (1990) at p. 61.

⁵⁹⁶ See Canada, *Schreter v Gasmac Inc* (1992) 7 OR (3d) 608, 89 DLR (4th) 365 and *Corporacion Transnacional de Inversiones, SA de CV v STET International* (1999) 45 OR (3d) 183 (Ont SCJ) (3 May 2001 Supreme Court of Canada) quoting the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985) at p. 63, 120(40) *The Canada Gazette*, Part I, October 4, 1986, Supplement 1988, c. 30, S.13; Singapore, *Hainan Machinery Imp & Exp Corp v Donald & McArthy Pte Ltd*, XXII YBCA 771 - 779 (1997) at p. 779 (29 September 1995 High Court, No 1056 of 1994); Hong Kong SAR, *JJ Agro Industries Ltd v Texuna Int'l Ltd* (12 August 1992 - Supreme Court of Hong Kong, High Court), XVIII YBCA 396 - 402 (1993) at p. 398, paras 5 and 6.

⁵⁹⁷ See, e.g., Iran-US Claims Tribunal Case No 164, Chamber Three Award No 570-164-3 of 15 May 1996, available at www.kluwerarbitration.com, *Iran-United States Claims Tribunal: Selected Awards*, at para 99 *et seq*; Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award No 33 of 30 September 1993, *Agent v Seller*, XXIII YBCA 113 - 127 (1998) at p. 124; Society of Maritime Arbitrators, Final Award No 2699 of 23 August 1990, *Trade & Transport, Inc v Valero Refining Co, Inc*, XVIII YBCA 124 - 134 (1993) at p. 127, where the tribunal agreed with the submission that the signature in one of the documents submitted as evidence had been forged. See also M. Roth, "False Testimony at International Arbitration Hearings", 11(1) J Int'l Arb 5 - 42 (1994).

⁵⁹⁸ See, e.g., Iran-US Case Nos 842, 843 and 844, Chamber One Award No 581-842/843/844-1 of 22 May 1997, available at www.kluwerarbitration.com, *Iran-United States Claims Tribunal: Selected Awards*, at p. 66, para 159.

⁵⁹⁹ For there to be a breach of transnational public policy, a procedural irregularity must be such as to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action which violate a sense of judicial propriety. See ICSID, 23 June 2001, *Alex Genin Eastern Credit Limited, Inc and AS Baltoil v Republic of Estonia*, unpublished.

Tribunal, an allegation of forgery must be proven with a higher degree of probability than other allegations. The proper standard of proof is that of “clear and convincing evidence.”⁶⁰⁰

- 4.55. The difficulties faced by arbitration tribunals evaluating allegations of fraud is illustrated in another award by the same Tribunal:

the Tribunal cannot, in the field of evidence as in any other field, make the domestic rules or judicial practices of one party prevail over the rules and practices of the other, in so far as such rules or practices do not coincide with those generally accepted by international Tribunals. (...)

It is clear that the value attributed to (...) evidence is directly related (...) to a system of sanctions in case of perjury, which can easily and promptly be put into action and is rigorous enough to deter witnesses from making false statements. Such a system does not exist within international Tribunals and recourse to the domestic courts of the witness or affiant by the other party would be difficult, lengthy, costly and uncertain. In the absence of any practical sanction (...), oral or written evidence of this kind cannot be accorded the value given to them in some domestic systems. Also it cannot be discounted that the ethical barriers which prevent the making of statements not in conformity with the truth before national courts will not have the same strength in international proceedings, notably when the other party is a foreign government, the conduct of which was severely condemned by public opinion in the country of the other party.⁶⁰¹

- 4.56. An allegation of fraud relating to evidence should be raised during the arbitral proceedings. Where proof of the fraud emerges after a partial or interim award has been rendered, that award may be reconsidered by the

⁶⁰⁰ See Iran-US Case Nos 842, 843 and 844, Chamber One Award No 581-842/843/844-1 of 22 May 1997, available at www.kluwerarbitration.com, *Iran-United States Claims Tribunal: Selected Awards*, at p. 66, para 159.

⁶⁰¹ Iran-US, Case No. 941, Chamber Three Award No 528-941-3 of 6 March 1992, available at www.kluwerarbitration.com, *Iran-United States Claims Tribunal: Selected Awards*, at p. 32, para. 67.

tribunal. As suggested in the *dictum* by the *ad hoc* tribunal in *Biloune v Ghana*,

a court or Tribunal, including this international arbitral Tribunal, has an inherent power to take cognizance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents or other egregious 'fraud on the Tribunal.' Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, this Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action.

The present Tribunal would not hesitate to reconsider and modify its earlier award were it shown by credible evidence that it had been the victim of fraud and that its determinations in the previous award were the product of false testimony.⁶⁰²

4.57. Where there the issue of fraud is raised during the arbitration proceedings the decision of the arbitrator is final.⁶⁰³ Where the fraud is not disclosed to the arbitration tribunal during the proceedings, the aggrieved party may seek to challenge⁶⁰⁴ or resist enforcement of the award.

⁶⁰² See *Ad hoc*, Investments Centre Awards of 27 October 1989 and 30 June 1990, *Biloune v Ghana*, XIX YBCA 11 - 32 (1994) at p. 22-23 [references omitted]. The inherent right to revise the award has also been assumed by the Iran-US Claims Tribunal. See Iran-US Case No B36 DEC 126-B36-2, Decision of 17 March 1997, *The United States of America v Iran*, XXIII YBCA 473 - 474 (1998) at p. 474 and the authorities cited therein, where the clarified that the tribunal's inherent right to revise the award is restricted to exceptional cases where fraud or perjury is raised.

⁶⁰³ See France, Court of Appeal Paris, 1 July 1999, *Braspetro Oil Services Company (Brasoil) v The Management and Implementation Authority of the Great Man-Made River Project (GMRA)*, 14(8) *Mealey's IAR* 24 - 25 (1999).

⁶⁰⁴ See, e.g., the *dictum* by Moore-Bick J in England, *Profilati Italia SRL v Paine Webber Inc & anr* [2001] 1 Lloyd's Rep 715: where an important document which ought to have been disclosed is deliberately withheld and as a result the party withholding it has obtained an award in his favour the court may well consider that he has procured that award in a manner contrary to public policy. See also France, Cour d'Appel Paris, 30 September 1993, *Euro'n Gas Turbines SA v Westman Int'l Ltd*, Rev Arb 359-371 (1994) where the court partially annulled an arbitral award on the grounds that it was based on a fraudulent report of expenses submitted by respondent in the arbitration, applying the general principle of law *fraus omnia corrumpit*.

4.58. Should proof of forgery or perjury emerge after the proceedings have been formally closed, the tribunal retains a residual jurisdiction to reconsider the award if it can be reconvened.⁶⁰⁵ Where reconsideration takes place, the tribunal will have an opportunity to exclude or amend in the operative part of the award any decisions based on fraudulent evidence.

4.59. At the enforcement stage, the courts will require that (i) the evidence sought to be adduced is of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the hearing; and (ii) the evidence was not available or reasonably obtainable either (a) at the time of the hearing of the arbitration; or (b) at such time as would have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the arbitrators' award if such procedure were available.⁶⁰⁶

4.3. Conclusion

4.60. Transnational procedural public policy is based on a balancing of procedural values⁶⁰⁷ and forms a self-contained system of principles overseeing the interests of procedural justice.

⁶⁰⁵ See, e.g., France, Cour de Cassation, 25 May 1992, *Fougerolle SA v Procofrance SA*, Rev crit droit int'l privé 699-701 (1992), Clunet 974-975 (1992), Rev Arb 91-93 (1993) where the court suggested that, based on general principles of law regarding fraud, in international arbitration the award may be reconsidered by the arbitral tribunal provided the arbitral tribunal remains constituted after the award has been made, or can be reconstituted. See also, e.g., Iran-US, Decision No 30-149-1 of 12 January 1984, *Mark Dallal and The Islamic Republic of Iran*, X YBCA 305 - 305 (1985); Iran-US Claims Tribunal, Decision No. 26-200-1 of 16 September 1983, *Henry Morris and The Government of the Islamic Republic of Iran*, IX YBCA 283 - 284 (1984); Iran-US Claims Tribunal Case No DEC 126-B36-2, Decision of 17 March 1997, XXIII YBCA 473 - 474 (1998).

⁶⁰⁶ See England, *Interdesco SA v Nullifire Ltd* [1992] 1 Lloyd's Rep 180, per Phillips J (dealing with perjury). The ruling in *Interdesco* was confirmed by the Court of Appeal in *Westacre Investments, Inc v Jugoimport - SDPR Holding*, (1999) XXIVa YBCA 753 - 776, at p. 770. The court clarified that under English law the conditions to be fulfilled are "(a) that the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators; and (b) where perjury is the fraud alleged i.e. where the very issue before the arbitrators was whether the witness or witnesses were lying, the evidence must be so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result."

⁶⁰⁷ For the application of this methodology see, e.g., NAI Case No 1694, Interim Award of 12 December 1996, XXIII YBCA 97 - 112 (1998) at p. 98; Zurich Chamber of Commerce Case No 415, Award of 20 November 2001, 20(3) ASA Bull 467 - 472 (2002) at p. 471, para. 16; Ad hoc, Challenge Decision of 11 January 1995, *Country X v Company Q*, XXII YBCA 227 - 242 (1997), at p. 238, para 37; Ad hoc, Investments Centre Awards of 27 October 1989 and 30 June 1990, *Biloune v Ghana*, XIX YBCA 11 - 32 (1994) at p. 23, para 35.

Flexibility is one of the essential characteristics of international arbitration. The operation of transnational procedural public policy turns on the facts⁶⁰⁸ and the procedural framework of the arbitration. The effectiveness of procedural public policy is proportional to its adaptability.

⁶⁰⁸ See, e.g., Germany, BGH, 14.5.1992 – III ZR 169/90, *NJW* 1992, at p. 2299 *et seq.*, cited in H. Raeschke-Kessler, “The New German Arbitration Act,” 14(1) *Arb Int* 47 - 56 (1998) at p. 53.

Chapter 5

SUBSTANTIVE TRANSNATIONAL PUBLIC POLICY

5.1. The principles of substantive transnational public policy

5.2. Protection of the global market

- (i) bribery and traffic of influence
- (ii) management of natural resources and the environment
- (iii) compensation in the event of expropriation
- (iv) state liability for *ultra vires* acts
- (v) illicit trafficking
- (vi) fraud (*fraus omnia corrumpit*)
- (vii) anti-competition

5.3. Other transnational interests

- (i) protection of cultural heritage
- (ii) international embargoes
- (iii) the fight against terrorism

5.4. Conclusion

5.1. The principles of substantive transnational public policy

5.1. This chapter explores the substantive rules developed by international tribunals to enforce transnational public policy. As seen below, those rules stem from the following principles:

- the protection of the international market;
- prohibition of anti-competitive practices;
- good faith
- the binding force of agreements (*pacta sunt servanda*);
- integral reparation;
- protection of the weaker party;
- prohibition of fraud (*fraus omnia corrumpit*).

5.2. Whilst public policy principles override the applicable law, they may also be reflected in a national policy. In those instances, one may wonder why tribunals have departed from the strict observance of national laws in deference to an autonomous public policy.

5.3. This question was addressed by the tribunal in ICC Case No 6329.⁶⁰⁹ The dispute concerned whether a national statute dealing with traffic in illicit drugs should be applied to the merits. The tribunal considered that it should rely on an autonomous rule condemning such practices, justifying this decision in light of the distinction between the *goal* and *method*⁶¹⁰ of the national provision. As illustrated by the tribunal,

the fight against drug trafficking is obviously in the international interest, yet that does not imply that all methods employed by a state in this context ought to be automatically applied internationally.⁶¹¹

5.4. The tribunal in ICC Case No 9333,⁶¹² further clarified that while the objectives of a particular national statute may be praiseworthy that does not necessarily justify the export of the methods or code of conduct contained therein, particularly where such methods have attracted substantial international criticism.

5.2. Protection of the global market

5.5. This section sheds light on the methods relied upon by international tribunals to identify and uphold the structural elements of the international community.

⁶⁰⁹ See ICC Case No 6329, 6(1) ICC Bull 59 (1992), followed in ICC Case No 9333 of 1998, Final Award, *X v Company L*, 19(4) ASA Bull 757 - 780 (2001).

⁶¹⁰ This distinction was fluently underlined in Rule B(1)(a) of the Interfaith Declaration: A Code of Ethics On International Business for Christians, Muslims and Jews, available at http://astro.ocis.temple.edu/~dialogue/Codes/cmj_codes.htm.

⁶¹¹ See ICC Case No 6329, 6(1) ICC Bull 59 (1992), at p. 59, french original: "la lutte contre le trafic de drogue présente un intérêt international évident, cela n'implique pas que toutes les méthodes utilisées par un Etat dans ce contexte doivent automatiquement être appliquées internationalement."

⁶¹² See ICC Case No 9333 of 1998, Final Award, *X v Company L*, 19(4) ASA Bull 757 - 780 (2001).

5.6. The sustainability of the international trade system requires the adoption of minimum, core moral standards by international businessmen who benefit from and inform that system. As stated in one arbitration award, in international business

credit and credibility as expressed in companies' activities involve honesty, honourable dealing, prestige, keeping one's word and other such moral values, without which the world of business is unthinkable.

Commerce (*cum merx* = with goods) is not only an activity "with goods," but also an activity in a specific world, in constant change and always in a hurry to find markets and opportunities of profit (*finis mercatorum est lucrum*). That is why *negotium* - in the sense of trade - means unrest (*neque otium* = there is no peace, no rest), i.e., the eternal search for various possibilities. In this world, mutual trust of the partners, as well as that of third parties in businesses - which essentially represent trade - is sometimes more important than the material values.⁶¹³

5.7. International tribunals have strived to lay down a level playing field whereupon transnational companies engage in their business in the certainty that fundamental standards are upheld. Public policy in international arbitration is inspired by a wider concern over the functioning, protection and development of the international market.⁶¹⁴

⁶¹³ See Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award No 33 of 30 September 1993, *Agent v Seller*, XXIII YBCA 113 - 127 (1998) at p. 117.

⁶¹⁴ In achieving this goal, tribunals may resort to general legal principles such as good faith. See ICC Case No 4145, Second Interim Award, *Establishment v Construction Company*, 112 Clunet 985 (1985) with note Y. Derains. In construing those principles tribunals take into account the consequences parties may be considered as having reasonably and legitimately envisaged. See ICSID Case No ARB/97/4, Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction of 1 December 2000, *Ceskoslovenska Obchodni Banka, A S v Slovak Republic*, 15(2) ICSID Rev -FILJ 544-557 (2000), XXVI YBCA 87 - 99 (2001) at p. 96. In particular, the rules in an international treaty are interpreted in accordance with the ordinary meaning to be given to its terms in light of the treaty's object and purpose. See ICSID Case No ARB(AF)/97/1, Award of 30 August 2000, *Metalclad v Mexico*, 16(1) ICSID Rev-FILJ 165-202 (2001) and the Vienna Convention on the Law of Treaties, Art. 31(1); ICC Case No 8423, Final Award of 1994, *Company v Parent Company and Subsidiary*, XXVI YBCA 153 - 166 (2001) at p. 160; and CRCICA Case No 27/1992, Award of 15 May 1993,

(i) bribery and traffic of influence

Rule S1: Arbitration tribunals shall not give effect to an arrangement involving corruption.

