PUBLIC POLICY AS A LIMIT TO THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: SEEKING COUNTERPOISE BETWEEN PUBLIC INTERESTS AND ARBITRAL AUTONOMY

Diana LAZAR*

"... a very unruly horse, and when once you get astride it you never know where it will carry you."[1]

POLITICA DE STAT CA LIMITĂ A EXECUTĂRII DECIZIILOR ARBITRALE DIN STRĂINĂTATE: STABILIREA UNUI ECHILIBRU ÎNTRE INTERESELE STATALE ŞI AUTONOMIA ARBITRALĂ

Arbitrajul comercial internațional este considerat astăzi ca fiind procedura obişnuită pentru soluționarea disputelor comerciale internaționale, reprezentând o alternativă la sistemul judecătoresc de stat. Arbitrajul oferă numeroase avantaje: acordă părților controlul şi o largă autonomie asupra procesului, flexibilitate, confidențialitate, posibilitatea de a alege arbitrii, iar o sentință arbitrală străină este, de obicei, mai uşor recunoscută şi executată decât o hotărâre judecătorească străină, datorită Convenției de la New York din 1958. Însă, oricât de liberală şi favorabilă ar fi astăzi voința statelor în privința arbitrajului, acestea impun, în virtutea suveranității lor, o importantă limită – respectarea ordinii publice.

Ordinea publică intervine, de obicei, pentru a proteja un interes public, dar când, cum şi în ce condiții aceste intervenții pot fi permise ? Care sunt acele interese publice pentru care este necesară protecție ?

Este imperioasa necesitatea clarificării acestor probleme, în scopul de a acorda mai multă certitudine şi previzibilitate arbitrajului comercial internațional, dar şi participanților acestuia, care sunt în căutarea justiției.

Problema ordinii publice ca obstacol la recunoaşterea şi executare sentințelor arbitrale străine constituie un subiect puțin studiat în doctrina națională, prezentând, însă, un interes sporit atât pentru avocați şi judecători, în practica dreptului, cât şi pentru profesori şi studenții lor în procesul de studiu şi a cercetării juridice.

Această cercetare îşi propune studierea conceptului de ordine publică în arbitrajul comercial internațional şi aplicarea acestuia ca temei pentru refuzul recunoaşterii şi executării sentințelor arbitrale străine.

ГОСУДАРСТВЕННАЯ ПОЛИТИКА КАК ПРЕДЕЛ ПРИВЕДЕНИЯ В ИСПОЛНЕНИЕ ИНОСТРАННЫХ АРБИТРАЖНЫХ РЕШЕНИЙ: ПОИСК ПРОТИВОВЕСА МЕЖДУ ГОСУДАРСТВЕННЫМИ ИНТЕРЕСАМИ И АРБИТРАЖНОЙ АВТОНОМИЕЙ

Международный коммерческий арбитраж (МКА) по праву считается одним из наиболее эффективных и широко применяемых механизмов разрешения международных коммерческих споров и представляет собой альтернативу национальному судебному процессу.

Характерными преимуществами МКА являются: значительная по сравнению с судебным процессом автономия сторон в принятии решений, гибкость процедуры и её конфиденциальность, возможность избрания арбитров, и что немало важно арбитражное решение международного органа пользуется большим доверием и легче признаётся, чем решение иностранного суда.

Однако каким бы либеральным ни было отношение государств к арбитражу сегодня, они всё же устанавливают одно важнейшее требование, исходящее из принципа суверенитета: непротиворечие публичному порядку государства. Соблюдение данного принципа является фундаментальным для признания и исполнения арбитражного решения в том или ином государстве. Возникает ряд закономерных вопросов: какие общественные интересы оберегаются государством и при каких обстоятельствах допускается вмешательство со стороны государственных органов?

Ответы на эти, а также другие вопросы позволят прояснить моменты, вызывающие трудности и непонимание у заинтересованных участников.

К сожалению, принцип непротиворечия публичному порядку государства не является достаточно изученным в рамках национальной доктрины и представляет особый интерес как для практиков (юристы, арбитры), так и для теоретиков (преподаватели и студенты).

* ***Diana LAZAR*** **-** doctorand.

Данная работа являет собой попытку проанализировать концепции непротиворечия публичному порядку государства и практики её применения в рамках международного коммерческого арбитража.

International commercial arbitration has had a globalizing impact on the law, being a direct effect of the globalizing trade and commercial relations, and becoming today the norm for dispute resolution in most international commercial transactions.

Thus, arbitration gives the parties substantial control and wide autonomy other the process, moreover, the flexibility, the confidentiality and the opportunity to select the arbitrators make this private system of adjudication particularly attractive. Furthermore, a foreign arbitral award is more easily to enforce, due to the success of international Conventions.

A trend toward delocalization of arbitral law has been underway for the last 50 years, starting with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). This shift has increased the focus on *public policy* as a potential means of control by national courts over international arbitration. The States attitude to arbitration, as liberal as it may be today, imposes by virtue of its sovereign power, one important boundary, the respect of the public policy, this being the ultimate limit to the autonomy of the international arbitration.[2]

Public policy, by its nature, is a dynamic concept that evolves continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions[3]. Public policy mediates between the interests of transnational business and those of the State with the closest connection to the contract.

As modern and predictable the attitude of national courts at the enforcement stage may be, and as evidenced by a narrow view of the public policy defence are the doctrinal developments such as: the competence-competence principle, the severability of the arbitration agreement, the arbitral jurisdiction to deal with interim relief and other precautionary measures, complex questions are raised about the interaction between public policy and international commercial arbitration. There is a call for recognition that the liberalization of arbitrable subject matter "comes necessarily at the price of some increase in judicial *ex post* control of the compatibility of the arbitrators' product with public policy." From time to time it is appropriate to revisit the question of public policy as a bar to enforcement of international arbitration awards.[4]

Judicial recognition and enforcement of an arbitral award is necessary when one of the parties to arbitration fails to execute voluntarily the award. In this situation, parties leave the "private sphere" of arbitration and turn to the public courts where one party seeks the coercive power to enforce the award, and the other may request to resist enforcement.[5] The public policy usually intervenes to defend a public interest but when and how these interventions are permitted? This is a crucial question that needs to be clarified in order to give more certainty to the international commercial arbitration and to its participants that need to find justice.

Before studying the application of the public policy limit to arbitral awards, the concept of the public policy should be revealed.

1. The Concepts of Public Policy

▪ Introduction

Public policy is of vital importance – it is the judicial benchmark for the protection of the public interest.[6]

Public policy is a functional concept; therefore it is particularly difficult to give a uniform definition of it[7]. The public policy is more than a law provision; it is an ongoing process, a complex concept and it isn't a specific fixed notion.

Early in 1853, the House of Lords of England explained that by public policy is understood a "prin-

[1] Burrough J. in *