5.8. All companies seek new outlets to increase their growth rate or at least to maintain a satisfactory competition level. In order to attain this goal, enterprises hire qualified personnel and have an effective production instrument at their disposal so that they can offer competitive products. In certain fields, the products or services offered do not differ significantly. Hence, the manager of an enterprise or the board of a company may be tempted to use various means, and particularly bribes to gain a competitive advantage in a certain country.

5.9. Bribery can be defined as an offer or request concerning the granting of a hidden and undue material advantage to the employee of a third party with the aim of influencing the third party in favour of the donor.⁶¹⁵ It involves the payment, receipt or solicitation of a private favour from a person exerting a public function or in a position of trust. On a commercial level, it includes also dealings with the employees or agents of a company to secure an advantage over competitors.

Company v Public Sector Company, M.E. Alam Eldin (ed.), *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration*, 193 - 196 (2000) where it was held that a contract must be interpreted according to the provisions of good faith in light of the commercial intention of the parties. See also ICC No 3242, *Clunet* 968 (1982) where the tribunal inferred from this rule that arbitrators are not bound by the characterisation of the contract ascribed to it by the parties. Good faith may require, e.g., the application of the *contra proferentem* rule. See *Society of Maritime Arbitrators Case No 2972*, Award of 26 April 1993, *Nordic American Shipping A/S v Bayoil USA Inc*, XX YBCA 126 - 132 (1995) at p. 131; *Ad hoc*, Award of 25 February 1978, *Flour Mill v Insurer*, VI YBCA 121 - 124 (1981); ICC, Award No 3779 of 13 August 1981, IX YBCA 124 - 130 (1984) at p. 129; ICC, Award of February 1984, *X Corporation v Y SA*, 1(4) J Int'l Arb 371 - 374 (1984) at p. 372; Iran-US Claims Tribunal Case No 34 (206-34-1), Award of 3 December 1985, *First Travel Corp v Iran*, XII YBCA 257 - 262 (1987); Iran-US Claims Tribunal Case No A15(IV)/A24-FT, Full Tribunal Partial Award of 28 December 1998, unpublished; US, *Roadway Package System, Inc v Scott Kayser* (7 June 2001, United States Court of Appeals), unpublished; ICSID, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, *Ceskoslovenska Obchodni Banka v Slovak Rep*, 14(1) ICSID Rev - FILJ 250-283 (1999). This rule holds the drafter of the agreement accountable where it has not ensured that precision and clarity is attained.

⁶¹⁵ See ICC, Case No 5622 of 1988, Final Award, *Broker v Contractor*, XIX YBCA 105- 123 (1994) at p. 111, para 20.

- 5.10. It is widely recognized that such practices are condemned by the international community⁶¹⁶ and undeserving of legal protection.⁶¹⁷ In a globalized world, corruption produces a ripple effect not only on the economic, social and political fabric of the country concerned but also that of the international community. Several international tribunals have expressly relied on transnational public policy to hold such arrangements void.⁶¹⁸
- 5.11. Whilst truly international or transnational public policy condemns bribery in the strongest manner, “the delicate problem remains to determine precisely where the line should be drawn between legal and illegal contracts, between illegal bribery and legal commissions.”⁶¹⁹
- 5.12. The parties must assist the tribunal in a finding of corruption.⁶²⁰ The difficulty in proving actual corruption is however illustrated in several arbitration awards.⁶²¹ It requires clear proof of a specific set of circumstances where wrongdoing is unequivocal. As stated in *Himpurna*,

⁶¹⁶ Consider, *e.g.*, the UN Convention Against Corruption 2003, available at www.undoc.org; Article 11 of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN doc E/CN.4/Sub.2/2003/12/Rev.2 (2003). See also the ICC Rules of Conduct on Extortion and Bribery in International Business Transactions, 1999 revised version, available at <http://www.iccwbo.org>; Resolution 3514 of the General Assembly, Resolution 2014 (LXI) of the Economic and Social Council (Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions), XV ILM 1222 (1976); Report of the *Ad Hoc* Working Group on Corrupt Practices in International Commercial Transactions, XVI ILM 1236 (1977); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997. See also Rule B(2)(e) of the Interfaith Declaration: A Code of Ethics On International Business for Christians, Muslims and Jews, available at http://astro.ocis.temple.edu/~dialogue/Codes/cmj_codes.htm; Principle 7 of the Caux Principles for Business, available at www.cauxroundtable.org; and Point VI of the OECD Guidelines for Multinational Enterprises, 2004 revision, available at www.oecd.org.

⁶¹⁷ J. Lew, “Determination of Arbitrators’ Jurisdiction and the Public Policy Limitation of that Jurisdiction,” in J. Lew (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987) at pp. 73, 85; ICC Case No 5622 of 1988, XIX YBCA 105 - 123 (1994), at p. 114.

⁶¹⁸ See ICC, Case No 5622, Award of 1988, *Broker v Contractor*, XIX YBCA 105 - 123 (1994) at p. 114, para 33; ICC Case No 2730, *Clunet* 914 (1984); ICC Case 3916, *Iranian party v Greek party*, *Clunet* 930 (1984); ICC Case No 3913, Award of 1981, *Clunet* 920 (1984), Collection of ICC Arbitral Awards 1974-85, at pp. 497, 562 with note Derains; ICC Case No 6248, Final Award of 1990, XIX YBCA 124 - 140 (1994) at p. 132. See also Germany, Supreme Court, 8 May 1985, *RIW* 653 (1985), *Clunet* 914 - 930 (1984).

⁶¹⁹ P. Lalive, “Transnational (or Truly International) Public Policy”, *ICCA Congress Series No 3*, at p. 276.

⁶²⁰ See ICC Case No 7047, *ASA Bulletin* 301 - 343 (1995). See also J. Rosell, “Illicit Commissions and International Arbitration: The Question of Proof,” 15(4) *Arb Int* 329 - 348 (1999).

⁶²¹ For examples where the evidence was insufficient to establish bribery see ICC Case No 4145 of 1984, *Agent v Company*, Collection of ICC Arbitral Awards 1974-85, at p. 559; ICC

the members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality. The arbitrators are well aware of the allegations that commitments by public-sector entities have been made with respect to major projects in Indonesia without adequate heed to their economic contribution to public welfare, simply because they benefited a few influential people. The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption. But such grave accusations must be proven. There is in fact no evidence of corruption in this case.⁶²²

5.13. In appropriate circumstances arbitration tribunals have relied on the available evidence, adverse conclusions and the effects of the agreement to infer instances of corruption.

5.14. One example is ICC Case No 5622.⁶²³ Defendant submitted an offer to the Algerian authorities in reply to an invitation to bids for certain works. It concluded a Protocol of Agreement with the claimant, under which claimant was to give legal and fiscal advice to defendant and coordinate its subcontractors, thereby helping to obtain the contract with the Algerian authorities. Defendant was to pay claimant a percentage of the price of the contract to be concluded with the Algerian authorities.

5.15. Defendant obtained the contract and paid claimant 50% of the agreed fee but refused to pay the remaining 50%, alleging that claimant's performance

Case No 6401 of 1991, *Westinghouse and Burns & Roe v National Power Company and the Republic of the Philippines*, Mealey's IAR B - 1 (1992); ICC Award of 1989, *K Ltd v M SA*, ASA Bull 216 (1993); ICC Case No 7047 of 1994, *Westacre v Jugimport*, ASA Bull 301 (1995); Ad hoc, Award of 28 June 1995, *S v Z*, ASA Bull 742 (1995); ICC Case No 8891 of 1998, *Clunet* 1076 (2000).

⁶²² Ad hoc, Final Award of 4 May 1999, *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara*, 14 Mealey's IAR A-1 - A 58 (1999); XXV YBCA 11 - 108 (2000) at pp. 13, 44.

⁶²³ ICC Case No 5622 of 1988, *Broker v Contractor*, XIX YBCA 105 - 123 (1994).

had been deficient. Claimant initiated ICC arbitration proceedings, claiming compensation. Defendant requested damages for the procedural costs.

- 5.16.** The tribunal noted the difficulty it had in obtaining relevant evidence. In the arbitration the tribunal had to rely on testimonial evidence as allegedly claimant's file containing the details of the agreement had been stolen. Further, the people who played a key role within the defendant company had been dismissed by the company. The tribunal noted that it was 'strange' that the parties had not called the most relevant witnesses. It was claimed, for instance, that one of the key witnesses had been traumatized by his imprisonment in Algeria.
- 5.17.** The witnesses that did testify revealed that claimant used its influence on the Algerian authorities, against payment, in order to have defendant's bid preferred to those of other companies.
- 5.18.** According to the award, the tribunal had to ask two questions. First, was the agreement between the parties a simulated contract? And second, has defendant at least tacitly approve of the Claimant's activities?
- 5.19.** The first question was answered affirmatively, as 50% of the fee was paid even though legal and fiscal advice and coordination, the purported subject matter of the contract, had never provided.
- 5.20.** Turning to the second point, the tribunal held that on the facts acquiescence by the company had to be inferred. As stated by the tribunal, "how else could it be explained that, during a period of three years, a company aiming at obtaining a major contract ... neither worried about nor requested information on its broker's work? Such behaviour can only be logically explained if we admit that defendant tacitly approved of claimant's activity."⁶²⁴
- 5.21.** The tribunal then distinguished between bribery and traffic of influence. It held that bribery had not been proved beyond doubt, despite the fact that one of the witnesses at the hearing had maintained that the representatives of Algeria had been 'taken care of' and that the correspondence between

⁶²⁴ ICC Case No 5622 of 1988, *Broker v Contractor*, XIX YBCA 105 - 123 (1994) at p. 109, para 15.

defendant and claimant had ambiguously mentioned payments 'which would have been made by defendant directly to local representatives.'

5.22. Yet traffic of influence was present. The tribunal further distinguished between traffic of influence and 'lobbying', by which an individual, company, committee, association or corporation - against payment uses his or its influence to promote or prevent the passage of legislation. The tribunal found lobbying a "perfectly legal activity which contains no illegal elements and does not violate morality."

5.23. On the facts, however, the parties had clearly gone beyond lobbying. The tribunal relied on the main characteristics of an illicit traffic of influence as follows:

1. Traffic in influence always presupposes the intervention of an agent, sponsor, consultant or sales representative who contractually undertakes to support or sponsor the companies or consortia seeking to obtain public contracts in the countries concerned

2. The services company acting as 'sponsors, sales representative' etc. is established in a country other than the country where the services are rendered.

3. The services company is generally not submitted to the restrictive legislation of the country where the services are rendered.

4. The fees, commissions, honoraria or payments made to the services company amount to very large sums. The payments made appear disproportionate to the activities which have in fact been developed by the sales agent or sponsor. Further, there is in general no proof of such activities.

5. The indication in the contract of the mutual obligations of the parties aims in fact at disguising reality. The real relation between the parties takes place in the backstage.

- 5.24. Noting that the applicable law did not contain a special provision dealing with traffic of influence, the tribunal relied on the notion of transnational public policy⁶²⁵ and declared the contract null and void, invoking the need to “moralize commercial transactions and to ban traffic in influence from commercial life (...) aiming at promoting high ethics in commercial transactions, both at a national and an international level, and to favour the growth of international trade in a context of fair competition.”⁶²⁶
- 5.25. The tribunal concluded that one of the consequences of this type of arrangements is that recovery is excluded for all performance aimed at obtaining an illicit or immoral result, as “the arbitrator cannot grant the parties’ claims without becoming somewhat of an ‘accomplice’, a role which he must refuse to play.”⁶²⁷ Consequently, claimant had to bear all costs of the arbitration. Defendant’s claim for damages was denied as it had tacitly approved of Claimant’s activities. Its claim did not ‘deserve any protection.’⁶²⁸
- 5.26. Another instance where an agreement tainted by corruption was struck out by transnational public policy can be found in ICC Case No 6248.⁶²⁹ In the arbitration, claimant was held to be nothing more than a post office box address providing cover for the improper activities of a consultant to a Group of companies, who had abused his position to extort payments from defendant for his private gain instead of acting exclusively in the interest of the Group. It was of the essence in this case that the facts revealed both the breach of a fiduciary relationship, secrecy and a clear motive behind the agreement.⁶³⁰
- 5.27. In addition, the tribunal held that an offensive arrangement may be made indirectly, where there is a chain of several parties between the parties to the agreement. According to the award it is irrelevant whether a claimant alleges

⁶²⁵ Citing the article by P. Lalive

⁶²⁶ ICC Case No 5622 of 1988, *Broker v Contractor*, XIX YBCA 105 - 123 (1994) at p. 118, para 45.

⁶²⁷ ICC Case No 5622 of 1988, *ibid*, XIX YBCA 105 - 123 (1994) at para 57.

⁶²⁸ ICC Case No 5622 of 1988, *ibid*, XIX YBCA 105 - 123 (1994) at p. 123, para 61.

⁶²⁹ ICC Case No 6248 of 1990, *Consultant v Contractor*, YBCA XIX 124 - 140 (1994).

⁶³⁰ In English law the facts would fall close to the notion of undue influence in equity. Yet this was not the solution given by the tribunal.

that practices and moralities in a certain country are different from the ones of a European country.

5.28. ICC Case 9333⁶³¹ provides further guidance as to how arbitration tribunals may investigate evidence indicative of corrupt practices. The method suggested by the tribunal can be described as follows:

a) the tribunal should first analyse the amount of the commission, whether it corresponds to the usages in the trade or is exorbitant in the circumstances of the dispute. The agent may just be greedy, or the principal may just have made a bad bargain. For the purposes of a finding of corruption, the amount of the commission should be considered in absolute terms, and not in accordance with the percentage rate.⁶³²

b) An indication of corrupt practices can be inferred from the submission of documentary evidence. A company suspecting of corrupt practices, the tribunal added, should notify its agents of its anti-corruption policy and confirm in writing that its agent may be involved in the payment of bribes.

c) Another factor to consider is whether the company has allowed for a reduction of the contract price. If so, that reduction may also affect the commission granted to the agent and, consequently, the value of the bribes the employees of the company would receive;⁶³³

d) Whether the company would have concluded the contract in the absence of any bribes;

⁶³¹ ICC Case No 9333 of 1998, Final Award, *X v Company L*, 19(4) ASA Bull 757 - 780 (2001) (original in French).

⁶³² As noted by the tribunal, in a finding of corruption tribunals should also consider the circumstances upon which the contract was negotiated and concluded. See ICC Case No 9333 of 1998, Final Award, *X v Company L*, 19(4) ASA Bull 757 - 780 (2001).

⁶³³ This point was also raised in ICC Case No 4145, *Recueil des sentences arbitrales de la CCI 1986-1990*, at pp. 53 and 59.

e) Whether competitors in the market have bribed or attempted to bribe employees of the company; and

f) Whether the relationship between the agent and the suspected representatives of the company legitimately results in an exchange of information placing the principal in a better bargaining position.⁶³⁴

5.29. It is irrelevant for the purposes of transnational public policy whether the breach is actual or consequential. Where the facts show there is an instance of corruption the agreement is deemed void, in whole or in part, for breach of public policy.⁶³⁵

(ii) management of natural resources and the environment

Rule S2: Tribunals recognise state sovereignty over national resources and the responsibility of the parties towards sustainable development.

5.30. The rational management of natural resources is ancillary to the higher interest of the international community in guaranteeing economic growth and the sustainability of the global market. The protection of natural resources is assured by transnational public policy and, to a different extent, national and international law.

5.31. Natural resources are closely knit to the notion of state sovereignty. The principle according to which states have sovereignty over natural resources has been recognised in arbitral case since the 1970's⁶³⁶ and underlies the

⁶³⁴ For a case where friendship between agent and a public entity was not an indication of bribery, see ICC Award of 1993, *Lunik v Soliman*, ASA Bull 210 and 442 (1998).

⁶³⁵ See ICC Case No 3913, *Clunet* 920 (1984), *Collection of ICC Arbitral Awards* 1974-85, 497, 562, with note Derains; ICC Case No 3916 of 1982, *Iranian party v Greek party*, 111 *Clunet* 930 (1984); ICC Case No 5622 of 1988, *Hilmarton v Omnium Traitment*, ASA Bull 247 (1993), Rev arb 327 (1993), Riv Dell' Arbitrato 773 (1992), XIX YBCA 105 (1994). In ICC Case No 6497 of 1994, *Consultant v Contractor*, XXIVa YBCA 71 - 79 (1999) the arbitrators held that although there was no direct evidence of corruption, on the evidence refusal to disclose banking documents relating to 33.33% of the contract was sufficient to establish bribery. The tribunal found such proportion of the contract void.

⁶³⁶ See Ad hoc, Award of 12 April 1977, *Libyan American Oil Co (LIAMCO) v Libya*, Rev Arb 132-191 (1980), VI YBCA 89 - 118 (1981) at pp. 97 - 98; Award of 19 January 1977,

notion of “investment” for the purposes of bilateral and multilateral investment treaties.⁶³⁷

5.32. Sovereignty extends to the power of states to celebrate contracts with foreign parties enabling them to search for, cultivate or exploit natural resources. Where such agreements are entered into, transnational public policy binds the state or state entity, whose breach results in the obligation to compensate the other party.⁶³⁸

5.33. It is often the case that where human health⁶³⁹ or species of fauna or flora are endangered the state will enact a statute restricting economic activity in certain areas.⁶⁴⁰ Should a private enterprise legitimately be required to disengage from an exploratory activity, such decision will be endorsed by the international community. However, transnational public policy places conditions on the re-nationalisation of resources⁶⁴¹ and holds the state liable for the expropriation resulting therewith.⁶⁴²

Texaco v Libya, 104 Clunet 350-389 (1977), 17 ILM 3-37 (1978), IV YBCA 177 – 187 (1979) at p. 183; Award on Re-opening of 1 August 1974, *British Petroleum Co (Libya) Ltd v Libya*, 53 ILR 297-388 (1979), V YBCA 158 – 167 (1980) at p. 166; United Nations Resolution No 626 (VII) of 21 December 1952; Resolution No 1803 (XVII) of 14 December 1962; Resolution of 25 November 1966; Resolution No 3281 (XXIX) of 12 December 1974.

⁶³⁷ See *e.g.*, Art. 1(1) of the Agreement between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments, signed on 23 November 1992, discussed in ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, *Ceskoslovenska Obchodni Banka AS v The Slovak Republic*, 14 ICSID Rev – FILJ 251 – 283 (1999) at p. 277.

⁶³⁸ AAA, Award of 24 August 1978, *Revere Copper & Brass Inc v Overseas Private Investment Corp*, 17 ILM 1321-1383 (1978); D. Bishop, “International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea,” XXIII YBCA 1131 - 1207 (1998) at p. 1156; ICSID, *AGIP v Congo*, XXI ILM 726-739 (1982), 71(1) Rev Crit Droit Int’l Privé 92-105 (1982) with note Batiffol at pp. 105-109.

⁶³⁹ Pursuant, *e.g.*, to Article 36 of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, available at www.ilo.org.

⁶⁴⁰ See, *e.g.*, the preamble to the Costa Rica Expropriation Decree of 5 May 1978, considered in ICSID Case No. ARB/96/1, Award of 17 February 2000, *Compañía del Desarrollo v Costa Rica*, 15(1) ICSID Rev - FILJ 169-204 (1999), 39 ILM 1317-1337 (2000), 15(7) Mealey’s IAR C-1 - C-14 (2000), 13(1) World Trade and Arbitration Materials 83-125 (2001):

Whereas:

1 The current area of the Santa Rosa National Park is insufficient to maintain stable populations of large feline species such as pumas and jaguars, and that a substantial area needs to be added to [it] if it is to carry out its conservationist objectives.

2 The lands situated to the north of the Santa Rosa National Park contain flora and fauna of great scientific, recreation, educational, and tourism value....

3 To meet these objectives, the Government of the Republic requires the property that belongs to the Compañía del Desarrollo de Santa Elena, S.A.

⁶⁴¹ The arbitrators in ICSID, Final Award of 31 March 1986, *Liberian Eastern Timber Corp v Liberia*, 26 ILM 647 - 679 (1987), XIII YBCA 35 – 52 (1988) at p. 47, laid down the conditions upon which an act of nationalization would be acceptable to the tribunal: the

- 5.34. International tribunals recognise the interest of the state in the rational use of natural resources, and the need to safeguard and improve the quality of life for its citizens and protect and restore the environment.⁶⁴³ Yet the threat to the environment or public health must be effective. As noted in the award on liability in *S D Myers Inc v The Government of Canada*,⁶⁴⁴ an arbitration tribunal *must take into account the general principles that emerge from the*

Government would have to point to some nationalisation law; then it would have to show that its action was taken for a bona fide public purpose; that it was non-discriminatory; and accompanied by payment (or at least the offer of payment) of appropriate compensation. On this point see also R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", III *Recueil des Cours* 176 - 305 (1982); and Ad hoc, *Aminoil v The Government of Kuwait*, 21 ILM 976 - 1053 (1982), 109 Clunet 869 - 909 (1982); United Nations Resolution 1803 (XVII) of 1962 relating to Permanent Sovereignty over natural resources. The principle of good faith will thus bind the state to any stabilization clause included in the contract. See Ad hoc, Award of 24 May 1982, *Kuwait v AMINOIL*, XXI ILM 976 - 1053 (1982), IX YBCA 71 - 96 (1984) at p. 80, 109(4) Clunet 869 - 909 (1982) with note P. Kahn, "Contrats d'Etat et nationalisation", at pp. 844 - 868; ICSID, *AGIP v Congo*, XXI ILM 726-739 (1982), 71(1) Rev Crit Droit Int'l Privé 92 - 105 (1982).

⁶⁴² ICSID Case No ARB/96/1, Award of 17 February 2000, *Compañía del Desarrollo v Costa Rica*, 15(1) ICSID Rev - FILJ (1999) award at pp. 169-204, decision on rectification at pp. 206 - 210, 39 ILM 1317-1337 (2000), 15(7) Mealey's IAR C-1 - C-14 (2000), 13(1) World Trade and Arb Mat 83 - 125 (2001), where the tribunal found that although a taking for environmental reasons may be legitimate, "expropriatory environmental measures - no matter how laudable and beneficial to society as a whole - are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."

⁶⁴³ See, e.g., NAFTA, Decision of 28 November 1997 and Award of 24 June 1998, *Ethyl Corp v The Government of Canada*, 16(3) J Int'l Arb 149 - 150 (1999), concerning the trade in or import for commercial purpose of a controlled chemical. The consensus in the international community on the need to protect the environment is expressed in the proliferation of international instruments on the topic. Consider, e.g., the UN Convention on Biological Diversity 1992, available at www.unep-wcmc.org; the International Convention on Civil Liability for Oil Pollution Damage 1969, 9 ILM 45 (1970); the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993, available at www.unep.org; the Declaration on the Right to Development 1986, <http://www.un.org/documents/ga/res/41/a41r128.htm>; the Rio Declaration on the Environment and Development 1992, available at www.un.org; the Plan of Implementation of the World Summit on Sustainable Development 2002, available at www.un.org; the United Nations Millennium Declaration 2000, available at www.un.org and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 2004, available at www.wto.org. See also the Universal Declaration on the Human Genome and Human Rights, UNESCO Gen Conf Res 29 C/Res16, reprinted in Records of the General Conference, UNESCO, 29th Sess, 29 C/Resolution 19, at 41 (1997) (adopted by the UN General Assembly, GA res 152, UN GAOR, 53rd Sess, UN doc A/RES/53/152 (1999)), Vienna Convention for the Protection of the Ozone Layer 1985 and the Montreal Protocol on Substances That Deplete the Ozone Layer 1987 and the conventions from 1933 to 2003, available at www.unep.org.

⁶⁴⁴ Discussed in M. Hunter and G. Conde-e-Silva, "Transnational Public Policy and its Application in Investment Arbitrations", 4(3) *JWI* 367 - 378 (2003) at p. 370. The awards in this case can be found at, *inter alia*, www.appletonlaw.com, www.dfait-maeci.gc.ca, and www.naftalaw.org.

[...] concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns.⁶⁴⁵

5.35. Performance of the contract remains unaffected by a state measure where it poses no threat to the environment. This was a determining factor in *Tecnicas Medioambientales TECMED S A v Mexico*.⁶⁴⁶ The ICSID tribunal had to decide a dispute over the Mexican authorities' failure to renew the license of a waste site held by TECMED's local Mexican subsidiary following a public outcry as to the possible environmental repercussions of the project.

5.36. The tribunal found that the investigation led by the Mexican Government itself revealed there had been no danger to public health or the environment and therefore the administrative decision revoking the licence on environmental grounds was in breach of the BIT between Spain and Mexico.

5.37. A similar reasoning underlined the tribunal's decision in the *Metalclad* arbitration.⁶⁴⁷ In this case, the investor started a NAFTA Chapter 11 arbitration alleging that it had been denied a construction permit to build and operate a hazardous waste facility in Guadalcázar, a local municipality in the United States of Mexico.

5.38. The municipality was concerned over the environmental impact of the project and created a nature reserve that included the construction site. Two independent technical studies determined that good engineering practices would make the site environmentally sustainable. Metalclad argued that it had secured all permits from the Federal Government, which had exclusive jurisdiction over the licensing of hazardous waste facilities.

5.39. The tribunal stated that one of the fundamental goals of NAFTA is to increase the transparency in local legal requirements. It therefore found Mexico in breach of the principle of fair and equitable treatment of foreign investors and liable for the expropriation. In a way typical of decisions based on public policy, the arbitral tribunal emphasised

⁶⁴⁵ *S D Myers Inc v The Government of Canada*, *ibid*, at para. 250. The tribunal in that case was considering the NAFTA agreement.

⁶⁴⁶ ICSID, 29 May 2003, *Tecnicas Medioambientales TECMED S A v Mexico*, 43(1) ILM 113 – 195 (2004).

– ⁶⁴⁷ ICSID Case No ARB(AF)/97/1, Award of 30 August 2000, *Metalclad v Mexico*, 16(1) ICSID Rev-FILJ 165-202 (2001).

the importance of predictable environmental standards and permit procedures, at both the federal and local levels, in each of the NAFTA countries.⁶⁴⁸

5.40. Where such standards are clearly established, arbitration tribunals have given effect to the environmental protection policy. In the ICSID tribunal's decision in *Emilio Agustín Maffezini v The Kingdom of Spain*,⁶⁴⁹ Emilio A. Maffezini, an Argentinian national, commenced proceedings against Spain under the 1991 Bilateral Investment Treaty between Argentina and Spain. Mr. Maffezini decided to establish and invest in a chemical products company in Galicia which he named Emilio A. Maffezini, S.A. (EAMSA). A Spanish entity called *Sociedad para el Desarrollo Industrial de Galicia* (SODIGA) offered advice regarding the investment.

5.41. Under the applicable law, chemical industries were specifically required to undertake an Environmental Impact Assessment (EIA). The law further required an EIA before consent was given to certain public and private projects considered to have significant environmental implications. Suspension of projects could be ordered, particularly if work thereon began before the EIA was approved.

5.42. Arguing that SODIGA was a public entity whose acts and omissions were attributable to Spain, Mr. Maffezini claimed that SODIGA was responsible for the failure of the project because, among other grounds, it had pressured EAMSA to make the investment before the Environmental Impact Assessment process was finalized and its implications were known.

5.43. The Tribunal found it should carefully examine these contentions, since the Environmental Impact Assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This held true, the tribunal added, increasingly under international

⁶⁴⁸ Kass & McCarroll, "The 'Metalclad' Decision Under NAFTA's Chapter 11", New York Law Journal (2000).

⁶⁴⁹ ICSID, Award of 13 November 2000, *Emilio Agustín Maffezini v The Kingdom of Spain*, available at www.worldbank.org.

law.⁶⁵⁰ It found that claimant not only knew but ought to have known of the need to undergo an Environmental Impact Assessment and as such Spain could not be held responsible for the decisions taken by the claimant with regard to the EIA. The claim was dismissed by the tribunal.

5.44. Decided awards demonstrate that environmental concerns may also be relevant to mainstream international commercial tribunals.⁶⁵¹ Commercial tribunals have been willing to extend their jurisdiction to environmental issues and have recognized the role of corporations in ensuring environmental protection.⁶⁵²

(iii) compensation in the event of expropriation

Rule S3: An act of expropriation must be accompanied by adequate compensation.

5.45. The idea that a state must promptly compensate the investor in the event of an expropriation is well established in arbitration practice⁶⁵³ and results

⁶⁵⁰ Citing the Convention on Environmental Impact Assessment in a Trans-boundary Context, Espoo, February 25, 1991, and P. Sands, "Environmental Impact Assessment", in *Principles of International Environmental Law* (Manchester University Press 1995), Vol. 1, at p. 579-595.

⁶⁵¹ In Society Of Maritime Arbitrators, Award No 2014 of 13 September 1984, *Unitramp v Koal Industries*, XI YBCA 202 - 202 (1986), compliance with environmental conservation procedures were deemed foreseeable in the ordinary course by all prudent businessmen and could not be recast as extraordinary to the degree that might excuse performance of a charterparty obligation using the lexicon of *force majeure*, acts of princes or *vis major*. *Prima facie* environmental concerns were also one of the factors leading to the grant of an interim measure in NAI Case No 1694, Interim Award of 12 December 1996, *Producer v Construction Company*, XXIII YBCA 97 - 112 (1998) at pp. 99 and 111.

⁶⁵² Described, e.g., in Principle 6 of the Caux Principles for Business, available at www.cauxroundtable.org; Point V of the OECD Guidelines for Multinational Enterprises, available at www.oecd.org; Rule 4 of the the Asia Pacific Economic Cooperation (APEC) forum Business Code of Conduct, available at www.Cauxroundtable.org/APECForumBusinessCodeofConduct.html.

⁶⁵³ See ICSID, Award of 26 June 2003, *Loewen v United States*, 42(4) ILM 811(2003); ICSID, 29 May 2003, *Tecnicas Medioambientales TECMED S A v Mexico*, 43(1) ILM 113 - 195 (2004); Ad hoc, Award of 30 June 1990, *Biloune v Ghana Investments Centre, Government of Ghana*, XIX YBCA 11 - 32 (1994), 95 I L R 183 (1993) at p. 211; Tribunal for Bank of International Settlements, Award of 22 November 2002, *Dr Horst Reineccius v Bank for International Settlements*, available at www.pca-cpa.org; ICSID, Award of 11 October 2002, *Mondev International Ltd v United States of America*, 2 ILM 85 (2003), 6 ICSID Rep 192 (2004), 125 ILR 110 (2004); and M. Hunter and G. Conde-c-Silva, "Transnational Public Policy and its Application in Investment Arbitrations", 4(3) *JWI* 367 - 378 (2003) at p. 375.

from the duty to provide protection and full security to the investor. An act of expropriation deprives the investor of the use and benefit of his investment even though he may retain nominal ownership of the rights.

5.46. International investment arbitration awards indicate that an expropriation may result, for instance, from a decree disallowing imports of certain goods,⁶⁵⁴ the refusal to renew a licence for a waste facility,⁶⁵⁵ failure to protect the investor for repossession of property by another company and withdrawal of an operating licence because of alleged fire regulations,⁶⁵⁶ denial of justice or malicious misapplication of the law by the local courts,⁶⁵⁷ or a military action.⁶⁵⁸

5.47. While states may require the indirect,⁶⁵⁹ partial⁶⁶⁰ or full expropriation of certain assets to implement a national policy, the expropriatory measure will be in breach of transnational public policy if it causes a distortion to the international trade system.

5.48. A classic example of the operation of transnational public policy in this area is where a State attempts to evade responsibility by enacting legislation to

⁶⁵⁴ Resulting in the expropriation *e.g.*, of a shipping license. See ICSID Case No ARB/99/6, Award of 12 April 2002, *Middle East Cement Shipping and Handling Co v Republic of Egypt*, 18 ICSID Rev - FILJ 602 (2003). See also NAFTA, Decision of 28 November 1997 and Award of 24 June 1998, *Ethyl Corp v The Government of Canada*, 16(3) J Int'l Arb 149 - 150 (1999).

⁶⁵⁵ ICSID, 29 May 2003, *Tecnicas Medioambientales TECMED S A v Mexico*, 43(1) ILM 113 - 195 (2004).

⁶⁵⁶ ICSID, Award of 8 December 2000, *Wena Hotels Limited v Arab Republic of Egypt*, 41 ILM 896 (2002).

⁶⁵⁷ See, *e.g.*, Iran-US Claims Tribunal Case No 43, Award of 8 October 1986, *Oil Field of Texas Inc v Iran*, XII YBCA 287 - 291 (1987). In ICSID arbitrations this situation will arise where the contract provides for the exhaustion of local remedies before the dispute can be referred to the arbitration tribunal. In such cases the state will be held liable where there is a denial of justice, where claimants were treated unfairly in that court (procedural injustice) or the judgment was substantially unfair or otherwise denied rights attributed to the investor. Consider the discussion in ICSID Case No ARB/97/3, Award of 21 November 2000, *Compañía de Aguas v Argentina*, 40 ILM 457-473 (2001), XXVI YBCA 61 - 86 (2001) at p. 74 and ICSID Case No ARB(AF)/97/2, Award of 1 November 1999, *Robert Azinian, et al v The Government of the United Mexican States*, 14(1) ICSID Rev - FILJ 538-575 (1999), XXV YBCA 262 - 278 (2000).

⁶⁵⁸ ICSID Case No ARB/87/3, Final Award of 27 June 1990, *Asian Agricultural Products Ltd v Sri Lanka*, 30 ILM 580 - 627 (1991), 2 ICSID Rev - FILJ 526-573 (1991).

⁶⁵⁹ "Creeping" or "tantamount to" expropriation. See ICSID Case No ARB/99/6, Award of 12 April 2002, *Middle East Cement Shipping and Handling Co v Republic of Egypt*, 18 ICSID Rev - FILJ 602 (2003).

⁶⁶⁰ See, *e.g.*, ICSID Final Award of 31 March 1986, *Liberian Eastern Timber Corp v Liberia*, 26 ILM 647-679 (1987), where the expropriation resulted from the unwarranted reduction of a concession area.

facilitate expropriation.⁶⁶¹ In *Compañía del Desarrollo v Costa Rica*⁶⁶² the arbitral tribunal found that a Costa Rican law on the appraisal and valuation of expropriated property was overridden by a transnational policy protecting foreign investment.

- 5.49. All acts of expropriation must therefore be accompanied by adequate compensation. The purpose of compensation in event of expropriation is “to place the party to whom they are awarded in the same pecuniary position they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion.”⁶⁶³ An international tribunal must attempt to re-establish the situation that would otherwise have existed, or, if this is not possible, payment of a sum corresponding to the value of such restitution.⁶⁶⁴

(iv) state liability for *ultra vires* acts

Rule S4: States are liable for the *ultra vires* acts of its officials or political sub-divisions.

- 5.50. Investment arbitration cases provide several examples where transnational public policy will hold the host state liable for an act of its subsidiary organs or officials. In *SPP v Egypt*, for instance, the tribunal felt bound to apply the principle “which establishes the international responsibility of States when unauthorized or *ultra vires* acts of officials have been performed by State agents under cover of their official character.” Indeed, if such unauthorized or *ultra vires* acts could not be ascribed to the State, all

⁶⁶¹ M. Hunter and G. Conde-e-Silva, “Transnational Public Policy and its Application in Investment Arbitrations”, 4(3) *JWI* 367 – 378 (2003) at p. 375.

– ⁶⁶² ICSID Case No ARB/96/1, Award of 17 February 2000, *Compañía del Desarrollo v Costa Rica*, 15(1) ICSID Rev - FILJ (1999); award at p. 169-204, decision on rectification at pp. 206-210, 39 ILM 1317 - 1337 (2000).

⁶⁶³ Ad hoc, Award of 15 March 1963, *Sapphire International Petroleum v NIOC*, 35 ILR 136 – 186 (1967). In the same sense see Iran –US Claims Tribunal, Award No 298-317-1, *Sola Tiles Inc v Islamic Republic of Iran*, 14 Iran-US CTR 223 234 (1987).

⁶⁶⁴ See ICSID Case No ARB/81/8, Award of 5 June 1990, *Amco Asia Corp v Indonesia*, XVII YBCA 73 – 105 (1992) and the Permanent Court of Justice in the *Chorzow* case, PCIJ Series A, No 17, at 47.

State responsibility would be rendered illusory.⁶⁶⁵ According to the tribunal, “the practice of states has conclusively established the international responsibility for unlawful acts of state organs, even if accomplished outside the limits of their competence and contrary to domestic law.”⁶⁶⁶

5.51. This issue arose in *Compañía de Aguas v Argentina*.⁶⁶⁷ The arbitral tribunal considered allegations that the State did not have constitutional control over the conduct of its political sub-divisions and was therefore not bound by their actions. Nonetheless, it held that

it is well established that actions of a political subdivision of federal state, such as the Province of Tucumán in the federal state of the Argentine Republic, are attributable to the central government. It is equally clear that the internal constitutional structure of a country can not alter these obligations. Finally, the Special Rapporteur of the International Law Commission, in discussing the proposed Commentary that confirms the attribution of conduct of political subdivisions to the federal State, has referred to the “established principle” that a federal state “cannot rely on the federal or decentralized character of its constitution to limit the scope of its international responsibilities.”⁶⁶⁸

5.52. In mainstream commercial arbitrations the issue of *ultra-vires* liability may arise, *e.g.*, where the tribunal needs to establish that a company is bound by the signature the chairman of the board of directors without the consent of the board or whether an agent has the authority to bind the principal.

⁶⁶⁵ In ICSID Case No ARB/84/3, Award of 20 May 1992, *SPP (Middle East) Ltd v Egypt*, 32 ILM 933-1038 (1993), XIX YBCA 51 - 104 (1994) at pp. 60 – 61.

⁶⁶⁶ In ICSID Case No ARB/84/3, *ibid*, XIX YBCA 51 - 104 (1994) at p. 61.

⁶⁶⁷ ICSID Case No ARB/97/3, Award of 21 November 2000, *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentina*, 40 I L M 457-473 (2001), XXVI YBCA 61 - 86 (2001).

⁶⁶⁸ ICSID Case No ARB/97/3, *ibid*, XXVI YBCA 61 - 86 (2001) at pp. 69-70, references omitted.

- 5.53. Only the circumstances of the case can determine whether the principle of protection of the weaker party, which underlies investment arbitration, comes into play.⁶⁶⁹

(v) illicit trafficking

Rule S5: A contract requiring the illicit trafficking of goods is null and void.

- 5.54. Illicit trafficking⁶⁷⁰ amounts to an arrangement for the movement of goods with a detrimental effect on the international community. Any form of illicit trafficking is prohibited by transnational public policy.⁶⁷¹
- 5.55. The characterisation of what is 'illicit' is drawn from the object or performance of the contract. Arrangements illicit by their object include the sale of conventional weapons without an appropriate licence,⁶⁷² atomic, biological and chemical weapons or their components,⁶⁷³ endangered species,⁶⁷⁴ non-medicinal drugs,⁶⁷⁵ human beings⁶⁷⁶ and other protected assets.⁶⁷⁷

⁶⁶⁹ See, e.g., Italian Arbitration Association, Case No 76/98, Award of 24 November 1999, *Exclusive distributor v Principal*, XXV YBCA 368 - 381(2000) at p. 379.

⁶⁷⁰ See *Fouchard Gaillard Goldman* at pp. 850 - 851, paras 1520 *et seq.*

⁶⁷¹ See P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series No 3*, at p. 283; A. Sheppard, "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", 19(2) *Arb Int'l* 217 - 248 (2003) at p. 221.

⁶⁷² Consider, e.g., the preamble to the UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, UN Document A/RES/55/255, available at www.unodc.org; the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials, available at www.unodc.org; and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects 1993, UN doc A/RES/51/49, and additional protocols, available at www.un.org.

⁶⁷³ Consider, e.g., the Treaty on the Non-Proliferation of Nuclear Weapons, available at www.un.org; the Convention On The Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Signed at Washington, London, and Moscow April 10, 1972, available at <http://www.icrc.org>; and Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1993, available at www.un.org. See also International Court of Justice, 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, WL 939337 (1996), ICJ 226 (1996).

⁶⁷⁴ As restated in the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973, available at www.cites.org.

- 5.56. An arrangement is also illicit where performance entails piracy,⁶⁷⁸ counterfeiting, theft⁶⁷⁹ or the smuggling of goods.⁶⁸⁰
- 5.57. Most national courts today acknowledge the validity of export or import controls imposed by a friendly foreign country.⁶⁸¹ Likewise, tribunals recognise a national measure restricting trade in a certain product. It remains unclear, however, what the proper legal solution may be where a country imposes unilateral export controls or other protectionist measures in relation to otherwise merchantable assets.⁶⁸² A dispute may arise as to the effects such measures have on the legal relationship between the parties.

⁶⁷⁵ Consider the Single Convention on Narcotic Drugs, 1961; Convention on Psychotropic Substances 1971; and the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, all available at www.unodc.org.

⁶⁷⁶ Consider, e.g., the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime 2003, GA Res 25, annex II, UN GAOR, 55th Sess, Supp No 49, at p. 60, UN doc A/45/49 (Vol. I) (2001), available at www.uncjin.org; the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, available at www.unodc.org; UN Resolution A/55/383.

⁶⁷⁷ *Choses hors du commerce*.

⁶⁷⁸ Consider, e.g., "Piracy at Sea," ICC publication 455; Report of the World Customs Organisation of April 2001, "Smuggling, Counterfeiting and Piracy: The Rising Tide of Contraband and Organised Crime in Europe", available at www.wcoipr.org.

⁶⁷⁹ Such as stolen human body parts and cultural property. See the UN Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris, 14 November 1970, available at <http://portal.unesco.org>; and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, done at Rome, 24 June 1995, available at www.unidroit.org. See also Italy, Tribunal of Turin of 25 March 1982 *Repubblica dell' Ecuador - Casa della cultura ecuadoriana v Danusso*, 18 RDIPP 625 (1982), cited by P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series No 3*, at p. 269.

⁶⁸⁰ In national laws the term "smuggling" amounts to customs fraud consisting in the movement of goods across a customs frontier in any clandestine manner. See e.g., Article 1(d) of the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences, done at Nairobi, 9 June 1977, available at www.coomd.org. For the inclusion of smuggling in the notion of public policy see P. Mayer, A. Sheppard, "Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", 19(2) *Arb Int'l* 249 – 263 (2003) at p. 255-256, Recommendation 1(c).

⁶⁸¹ See England, *Sion Soleimany v Abner Soleimany* [1998] 3 WLR 811-832 (30 January 1998 - Court of Appeal). P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series No 3*, at p. 282 – 283 notes a similar evolution in French, German and Swiss case law.

⁶⁸² The issue is particularly relevant in commercial arbitrations, where there is no relationship between the state imposing the unilateral measure and the merchant. In investment cases the question whether a State entity is released from its obligations to an overseas buyer when the State embargoes the sale has consistently been answered in favour of the State entity. See England, *Czarnikow Ltd v Rolimpex* [1979] AC 351; *The Soviet-Israel Oil Arbitration* (1958) 27 ILR 631. The embargo leads to the obligation to compensate the investor for any expropriation incurred where, for instance, it carries the revocation of a shipping licence. See

- 5.58. International tribunals have relied on the principle of territoriality when considering the validity of arrangements concerning the export of goods prohibited by one country. According to that method, the characterization of an international movement of goods as licit or illicit is based on an applicable national law. An international movement of goods is illicit if recognised as such either in the place of performance or under the law of the seat of arbitration.⁶⁸³
- 5.59. Other tribunals have adopted the transnational public policy approach and considered the effects of the unilateral ban on the international trade system. A leading example is the award by an *ad hoc* arbitration tribunal sitting in Germany.⁶⁸⁴ The decision provides general guidance in this area and should be analysed more closely.
- 5.60. The tribunal was considering a dispute as to whether a party was compelled to perform under a contract for the sale of 6,000 sacks of semi-roasted coffee and 2,000 sacks of Colombian “Excelso” semi-roasted coffee despite a restriction on exports imposed by the Colombian government. The contract was governed by German law as the law of the place of arbitration.⁶⁸⁵
- 5.61. Seller delivered 6,000 sacks and then pleaded *force majeure*, alleging that the export of semi-roasted coffee from Colombia became illegal under Colombian law. According to the award, the restriction was aimed at guaranteeing that semi-roasted coffee sold to Colombian roasters for national consumption against moderate prices remained in the country.⁶⁸⁶
- 5.62. After the last day of the contract period for shipment, buyer bought the remaining coffee in the best available market. It then initiated arbitral proceedings before the German Coffee Association to recover the difference between the contractual price and the price paid for the coffee.

ICSID Case No ARB/99/6, Award of 12 April 2002, *Middle East Cement Shipping and Handling Co v Republic of Egypt*, 18(2) ICSID Rev – FILJ 602 – 645 (2003).

⁶⁸³ For instance, in ICC Case 1399, Award of 14 April 1966, *Mexican licensee v French licensor*, cited at J. Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications 1978), at p. 550, para 422 fn 1, a contract for the sale of lighters in breach of Mexican customs was enforced by the tribunal on the grounds that the contract was to be performed in France and in accordance with the notion of *bona fides* in French law which did not repudiate the transaction.

⁶⁸⁴ See *Ad hoc*, Award of 19 March 1987, *Buyer v Seller*, XIX YBCA 44 - 47 (1994).

⁶⁸⁵ *Ad hoc*, *ibid*, XIX YBCA 44 - 47 (1994) at p. 44.

⁶⁸⁶ *Ibid*, at p. 45.

- 5.63. The arbitrators first examined defendant's contention that the contract was invalid since the export of semi-roasted coffee was forbidden in Colombia. The tribunal first established that this matter was not confined to the public policy of the German legal system.⁶⁸⁷
- 5.64. It then stated that to prepare, promote and profit from criminal activities, such as professional smuggling, would indeed be contrary to *bonos mores*. Yet, it continued, *bonos mores* does not bar the acquisition of goods freely available in the international market before and during the imposition of export controls.⁶⁸⁸
- 5.65. The tribunal held for claimant on the grounds that, in the absence of smuggling or other criminal activity, a country imposing a unilateral ban on exports tacitly consents to the sale of restricted goods already available in the international market, particular where it has not taken steps to have the ban recognised by the international community.⁶⁸⁹
- 5.66. The approach of the tribunal is praiseworthy as it avoids sensitive considerations of international comity. The ratio of this decision is that illicit trafficking occurs where transnational public policy is effectively breached. A ban on trade imposed by a domestic-international public policy does not extend to a foreign transaction unless smuggling or some other activity prohibited by the international community is involved.
- 5.67. A unilateral ban on merchantable goods must be weighted against the need for performance of contractual arrangements and the stability of the global market. National measures affecting the international trade system are integrated in a wider regulatory framework to which arbitration tribunals are not indifferent.⁶⁹⁰

⁶⁸⁷ As stated by the tribunal, "Art. 134 of the German Civil Code does not apply to a foreign legal prohibition, because this legal prohibition is not directly connected with the German territory." See Ad hoc, Award of 19 March 1987, *Buyer v Seller*, XIX YBCA 44 - 47 (1994).

⁶⁸⁸ See Ad hoc, Award of 19 March 1987, *Buyer v Seller*, XIX YBCA 44 - 47 (1994). In the same sense see Arbitral Tribunal of the Commission of Grain-Merchants Rotterdam, *Nederlandse Jurisprudentie* (22 August 1972), 435 *Netherlands Law Reports* (1973).

⁶⁸⁹ E.g., by notifying consumer countries or the relevant international organization.

⁶⁹⁰ Consider, for instance, the preamble of the GATT 1994; the Marrakesh Protocol of 15 April 1994; the Agreement on Import Licencing Procedures 1971; the Understanding on Rules and Procedures Governing the Settlement of Disputes Annexed to the GATT 1994; and the Annex to the Decision on Notification Procedures, which calls for the notification of export restrictions, all available at www.wto.org.

(vi) fraud

Rule S6: A party must not rely on fraud.

5.68. Instances of fraud offend deep rooted notions of justice and morality. The prohibition of fraud in international commerce has been identified as an issue of public policy.⁶⁹¹ National courts have been unanimous in their condemnation of fraud.⁶⁹² In *Dandong Shuguang Axel Corporation, Ltd v Brilliance Machinery*,⁶⁹³ for instance, an arbitral decision oblivious to fraud

⁶⁹¹ *Fouchard Gaillard Goldman*, at p. 339, para 569; D. Caron and L. Reed, "Post Award Proceedings," 11(4) *Arb Int* 429 – 454 (1995) at p. 444; D. Miller, "Public Policy in International Commercial Arbitration in Australia", 9(2) *Arb Int* 167 -196 (1993) at p. 171, para 9; F. Nariman, "India", J. Paulsson(ed.), *International Handbook on Commercial Arbitration*, Suppl. 30 (January 2000) at p. 42; C. Kuner, "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards", 7(4) *J Int'l Arb* 71 – 92 (1990) at p. 78; S. Lazareff, "Mandatory Extraterritorial Application of National Law", 11(2) *Arb Int* 137 -150 (1995) at p. 139 (identifying fraud as an issue of international public policy). See also US, *Biotronik v Medford Medical Instrument Co*, 415 F. Supp. 133 (D.N.J., 1976), finding that fraud is contained in the public policy defence; Canada, *Re Corporacion Transnacional de Inversiones, SA v STET International, SpA*, 45 OR (3d) 183, affirmed (2000) 49 OR (3d) 414, O.J. No. 3408 (C.A., Catzman, Abella & Rosenberg JJ.A.); Singapore, *Re An Arbitration between Hainan Machinery Import and Export Corporation and Donald & McArthur Pte Ltd*, [1996] 1 SLR 34 per Judith Prakash J.; England, *Westacre Investments v Judoimport*, (1998) XXIII YBCA 836 – 879, at pp. 868 - 869, para 75: "fraud in international commerce should invite the attention of English public policy in relation to contracts which are not performed within the jurisdiction of the English courts. That it should be the policy of the English courts to deter the exercise of personal influence short of corruption and fraud to obtain valuable contracts in foreign countries in which such activity is not contrary to public policy by refusing to enforce contracts would involve an unjustifiable in-road into the principle of *pacta sunt servanda*."

⁶⁹² See Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985) at p. 63, in 120(40) *Canada Gazette* 13 (1988) at p. 30; US, *Ocean Warehousing B V v Baron Metals and Alloys Inc et al*, 2001 U S Dist LEXIS 6898; US, *Oriental Commercial and Shipping Co Ltd v Rosseel NV*, 609 F Supp 75 (S D N Y 1985); US, *Riley v Kingsley Underwriting Agencies Ltd*, 969 F 2d 953 (10th Cir), cert denied 506 US 1021, 121 L Ed 2d 584, 113 S Ct 658 (1992); Canada, *Corporacion Transnacional de Inversiones SA de CV v STET International* (1999) 45 O R (3d) 183 (Ont S C J), affirmed (2000) 49 O R (3d) 414 (Ont C A) (3 May 2001 - Supreme Court of Canada); Canada, *Blanchard v Control Data Canada Ltd*, [1984] 2 SCR 476; Hong Kong SAR, High Court 8 April 2000, *Medison Co Ltd v Victor (Far East) Ltd*, 15(5) Mealey's IAR J-1 - J-3 (2000), XXVI YBCA 774 – 779 (2001) at p. 778; Cyprus, Supreme Court, 28 April 1999, *The Attorney General of the Republic of Kenya v Bank für Arbeit und Wirtschaft AG*, XXV YBCA 641 - 709 (2000) at p. 700; Zimbabwe, 29 March and 9 December 1998, *Zimbabwe Electricity Supply Commission v Genius Joel Maposa*, XXV YBCA 535 – 556 (2000) at p. 546; Singapore, *Hainan Machinery Imp & Exp Corp v Donald & McArthur Pte Ltd* [1996] 1 Singapore Law Reports 34-46 (29 September 1995 - High Court); Luxemburg, Court of Appeal, 24 November 1993, *Kersa Holding Co v Infancourtage*, XXI YBCA 617 – 626 (1996) at p. 625.

⁶⁹³ See US, *Dandong Shuguang Axel Corporation, Ltd v Brilliance Machinery Company et al*, 2001 U.S. Dist. LEXIS 7493, XXVII YBCA 617 - 625 (2002) at p. 623.

was set aside even though the evidence was available to the arbitrator during the arbitration proceedings.

- 5.69. International arbitrators must consider contractual fraud with caution. Allegations of fraud in the procurement or performance of a contract are frequently made for tactical reasons⁶⁹⁴ and must be subject to a high standard of proof, beyond the “rough and tough” of the trade.⁶⁹⁵ Further, a distinction must be drawn between fraud as an issue of formation of the will and fraud as a public policy defence. For a finding of fraud to belong to transnational public policy it must be of such gravity as to make a defence of consent unavailable.⁶⁹⁶

(vii) anti-competition

Rule S7: The arrangement must conform with transnational anti-trust or anti-competition standards.

- 5.70. The protection of a competitive market is one of the most effect means to ensure the fair management of business resources and fair prices for consumers.⁶⁹⁷ Those rules are present, in one form or another, in every legal system, as evidenced by a comparative study of national competition laws.⁶⁹⁸

⁶⁹⁴ See *Redfern and Hunter* (4th ed.), at p. 171, para 3-23.

⁶⁹⁵ See, by implication, the decision of the tribunal in, e.g., Milan Chamber of Arbitration Case No 1398, Award of 18 March 1999, *Licensee v Licensor*, XXV YBCA 382 – 387 (2000) at pp. 384 *et seq*; ICC Case No 6320, Final Award of 1992, XX YBCA 62 – 109 (1995) at pp. 65 *et seq*; Society of Maritime Arbitrators, Final Award No 2642 of 28 March 1990, *Triumph Tankers Ltd v Kerr McGee Refining Corp*, XVIII 112 - 123 (1993); ICC Case No 6230, Final Award of 1990, *Subcontractor v Main Contractor*, XVII YBCA 164 - 177 (1992) at p. 171; Ad hoc, Awards of 27 October 1989 and 30 June 1990, *Biloune v Ghana Investments Centre, Government of Ghana*, XIX YBCA 11 - 32 (1994) at p. 21; ICC Case No 5649, Final Award of 1987, *Bank v Company*, Clunet 1054-1060 (1987) with note S. Jarvin, pp. 1060-1061; Ad hoc, Award of April 1982, *Company Z and Others v Organization ABC*, VIII YBCA 94 - 117 (1983); Italian Arbitration Association, *Exclusive distributor v Principal*, XXV YBCA 368 - 381 (2000) at p. 374.

⁶⁹⁶ See, e.g., the dictum of the tribunal in ICC Case No 6320, Final Award of 1992, XX YBCA 62 – 109 (1995) at p. 78, para 62.

⁶⁹⁷ See, e.g., Rule B(1)(b) of the Interfaith Declaration: A Code of Ethics On International Business for Christians, Muslims and Jews, available at http://astro.ocis.temple.edu/~dialogue/Codes/cmj_codes.htm.

⁶⁹⁸ See UNCTAD, “Model Law on Competition, Substantive Possible Elements for a competition law, commentaries and alternative approaches in existing legislations,” UNCTAD Series on Issues in Competition Law and Policy, UNCTAD doc TD/B/RBP/CONF.5/7/Rev.2

5.71. Whilst most international arbitration awards have so far confined competition law to domestic-international⁶⁹⁹ or regional public policy,⁷⁰⁰ some tribunals have found transnational principles on competition in cases dealing with the registration of domain names⁷⁰¹ and the calculation of damages.⁷⁰²

5.72. The role of transnational rules on competition in international disputes is rapidly increasing.⁷⁰³ The international community has made a substantial effort to unveil a worldwide consensus on the fundamental principles of competition law.⁷⁰⁴ One example is the UN 'Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business

and the comparative study in annex I to III, available at www.unctad.org. See also UNCTAD doc TD/B/COM.2/EM/2, "Consultations on Competition Law and Policy, Including the Model Law and Studies Related to the Provisions of the Set of Principles and Rules", available at http://www.unctad.org/en/docs/c2em_d2.en.pdf.

⁶⁹⁹ See, e.g., ICC Case No 7146, Partial Award of 1992, XXVI YBCA 119 - 129 (2001); ICC Case No 7314, Final Award of 1995, *Manufacturer v Licensor*, XXIII YBCA 49 - 65 (1998); ICC Case No 8423, Final Award of 1994, *Portuguese company v French parent company et al*, XXVI YBCA 153 - 166 (2001) at p. 155.

⁷⁰⁰ For examples of the harmonisation and legal integration of competition rules at a regional level see the Asia-Pacific Economic Cooperation organization at <http://www.apec.org>; for the Common Market for Eastern and Southern Africa Competition Policy see <http://www.comesa.int/trade/issues/policy>; for the European Union see http://europa.eu.int/pol/comp/index_en.htm; for the Western Hemisphere see http://www.sice.oas.org/compol/com_pol.asp. See also the many reports and recommendations from the Organisation for Economic Cooperation and Development available at <http://www.oecd.org>.

⁷⁰¹ WIPO Case No D2000-0044, Decision of 16 March 2000, *Educational Testing Service v TOEFL*, XXVII YBCA 201 - 208 (2002).

⁷⁰² See Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award No 33 of 30 September 1993, *Agent v Seller*, XXIII YBCA 113 - 127 (1998) at pp. 116 - 117.

⁷⁰³ See B. Goldman, "L'arbitrage international et le droit de la concurrence", *ASA Bull* 260 - 290 (1989) at p. 289 and J. Werner, "Application of Competition Laws by Arbitrators - The Step Too Far," *J Int'l Arb* 12(1) 21 - 26 (1995) at p. 22; *Fouchard Gaillard Goldman*, at p. 869. Yet see J. Racine, "L'ordre concurrentiel et les droits de l'homme", *Mélanges en l'honneur d'Antoine Pirovano* (Frison-Roche 2003) at p. 419. See also J. Moitry, "Arbitrage international et droit de la concurrence: vers un ordre public de la lex mercatoria?," *1 Rev Arb* 3 - 36 (1989) at p. 33. It should be noted that for Moitry the transnationality of public policy in competition law would be drawn from the common elements to the laws in contact with the dispute.

⁷⁰⁴ See the United Nations Set of Principles and Rules on Competition, UN doc TD/RBP/CONF/10/Rev2, January 2001, available at <http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/rbpc10rev20en.pdf>; the Declaration and the Programme of Action on the Establishment of a New International Economic Order, 328 I (XXIX) of 12 December 1974 containing the Charter of Economic Rights and Duties of States, and 3362 (S-VII) of 16 September 1975 on development and international economic co-operation and Point IX of the OECD Guidelines for Multinational Enterprises, available at www.OECD.org; Rule 5 of the the Asia Pacific Economic Cooperation (APEC) forum Business Code of Conduct, extracts available at www.cauxroundtable.org/APECForumBusinessCodeofConduct.html. See also the World Trade Organization annual reports and minutes on competition law available at <http://www.wto.org>.

Practices and the Principles and Rules for Enterprises, including Transnational Corporations.’⁷⁰⁵

5.73. The principles, “universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour,”⁷⁰⁶ are designed to safeguard the creation, encouragement and protection of competition, the control of the concentration of capital or economic power, encourage innovation and protect and promote social welfare and the interests of consumers.⁷⁰⁷ With these objectives in mind, the international community has undertaken to tackle restrictive business practices⁷⁰⁸ and the abuse of a dominant position⁷⁰⁹ in the market.

5.74. According to the ‘Principles and Rules for enterprises, including transnational corporations,’⁷¹⁰ enterprises should conform to the restrictive business practices laws, and the provisions concerning restrictive business practices in other laws, of the countries in which they operate.⁷¹¹ Enterprises engaged on the market in rival or potentially rival activities, should refrain from practices limiting access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade.⁷¹²

⁷⁰⁵ See UN TD/RBP/CONF/10/Rev2, 2001, available at <http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/rbpc10rev20en.pdf>.

⁷⁰⁶ See Article B(7) of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the Principles and Rules for Enterprises, including Transnational Corporations, included in United Nations Set of Principles and Rules on Competition, *ibid*.

⁷⁰⁷ See Article 13 of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at www.cedha.org.ar.

⁷⁰⁸ Defined in the principles as “acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact.”

⁷⁰⁹ That is, a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

⁷¹⁰ Incorporated in the United Nations Set of Principles and Rules on Competition, UN doc TD/RBP/CONF/

10/Rev2, available at <http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm>.

⁷¹¹ See Article D(1).

⁷¹² Those practices include agreements fixing prices, including as to exports and imports; collusive tendering; to market or customer allocation arrangements; allocation by quota as to sales and production; collective action to enforce arrangements, e.g. by concerted refusals to

5.75. According to Article D(4) of the Principles, enterprises should refrain from the following acts or behaviour in a relevant market when, through an abuse⁷¹³ or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade:

(a) Predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors;

(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods and services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;

(c) Mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature;

(d) Fixing the prices at which goods exported can be resold in importing countries;

(e) Restrictions on the import of goods which have been legitimately marked abroad with a trademark identical with or similar to the

deal; concerted refusal of supplies to potential importers; collective denial of access to an arrangement, or association, which is crucial to competition. See Article D(3).

⁷¹³ According to the Set of Principles, whether acts or behaviours are abusive should be examined in terms of their purpose and effects in the actual situation, in particular with reference to whether they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, and to whether they are: (a) Appropriate in the light of the organisational, managerial and legal relationship among the enterprises concerned, such as in the context of relations within an economic entity and not having restrictive effects outside the related enterprises; (b) Appropriate in light of special conditions of economic circumstances in the relevant market such as exceptional conditions of supply and demand or the size of the market; (c) Of types which are usually treated as acceptable under pertinent national or regional laws and regulations for the control of restrictive business practices; (d) Consistent with the purposes and objectives of these principles and rules.

trademark protected as identical or similar goods in the importing country where the trademarks in question are of the same origin, *i.e.*, belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices;

(f) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(i) Partial or complete refusals to deal on the enterprise's customary commercial terms;

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee

5.76. The Set of Principles contain also rules directed at states,⁷¹⁴ providing for the improvement and effective enforcement of appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, the principle of eliminating or effectively dealing with anti-competitive practices⁷¹⁵ and of fair and equitable treatment of all enterprises.

⁷¹⁴ See the Principles and Rules for States at National, Regional and Subregional levels, contained in the United Nations Set of Principles and Rules on Competition, UNCTAD doc TD/RBP/CONF/10/Rev2, January 2001.

⁷¹⁵ This includes the duty to establish adequate remedies and the protection of legitimate business secrets. See Article E(1) and E(5) of the UN Set of Principles.

- 5.77. States have the duty to communicate annually to the Secretary-General of UNCTAD appropriate information, which is published in an annual report on developments in restrictive business practices legislation. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices is continuously monitored by an intergovernmental group of experts.⁷¹⁶

5.3. Other transnational interests

Although every human activity may have some economic impact, rules of transnational public policy are also veered towards the protection of immaterial interests, other than international trade. International tribunals have relied on transnational public policy to assert the fundamental political, ethical, moral, and social welfare of the international community.

(i) protection of cultural heritage

Rule S8: An agreement detrimental to the protection of cultural heritage is null and void.

- 5.78. As a result of the systematic destruction of historical assets during the holocaust, the protection of cultural heritage has become one of the greatest concerns of the international community. The public policy character of this prohibition is described in the preamble to the UNESCO Convention, which draws attention to the fact that “the interchange of cultural property among nations for scientific cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.”⁷¹⁷

⁷¹⁶ See *e.g.*, UNCTAD doc TD/B/COM2/CLP/48, Report of the Intergovernmental Group of Experts on Competition Law and Policy, 22 December 2004, available at http://www.unctad.org/en/docs/c2clpd48_en.pdf.

⁷¹⁷ See the preamble to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris, 14 November 1970, available at www.unesco.org. See also Article 12 of the Norms on the

5.79. According to the convention, “it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations. Its museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles. The illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations.”⁷¹⁸

5.80. International arbitration tribunals have followed the lead of national courts⁷¹⁹ in recognising the need to protect cultural heritage.⁷²⁰ The arbitrability of disputes concerning the protection or registration of cultural property is normally unopposed by national law.⁷²¹

5.81. The leading arbitration award in this area is *Southern Pacific Properties v Republic of Egypt*,⁷²² also known as the *Pyramids* case. The tribunal was dealing with a dispute over a joint venture project to build a tourism complex on a plateau overlooking the pyramids. In 1974, the Ministry of Tourism of Egypt and EGOH, the Egyptian General Organization for Tourism and

Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at www.ohchr.org; ICC (ed.), “International Art Trade and Law”, ICC publication 513; ICC (ed.), “International Art Trade Law, ICC publication 532.

⁷¹⁸ See the preamble to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris, 14 November 1970, available at www.unesco.org. See also the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995, available at 103 *UNIDROIT Bulletin d'Information* 4 - 11 (1995) and M. Schneider, “UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report,” 3 *Unif L Rev* 476 - 564 (2001).

⁷¹⁹ See the cases cited by P. Lalive, “Transnational (or Truly International) Public Policy”, *ICCA Congress Series No 3*, at p. 268.

⁷²⁰ On this topic see Q. Byrne-Sutton, “Arbitration and Mediation in Art-Related Disputes”, 14(4) *Arb Int* 447 - 456 (1998); the proceedings of the international symposium on Resolution Methods for Art-Related Disputes, held by the Art-Law Centre in Geneva and published as 11 *Studies in Art Law* (eds Q. Byrne-Sutton and M. Renold); E. Sidorsky, “Cultural Property Disputes and the Draft UNIDROIT Convention Possible Applications of International Arbitration”, 4(4) *Am Rev Int'l Arb* 475 - 518 (1993); F. Shyllon, “The recovery of cultural objects by African States through the UNESCO and UNIDROIT Conventions and the role of arbitration”, 2 *Unif L Rev* 219 - 241 (2000).

⁷²¹ Consider, e.g., Article 14 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at the Hague, 14 May 1954, available, e.g., at www.oup.co.uk/pdf/bt/cassese/interimlaw/ch03/1954_conv_prot_property.pdf, providing for arbitration in the event of a dispute over the registration of cultural property.

⁷²² See ICSID Case No ARB/84/3, Award of 20 May 1992, *SPP (Middle East) Ltd v Egypt*, 32 ILM 933-1038 (1993), XIX YBCA 51 - 104 (1994). See also ICC Award No 3493 of 16 February 1983, *SPP (Middle East) Ltd v Arab Republic of Egypt*, IX YBCA 111 - 123 (1984).

Hotels, undertook to transfer the right of usufruct of such property to the joint venture company and assist in obtaining all necessary local approval for the execution of the project. The land necessary for the project was granted to the joint venture by a Presidential Decree of 1975 and the project was finally approved by the Egyptian government in 1977, whereupon construction at the site began.

5.82. In late 1977, the pyramids project began to encounter political opposition in Egypt. Opponents of the project claimed that it posed a threat to undiscovered antiquities. In May 1978 the Ministry of Information and Culture declared the land surrounding the Pyramids to be “public property” and the decrees granting the land to the joint venture and authorising the project were revoked.

5.83. The arbitrators had to decide whether the Egyptian government was bound to the agreement or whether it had effectively discharged itself either by the cancellation orders resulting from the public outcry or by signing the UNESCO convention. The tribunal first held that neither the governmental decrees nor the UNESCO Convention, which was not in force in Egypt at the time of the decrees, applied to cancel the pyramids project. Yet, the tribunal concluded, as a matter of principle the protection of cultural heritage required that the project be discontinued upon discovery of the antiquities and inclusion of the “pyramids fields” in the World Heritage list.⁷²³

5.84. The tribunal’s decision expresses the concerns of transnational public policy in this area. Regardless of the standard found in national or international law, public policy requires parties to abstain from any activity which may endanger the scientific value of historical records.

⁷²³ On the facts, the Republic of Egypt had to compensate SPP for the expropriation resulting from its application to the World Heritage Committee. See ICSID Case No ARB/84/3, Award of 20 May 1992, *SPP (Middle East) Ltd v Egypt*, 32 ILM 933-1038 (1993), XIX YBCA 51 - 104 (1994) at p. 72.

(ii) international embargoes

Rule S9: Effect must be given to an international embargo.

5.85. A ban on trade is normally the first weapon relied upon by the international community to impose its will on a rogue state. Tribunals have often been required to consider the effects of a ban on trade or other commercial activity with a particular state.⁷²⁴

5.86. Whilst most international trade restrictions fall within the jurisdiction of the World Trade Organisation,⁷²⁵ the United Nations Compensation Commission⁷²⁶ or Mixed Claim Commissions, judicial decisions have repeatedly extended such jurisdiction to commercial arbitration tribunals.⁷²⁷

⁷²⁴ On the topic see J. Moitry, "L'arbitre international et l'obligation de boycottage imposée par un Etat," 118 *Clunet* 349 (1991); L. Matray, "Embargo and Prohibition of Performance," in K. Böckstiegel (ed.), *Acts of State and Arbitration* (Carl Heymanns Verlag KG 1997), at p. 69.

⁷²⁵ N. Komuro "The WTO Dispute Settlement Mechanism Coverage and Procedures of the WTO Understanding", 12(3) *J Int'l Arb* 81 - 161 (1995).

⁷²⁶ B. Leurent, "Views on the UNCC and its Adjudication of Contractual Claims," 17(1) *J Int'l Arb* 133 - 138 (2000).

⁷²⁷ For court decisions recognising the jurisdiction of arbitral tribunals to decide on the effects of international embargoes see Switzerland, Tribunal Fédéral, 23 June 1992, *Fincantieri-Cantieri Navali italiani SpA v M*, ASA Bull 58-68 (1993); US, *United Kingdom v Boeing Co*, 29 June 1993 XIX 240 - 248 (1994) (United States Court of Appeals No. 92-9242); US, *In re Belship Navigation Inc v Sealift Inc*, 1995 WL 447656 (SDNY July 28 1995); 6 World Arb & Med Rep 226 (1995); Canada, Supreme Court of Québec, 15 February 2000, *Air France v Kéba Mbaye et al*, 18(1) ASA Bull 116 - 143 (2000); France, Tribunal de Grande Instance Paris, 28 October 1988, *Drexel Burnham Lambert Ltd v Philipp Brothers*, and 29 June 1989, *Philipp Brothers v Drexel*, Rev Arb 497 (1990); Germany, Oberlandesgericht Hamburg, 26 January 1989, XVII YBCA 491 - 499 (1992) and Bundesgerichtshof, 26 April 1990, XXI YBCA 532 - 534 (1996); South Africa, *Benidai Trading Co Ltd v Gouws & Gouws Ltd*, 3 South African Law Reports (1977) at pp. 1021 *et seq* (Supreme Court); and the dictum in England, *Bremer Handelsgesellschaft M B H v Ets Soules et Cie & Anthony G Scott*, 2(2) *J Int'l Arb* 77 - 81 (1985) (11 October 1984 - Queen's Bench Division (Commercial Court)) and *BTP Tioxide Ltd v Pioneer Shipping Ltd*, VII YBCA 179 - 188 (1982) at p. 187 (House of Lords). For the minority view see Italy, Court of Appeal Genoa, 7 May 1994, *Fincantieri-Cantieri Navali Ital SpA v Iraq*, 4(3) *Rivista dell'arbitrato* 505-513 (1994) with note by S. La China at pp. 513 - 520. See also Ad hoc, *Air France v Kéba Mbaye et al*, 18(1) ASA Bull 116 - 143 (2000) at p. 117, where the arbitrator found that assuming jurisdiction over the effects of a UN embargo was in accordance to transnational public policy. The decision of the arbitrator was recognised by the Supreme Court of Québec, 15 February 2000, *Air France v Kéba Mbaye et al*, 18(1) ASA Bull 116 - 143 (2000). Similarly, in ICC Case No 6719 of 1991, *Collection of ICC Arbitral Awards 1991-1995* (ICC 1997), at p. 197, the tribunal was deciding a dispute concerning agency agreements concluded in order to obtain a supply of military materials from Iraq. Defendant raised an exception of non-arbitrability founded on the United Nations Resolutions of 1990 relating to the Iraq embargo. The arbitral tribunal considered that: *Il faut se garder de confondre l'application par l'arbitre international de dispositions d'ordre public d'une part et l'inarbitrabilité du litige d'autre part. Le seul fait que la nature du litige puisse amener l'arbitre à appliquer certaines règles juridiques d'ordre public ne signifie*

- 5.87. Although there are no known cases where the tribunal declared an international embargo invalid on transnational public policy grounds, disputes have arisen over the extent the contract between the parties may be affected by an international embargo.
- 5.88. In most cases, embargo legislation triggers a hardship or *force majeure* clause in the contract.⁷²⁸ Parties may elect to terminate the contract as a result of the embargo, whereby the task of the arbitrator is confined to the political risk borne by each party.⁷²⁹
- 5.89. The embargo becomes however a public policy issue where it calls for the ousting of the contract or the modification of a normal legal rule according to which contracts must be performed in accordance with their terms. One example of the public policy effects of an international embargo can be found in Chamber of National and International Arbitration of Milan Award 1491 of 1992.⁷³⁰
- 5.90. The Claimant had agreed to supply the main contractor with parts of a plant to be built in Iraq. Delivery of the first batch of products was to take place in November 1990. The arbitration clause in the contract provided for a sole arbitrator and further called for *arbitrato irrituale*, a decision according to the rules of law, under Italian law.
- 5.91. On 8 August 1990, EC Council Regulation No 2340 declared an embargo against Iraq whereupon the main contractor informed subcontractor that their contract was suspended. The Regulation forbade the parties, by means of vessels or aircrafts flying the flag of a EC Member State, to export any product originated in or coming from the EC to Iraq and Kuwait. Further,

pas que le litige devient, par là-même, inarbitrable. That is also the gist of Recommendation 1(e) of the Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 19(2) *Arb Int* 249 - 263 (2003) at p. 256.

⁷²⁸ On the *force majeure* effect of national and international sanctions against Iraq on the relationship between a company and its subcontractor see Chamber of National and International Arbitration of Milan, 20 July 1992, *Subcontractor v Contractor*, Int'l Const L Rev 201 (1993).

⁷²⁹ This occurred in ICC Case No 9473, Final Award of 2 January 1999, *Buyer v Seller*, XXVI YBCA 18 - 23 (2001), where the contract was terminated following the embargo on British beef during the BSE crisis.

⁷³⁰ See Chamber of National and International Arbitration of Milan, Award No 1491, 20 July 1992, *Subcontractor v Main Contractor*, XVIII YBCA 80 - 91 (1993).

it banned all activities which had as their object or effect the promotion of such sales or supplies.

5.92. The arbitrator was asked to decide the effect of the EC Regulation and other laws concerning the embargo on the main contractor as a party to the main contract and the subcontract between the parties.

5.93. The tribunal held that the embargo called for a non-restrictive interpretation in accordance with the goals set out by the UN Security Council decisions at an international level. The wording of Regulation No 2340 of 1990, "activities the object or effect of which is the promotion of sales or supplies to Iraqi parties" indicated that the Regulation's determining factor was not the parties' intention, but the activity's objective capability to lead to the prohibited result. It followed that the subcontract between the parties was governed by those provisions and, therefore, affected by the embargo legislation.⁷³¹

5.94. It was further held that the forbidden activities towards Iraq, which originally could be considered temporary, should now be considered definitive, taking into account that it was impossible to foresee whether full normalization would be reached in the relationship with the Iraqi State.

5.95. In the final award, it was decided that the embargo must be upheld. In light of the broad wording of the prohibition and its mandatory character, the main contract between main contractor and the Iraqi customer could not be performed. The tribunal considered that the objective, absolute and definitive circumstances of the case rendered the contract between the parties unenforceable.

⁷³¹ The subcontract undoubtedly and univocally concerned the production of a part of the works for the plant to be built under the main contract, which was well known to and accepted by subcontractor. The prohibition based on the EC Regulation and national legislation did not allow performance under the subcontract, since the subcontract univocally aimed at the execution of the main contract's works, that is, had as its effect the promotion of supplies to Iraq.

(iii) the fight against terrorism

Rule S10: An agreement involving a terrorist activity is offensive to transnational public policy.

5.96. Transnational public policy will strongly condemn any agreement leading to a terrorist activity.⁷³² The ethos of the international community condemns any social or political change at the expense of human life. This proposition is illustrated by the proliferation of international legal instruments on the subject.⁷³³

5.97. The scarcity of case law and arbitral awards in this area is explained by the fact that terrorist activities are controlled by criminal law. In international arbitration the topic of terrorism is mostly relevant for the purposes of compensation, ascertaining the scope of a provision in an insurance contract and the effects of money laundering legislation.

5.98. One of the most salient hurdles in this area is the establishment of a working definition of terrorism. A comparative study⁷³⁴ shows that national laws will generally rely on an intention to commit a terrorist act, for instance,

⁷³² *Fouchard Gaillard Goldman*, at p 824; P. Lalive, "Transnational (or Truly International) Public Policy", *ICCA Congress Series No 3*, at p. 285; I. Paulsson, "Towards Minimum Standards of Enforcement: Feasibility of a Model Law", *ICCA Congress Series no 9*, at p. 582.

⁷³³ Consider, *e.g.*, the UN Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 26 January 1973; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 23 September 1971; Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988; Convention on Offences and Certain Other Acts Committed on Board Aircraft of 14 September 1963; Convention on the Marking of Plastic Explosives for the Purpose of Identification of 1 March 1991; Convention on the Physical Protection of Nuclear Material of 3 March 1980; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 14 December 1973; International Convention Against the Taking of Hostages of 18 December 1979; International Convention for the Suppression of Terrorist Bombings of 12 January 1998, all available at www.unodc.org.

⁷³⁴ See, *e.g.*, Australia, s.5 Terrorism Insurance Act 2003; France, Criminal Code Article L421-1; Hungary, Act No IV of 1978 on the Criminal Code, Section 261 (amendment for Acts of Terrorism of 1 March 2003); Spain, Criminal Code Art. 571; Turkey, Counter terrorism Act of 1991; England, Reinsurance (Acts of Terrorism) Act 1993; US, Terrorism Risk Insurance Act of 2002, Public Law 107-297. See also the OECD Check-List of Criteria to Define Terrorism for the Purpose of Compensation of 15 December 2004, available at www.oecd.org.

coerce or intimidate a government or the general public; by a certain category of people, that is, a terrorist organisation; the means used, such as an act or threat of violence; and its effects, namely harm to human life, tangible or intangible property or infrastructure.

5.99. The UN Convention for the Suppression of the Financing of Terrorism defines terrorism as an act falling within the scope of another UN convention dealing with terrorism or

any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.⁷³⁵

5.100. In the unlikely event that the dispute directly or indirectly involves such an act, the intervention of transnational public policy will bar the effects of the parties' agreement. The question remains as to whether the arbitrators themselves are under an obligation to inform the relevant authorities of apparent terrorist activities. The issue can only be resolved in light of the applicable criminal law and the duty to report such activities therein or, in its absence, the moral obligation owed by the arbitrators, as individuals, to the international community.

5.4. Conclusion

5.101. Arbitration tribunals apply the principles of substantive transnational public policy to control the effects of a national law or the contract. The principles expounded by tribunals pursue policy objectives essential to the protection of the global market and the legitimate expectations of the parties.

5.102. Cases involving the breach of international embargoes, destruction of cultural heritage and the environment, protection of the investor, corruption or

⁷³⁵ See Article 2(1)(b) of the UN Convention for the Suppression of the Financing of Terrorism of 25 February 2000 and the annex thereto, available at www.un.org.

fraud illustrate the role played by the superior interests of the international community in the resolution of the dispute.

CONCLUSIONS

- 6.2. The legal order of the international community⁷³⁶ has its own values and standards. Transnational public policy is a part of transnational law⁷³⁷ and applies regardless of a connection with a national legal system. The characteristics of transnational public policy are similar to those found in the traditional notion of public policy in national laws, with the exception that it has a different content and purpose.
- 6.3. An analysis of judicial decisions reveals that that content and purpose has been observed by national courts dealing with international arbitration awards under the guise of the public policy of the forum.⁷³⁸ Two conclusions can be drawn from those decisions. First, the public policy provision in Article V(2)(b) of the New York Convention has been understood by the national courts as international public policy. Second, the concepts of international and transnational public policy are synonymous.⁷³⁹
- 6.4. Given its bearing on the decision making process of arbitration tribunals, the thesis focused on the application of transnational public policy in international awards. It demonstrated that transnational public policy has a

⁷³⁶ For the characteristics of the transnational legal order see E. Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?", 17(1) *Arb Int* 59 - 72 (2001) at p. 65.

⁷³⁷ The expression was analysed in detail by P. Jessup, "Transnational Law", in *Storrs Lectures on Jurisprudence* (Yale University Press 1956).

⁷³⁸ See, e.g., England, House of Lords, *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 AC 883, 2002 WL 819941 (HL), [2002] 3 All E R 209, [2002] 2 WLR 1353, [2002] 1 All E R (Comm) 843 at paras 114 and 115; Switzerland, Tribunal Fédéral, 13 November 1998, *X SA et al v Z SA*, XXV YBCA 443 -534 (2000) at p. 513; Italy, Corte di Appello of Milan, December 1992, *Allsop Automatic Inc v Tecnoski snc*, 30 Rivista di diritto internazionale privato e processuale 873-874 (1994), XXII YBCA 725 - 726 (1997) at p. 726; Uruguay, Court of Appeal, 18 June 2003, *Enersis SA and Others v Pecom Energia SA and Others*, unpublished (original in Spanish); Canada, *Schreter v Gasmac Inc* (1992), 7 OR (3d) 608, 89 DLR (4th) 365.

⁷³⁹ The same can be said of the expressions supranational, truly international or genuinely international public policy. The researcher should however be wary of the use of the words 'international public policy' in judicial decisions. A national judge may use those words to protect interests which are exclusively national. Whereas the terminological ambiguity is mostly irrelevant, some national courts have emphasized that the New York Convention refers to the international public policy of a country, suggesting that its content may in theory be nationalized should the interests of the forum so require. In such an event, the 'international' public policy applied by the court is best described as 'domestic-international.' Decisions based on domestic-international public policy are however becoming increasingly rare. The need to distinguish the international public policy of a country from 'truly' international or transnational public policy will become obsolete should courts follow the current trend to address the interests of the international community under the international public policy of the forum.

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controlling function within the overall body of rules applied by the arbitrator, including therefore national⁷⁴⁰ and international law.⁷⁴¹ It showed also that transnational public policy is simultaneously a set of values and a method relied upon by the tribunal to uphold those values.

6.5. International arbitrators arrive at transnational public policy by observing the social function of that standard in the international community. The content of transnational public policy is determined in light of what the reasonable member of the international community, aware of the primary sources of transnational public policy and the circumstances of the case, would proclaim an essential value or interest in that community.⁷⁴²

6.6. Transnational public policy is drawn from primary sources and secondary sources. Secondary sources include national principles of law and public policy, regional conventions, mandatory provisions in national legislation and judicial decisions. Secondary sources rely on the comparative method and provide a common denominator but require a reference to a primary source of transnational public policy. The concerns of a wider transnational community are not necessarily found in national communities.

6.7. Primary sources include the principles of social or business ethics and morality found in guidelines, reports and resolutions of international organisations,⁷⁴³ natural law, trans-religious principles,⁷⁴⁴ the general principles of law mentioned in Article 38 of the Statute of the ICJ, the preamble of international conventions and certain provisions therein, *Ius*

⁷⁴⁰ See, e.g., ICSID Case No ARB/84/3, Award of 20 May 1992, *SPP (Middle East) Ltd v Egypt (SPP)*, XIX YBCA 51 (1994); ICSID, Case No ARB/82/1, Jurisdictional Decision of 1 August 1984, *Société Ouest-Africaine des Bétons Industriels v Senegal*, 6(1) ICSID Rev – IILJ 46-48 (1991); ICC award No 1110 of 15 January 1963, *Argentine Engineer v British Company*, 3 Arb Int 282-294 (1994); ICC Case No 5622, Award of 19 August 1988, *Y v X*, 2 Rev Arb 327 - 342 (1993); ICC Partial Award in Case No 8420 of 1996, XXV YBCA 328 - 340 (2000); ICC Case No 6248, Final Award of 1990, *Consultant v Contractor*, XIX YBCA 124 - 140 (1994).

⁷⁴¹ ICC Case No 6474 of 1992, Partial award on Jurisdiction and Admissibility, *Supplier (European country) v Republic of X*, XXV YBCA 279 - 310 (2000).

⁷⁴² For the process leading to universal values see B. Spinoza, *Ethics* (Wordsworth 2001).

⁷⁴³ See e.g., the publication section in www.worldbank.org, www.imf.org, www.wto.org, www.iccwbo.org, www.ibanet.org, www.ila-hq.org.

⁷⁴⁴ See, e.g., A. Wilson (ed.), *World Scripture – A Comparative Anthology of Sacred Texts* (Paragon House Publishers 1995); M. Eliade, "Patterns in Comparative Religion", III(1) *Archaeus* 175 - 207 (1999); B. Spinoza, "Tractatus Theologico-Politicus – Treatise on Religion and Politics", in R. Elwes, *The Chief Works of B. Spinoza* (George Bell and Sons, London 1883); S. Twiss, *Comparative Religious Ethics* (Westview Press 2000); C. Wei-hsun Fu and G. Spiegler, *Religious Issues and Interreligious Dialogues* (Greenwood Publishing Group 1989).

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Cogens, international custom and authoritative international awards. Only primary sources are strictly binding for the purposes of transnational public policy.

- 6.8. International arbitration tribunals have relied on transnational public policy to determine their jurisdiction, the rules governing the arbitral procedure and the merits of the dispute.
- 6.9. The jurisdiction of an arbitration tribunal is governed by autonomous principles, distinguished from domestic-international public policy. Those principles have a controlling function over national law, the parties and the members of the tribunal. As shown in ICC Case No. 10623⁷⁴⁵ and the *Deutsche Schachtbau (DST) v Rakoil*⁷⁴⁶ arbitration, the controlling functions of transnational public policy safeguard the autonomy of the arbitrator to decide its own jurisdiction.⁷⁴⁷ It flows from this principle, *e.g.*, that a party who has entered into an arbitration agreement may not rely on a change in the national law,⁷⁴⁸ immunity from suit,⁷⁴⁹ a unilateral repudiation of the contract or some other act of its own will⁷⁵⁰ to escape the effects of that agreement.

⁷⁴⁵ See ICC Case No 10623, Award of 7 December 2001, *S v State X*, 21(1) ASA Bull 82 – 111 (2003) at pp. 83 *et seq.* See also A. Crivellaro, “Note – Award of 7 December 2001 in Case No 10623”, 21(1) ASA Bull 60 – 81 (2003).

⁷⁴⁶ See ICC Case No 3572, Final Award of 1982, *Deutsche Schachtbau- und Tiefbohr GmbH v Rakoil*, XIV YBCA 111 – 121 (1989), at pp. 116 – 117, para 13.

⁷⁴⁷ See ICC Case No 3572, Final Award of 1982, *Deutsche Schachtbau- und Tiefbohr GmbH v Rakoil*, XIV YBCA 111 – 121 (1989), at pp. 116 – 117; ICC Case No 10623, Award of 7 December 2001, *S v State X*, 21(1) ASA Bull 82 – 111 (2003); ICSID Case No ARB/82/1, *Société Ouest-Africaine des Bétons Industriels v Senegal*, 6(1) ICSID Rev – FILJ 46-48 (1991); ICC Case No 3896 of 1982, *Framatome v Iranian Agency of Atomic Energy*, Clunet 58 (1984); ICC Case No 7263, Interim Award of 1994, *Ministry of Defence (Country X) v Contractor (US)*, XXII YBCA 92 – 106 (1997).

⁷⁴⁸ See ICSID Case No ARB/82/1, *Société Ouest-Africaine des Bétons Industriels v Senegal*, 6(1) ICSID Rev – FILJ 46-48 (1991) and the discussion in M. Hunter and G. Conde-e-Silva, “Transnational Public Policy and its Application in Investment Arbitrations”, 4(3) *JWI* 367 – 378 (2003). This holds true in relation to Constitutional law. See ICC Case No 7263, Interim Award of 1994, *Ministry of Defence (Country X) v Contractor (US)*, XXII YBCA 92 – 106 (1997) at p. 95, where the tribunal reached its conclusion “rightly based on general principles and specific rules concerning international arbitration relied upon by both parties.”

⁷⁴⁹ See K. Berger, *International Economic Arbitration* (Kluwer Law 1993), at p. 186.

⁷⁵⁰ This will extend to situations where a legal person attempts to rely on irregularities committed, by action or omission, by its own organs or representatives. See ICC Case No 3896 of 1982, *Framatome v Iranian Agency of Atomic Energy*, Clunet 58 (1984). And regardless of whether claimant or respondent alleges the lack of capacity. See ICC Case No 7263, Interim Award of 1994, *Ministry of Defence (Country X) v Contractor (US)*, XXII YBCA 92 – 106 (1997).

6.10. Jurisdictional transnational public policy confines however the arbitration tribunal to its mandate.⁷⁵¹ Given their position in the international dispute resolution process, arbitration tribunals must not refer any issue in dispute to a statute or national court,⁷⁵² the assistants to the tribunal,⁷⁵³ an expert in areas outside his expertise.⁷⁵⁴ It requires also that arbitration awards be given effect. Arbitration tribunals are bound by their own decisions⁷⁵⁵ and, absent a breach of public policy, international awards rendered by other arbitration tribunals.⁷⁵⁶

6.11. The scope of transnational public policy extends to the principles of due process and procedural good faith in arbitration proceedings.⁷⁵⁷ Procedural transnational public policy requires that each party must be treated equally and given an opportunity to present its case⁷⁵⁸ and deal with the case of its opponent.⁷⁵⁹ It entails also that the arbitrators must remain impartial in

⁷⁵¹ ICC Case No 7639, Final Award of 1994, *Sponsor v Contractor*, XXIII YBCA 66 - 79 (1998) at p. 75; ICC Case No 6268, Final Award of 18 May 1990, *Seller v Buyer*, XVI YBCA 119 - 126 (1991) at p. 126.

⁷⁵² See J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) at pp. 149 *et seq.*

⁷⁵³ See C. Partasides, "The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration", 18(2) *Arb Int* 147 - 164 (2002) at p. 147.

⁷⁵⁴ See Iran-US Chamber One Award No 314-24-1 in Case No 24, concerning the Statement of K. Ameli of 20 August 1987, available at *Iran-United States Claims Tribunal: Selected Awards*, at para 4.

⁷⁵⁵ See ICC Case No 3267, Final Award of 28 March 1984, XII YBCA 87 - 96 (1987). Yet, as noted in Ad hoc, Award of 5 February 1988, *Wintershall AG v Qatar*, XV YBCA 30 - 53 (1990) at para 85 the *res judicata* effect of a partial final award in no sense deprives the parties of the ability to agree to an interpretation of a partial award nor the clarification of a decision or the giving of a decision on points which an award has left undecided.

⁷⁵⁶ In arbitral practice parallel proceedings will often take place in multiparty, multicontract arbitrations. See B. Hanotiau, "Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues", 18(3) *J Int'l Arb* 253 - 360 (2001). Where the arbitrators decline to set an arbitration on foot on the grounds of *lis pendens*, national courts will be inclined to find the arbitration agreement inoperative or incapable of being performed in relation to that arbitration. See, e.g., England, *Fowler v Merrill Lynch* (1985) X YBCA 499 - 503 at p. 499 (QBD (Commercial Court), 10 June 1982).

⁷⁵⁷ See Chapter 4.

⁷⁵⁸ See ICSID, Annulment Proceedings of 28 January 2002, *Wena Hotels Limited v Arab Republic of Egypt*, 41 ILM 933 (2002).

⁷⁵⁹ See ICSID, Ad Hoc Committee Annulment Proceeding of 28 January 2002, *Wena Hotels Limited v Arab Republic of Egypt*, 41 ILM 933 (2002); ICC Case No 6268, Final Award of 18 May 1990, XVI YBCA 119 - 126 (1991) at p. 126. See also Ad hoc, Interim Award of 26 September 1999 and Final Award of 16 October 1999, *Himpurna California Energy Ltd v Republic of Indonesia*, 15 Mealey's IAR A-1 - A-20 and B-1 - B-20 (2000) and the interim order of the tribunal transcribed at para 60 of the award. See also, e.g., Geneva Chamber of Commerce and Industry Case No 130, Decision of 10 February 2000, *X v Y and others*, 18(2) ASA Bull 303 - 306 (2000) at p. 305; Iran-US Case No 46, Order of Chamber Three of 26 July 1991, *Ebrahimi v Iran*, XVII YBCA 382 - 388 (1992); ICC Case No 7047, Final Award of 1994, *Consultant v State agency and State owned bank*, 2 ASA Bull 301-357 (1995), XXI YBCA 79 - 98 (1996) at p. 82, para 6.

the arbitration⁷⁶⁰ and refrain from *ex parte* communications on issues relevant to the dispute. In turn, the parties have a general duty of good faith which precludes them, *e.g.*, from relying on fraudulent evidence in the arbitration proceedings.⁷⁶¹

- 6.12. The controlling functions of transnational public policy reach also to the substantive issues in dispute. Public policy requires international tribunals to recognise state sovereignty over national resources and the international responsibility of States, including governments and their political subdivisions,⁷⁶² towards, *e.g.*, the environment⁷⁶³ or foreign investors.⁷⁶⁴ The fundamental requirements of the international community entail also the invalidity of contracts based on corruption,⁷⁶⁵ requiring the illicit trafficking or

⁷⁶⁰ ICSID, Annulment Proceedings of 28 January 2002, *Wena Hotels Limited v Arab Republic of Egypt*, 41 ILM 933 (2002); CIETAC, Award of 14 July 1990, *Award on Dispute concerning Payment for Diesel-Engine Water-Pumps*, 38 CIETAC Awards 214-219 (1990) at p. 218. See also the Non-Waivable Red List in the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration 2003.

⁷⁶¹ See Iran-US Claims Tribunal Case No 164, Chamber Three Award No 570-164-3 of 15 May 1996, available at www.kluwerarbitration.com, *Iran-United States Claims Tribunal: Selected Awards*, at para 99 *et seq*; Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award No 33 of 30 September 1993, *Agent v Seller*, XXIII YBCA 113 – 127 (1998) at p. 124; Society of Maritime Arbitrators, Final Award No 2699 of 23 August 1990, *Trade & Transport, Inc v Valero Refining Co, Inc*, XVIII YBCA 124 – 134 (1993) at p. 127. The same general duty has led international tribunals to imply an international notion of estoppel in arbitration procedure. See, *e.g.*, Mexico-US Claims Commission, *Cuculla Case*, 3 Int Arb 2873 (1868); the *Salvador Commercial Co Arbitration*, USFR 838 (1902) at p. 866; Ad hoc, *United States v Great Britain*, 3 UNRIAA 1767 (1937) at p. 1790; Ad Hoc, Interim Award of 26 September 1999 and Final Award of 16 October 1999, *Himpurna California Energy Ltd v Republic of Indonesia*, 15 Mealey's IAR A-1 - A-20 and B-1 - B-20 (2000); ICSID Case 87/3, Award of 27 June 1990, *Asian Agricultural Products v Republic of Sri Lanka*, 6 ICSID Rev - FILJ 526 (1991).

⁷⁶² ICSID Case No ARB/97/3, Award of 21 November 2000, *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentina*, 40 ILM 457-473 (2001), XXVI YBCA 61 - 86 (2001).

⁷⁶³ See, *e.g.*, NAFTA, Decision of 28 November 1997 and Award of 24 June 1998, *Ethyl Corp v The Government of Canada*, 16(3) J Int'l Arb 149 - 150 (1999).

⁷⁶⁴ See ICSID, Award of 26 June 2003, *Loewen v United States*, 42(4) ILM 811(2003); ICSID, 29 May 2003, *Técnicas Medioambientales TECMED S A v Mexico*, 43(1) ILM 113 – 195 (2004); Ad hoc, Award of 30 June 1990, *Biloune v Ghana Investments Centre, Government of Ghana*, XIX YBCA 11 - 32 (1994), 95 I L R 183 (1993) at p. 211; Tribunal for Bank of International Settlements, Award of 22 November 2002, *Dr Horst Reineccius v Bank for International Settlements*, available at www.pca-cpa.org; ICSID, Award of 11 October 2002, *Mondev International Ltd v United States of America*, 2 ILM 85 (2003), 6 ICSID Rep 192 (2004), 125 ILR 110 (2004).

⁷⁶⁵ See ICC, Case No 5622, Award of 1988, *Broker v Contractor*, XIX YBCA 105 - 123 (1994) at p. 114, para 33; ICC Case No 2730, *Clunet* 914 (1984); ICC Case 3916, *Iranian party v Greek party*, *Clunet* 930 (1984); ICC Case No 3913, Award of 1981, *Clunet* 920 (1984), Collection of ICC Arbitral Awards 1974-85, at pp. 497, 562 with note Derains; ICC Case No 6248, Final Award of 1990, XIX YBCA 124 - 140 (1994) at p. 132. See also Germany, Supreme Court, 8 May 1985, *RIW* 653 (1985), *Clunet* 914 - 930 (1984).

sale of conventional weapons without an appropriate licence, atomic, biological and chemical weapons or their components, endangered species or non-medicinal drugs. Any practice amounting to fraud, piracy, counterfeiting, theft or smuggling is contrary to transnational public policy. Other examples include, *e.g.*, the respect for cultural heritage,⁷⁶⁶ international embargoes,⁷⁶⁷ competition, and the *prohibition of contracts* involving a terrorist activity.

6.13. The thesis clarified the distinction between national and transnational levels of public policy by exploring the meaning, functions and method of transnational public policy. It showed that the latter has a negative and a positive function within the body of rules applied the arbitrator and provided examples of those functions in arbitral practice.

6.14. The findings in this thesis can be taken in future to establish whether transnational public policy rules have been developed in other areas relevant to international arbitration. It is still unclear, *e.g.*, how transnational public policy principles may apply to the arbitrability of disputes, the liability of a parent company for the actions of its subsidiaries, the liability of parties to a consortium or joint venture, the granting of interim measures or the liability of principals and their agents. Those findings may also serve as the basis to an investigation into whether transnational public policy has influenced the enactment of national statutory laws.

6.15. The higher speculative regions of public policy generate sophisticated regimens which provide a profound encounter with the yardsticks that inform human culture. When we consider a broad sweep of legal history there are all kinds of answers to what constitutes the public policy of a legal system. Those answers have close ties with the cultural and socio-economic development of a community. The same is inevitably true with regard to transnational public policy.

6.16. Even though transnational public policy is severed from national laws, it draws from a model of society which allows both the respect of fundamental principles and cultural diversity. Specific principles, such as equality between

⁷⁶⁶ See ICSID Case No ARB/84/3, Award of 20 May 1992, *SPP (Middle East) Ltd v Egypt*, 32 ILM 933-1038 (1993), XIX YBCA 51 - 104 (1994).

⁷⁶⁷ See, *e.g.*, Chamber of National and International Arbitration of Milan, Award No 1491, 20 July 1992, *Subcontractor v Main Contractor*, XVIII YBCA 80 - 91 (1993).

the parties or the prohibition of smuggling or corruption, pervade the legal and social fundament of all communities.

6.17. Yet, whereas the protection of fundamental principles is a key metaphor in both the national and transnational legal system, the origin of those principles is more protean than it might appear at first glance. The history of human societies suggests not a fixed or given nature but rather a complex inheritance that is ramified from generation to generation. The expression 'public policy', identified with the basic yardsticks of a given culture, works just as well in the transnational context in pointing out that standards are given their character out of a complex of influences and inheritances. Those influences explain why the content of transnational public policy is often similar to the public policy of national legal systems. Yet, whilst domestic-international standards fracture the international community over time, transnational public policy allows for a conceptual uniformity in line with the integration of different legal systems in a wider community.

6.18. The thesis shows that the proclivity of public policy for analogical and correlative reasoning contrasts with the logical and propositional thinking in legal positivism. Such second-order thinking is based on an understanding of society with a priority of rest or substance over movement or process. Public policy moves in different directions. It is a form of correlative or analogical thinking serving as the basis for second-order analytical thinking.

6.19. The reason for setting up such a sharp contrast between causal and correlative thinking is to indicate that the manner the content of public policy is established is not always parallel to the desire to provide exhaustive formulae. It suggests however that a model or exemplary set of facts provokes a better metaphor that guides the parties' conduct than a broad definition of meaning and character. We learn the content of public policy by looking at prototypes of superlative behaviour.⁷⁶⁸ The key task of a decision-maker is to allow the content of public policy to speak for itself, to unfold its meaning as required in the circumstances.

⁷⁶⁸ The dependency on empirical research in the study of the public policy rules applied by international tribunals calls for a broader acceptance of the use of precedent in arbitration. See, e.g., K. Berger, "The International Arbitrators' Application of Precedents", 9(4) *J Int'l Arb* 5 (1992) at p. 5 *et seq.*

- 6.20. There is a distinct complexity to public policy, involving elements drawn from history, economics, sociology, legal tradition, politics, ethics and morality. This explains perhaps why the construction and application of public policy has always presented a problem to legal scholars. Public policy does never quite seem to fit with other methods of legal reasoning. Yet what the concept of public policy urges is not the necessity for speculation as to the current state of the law, but rather that the proper duty of the decision maker is to cultivate the parties so that a society permeated by conscionable behaviour can flourish.
- 6.21. As shown with regard to the primary sources of transnational public policy, the principles of public policy are instrumental to fundamental values. It is not possible for this reason to provide for an application of transnational public policy beyond specific facts. Other than that the principles of public policy are not absolute, strictly speaking. The scope of a principle of public policy is defined by other principles with the same standing.⁷⁶⁹
- 6.22. Concerns, e.g., with the proper administration of justice may lead the tribunal, on public policy grounds, to limit a party's opportunity to present its case.⁷⁷⁰ In different circumstances, due process may require that a party be given further time to submit its arguments or obtain relevant evidence.
- 6.23. Hypothetical cases illustrate also a similar relationship amongst the principles of substantive transnational public policy. It is clear, for instance, that the prohibition of corruption is an international evil and contrary to transnational public policy. Yet, what if a bribe is paid to ensure that a cultural asset is not permanently destroyed? In the same token, both international law and public policy require *that an international embargo must prevail over a contract in breach of that embargo*. Yet what if giving effect to that contract would save the lives of innocents?
- 6.24. The fact that the scope of a principle may be defined by other principles with the same standing should not lead to its exclusion from the

⁷⁶⁹ There is therefore a notion of proportionality in the application of public policy.

⁷⁷⁰ In other circumstances, those concerns are reconciled with the principle of equality or the tribunal's duty to decide. See, e.g., *Ad hoc*, Final Award of 4 May 1999, *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara*, 14 Mealey's IAR A-1 - A-58 (1999) at para 210. On this point see also M. Saville, "The Origin of the New English Arbitration Act 1996: Reconciling Speed with Justice in the Decision-making Process", 13(3) *Arb Int* 237 - 252 (1997).

notion of public policy. This conceptual necessity is in line with decided awards and implies a departure from a notion of public policy requiring the strict adherence to individual principles at all times. The latter construction would negate the controlling functions of public policy in relation to the content of public policy itself which would be, at the very least, a paradox. Transnational public policy is an expression of the values of the community it appertains and must be applied accordingly.

List of Transnational Public Policy Principles and Rules

<i>pacta sunt servanda</i> <i>ut res magis valeat quam pereat</i> <i>favor arbitrandum</i> <i>Kompetenz-Kompetenz</i> <i>non bis in idem</i> <i>res judicata</i> equality <i>audiatur et altera pars</i>	Impartiality good faith protection of international trade protection of competition integral reparation protection of the weaker party <i>fraus omnia corrumpit</i> international <i>estoppel</i>
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Jurisdiction

Rule J1: The arbitral tribunal has jurisdiction to determine its jurisdiction.

Rule J2: Lack of standing may not be invoked after the conclusion of a valid arbitration agreement.

Rule J3: An arbitration tribunal must follow its own judgment.

Rule J4: International awards in conformity with transnational public policy are binding on the parties.

Transnational Procedure

Rule P1: Parties must be treated with equality in the arbitration.

Rule P2: Each party shall be given an opportunity to present its case.

Rule P3: Each party shall be given an opportunity to deal with the case of its opponent.

Rule P4: Parties must have adequate notice of the relevant procedural steps in the arbitration.

Rule P5: Arbitrators must remain impartial throughout the proceedings.

Rule P6: The tribunal must not engage in *ex parte* communications on issues relevant to the dispute.

Rule P7: Parties must not submit fraudulent evidence in the proceedings.

Substance

Rule S1: Arbitration tribunals shall not give effect to an arrangement involving corruption.

Rule S2: Tribunals recognise state sovereignty over national resources and the responsibility of the parties towards sustainable development.

Rule S3: An act of expropriation must be accompanied by adequate compensation.

Rule S4: States are liable for the *ultra vires* acts of its officials or political subdivisions.

Rule S5: An agreement requiring the illicit trafficking of goods is null and void.

Rule S6: A party must not rely on fraud.

Rule S7: The arrangement must conform with transnational anti-trust or anti-competition standards.

Rule S8: An agreement detrimental to the protection of cultural heritage is null and void.

Rule S9: Effect must be given to an international embargo.

Rule S10: An agreement involving a terrorist activity is offensive to transnational public policy.

Claire

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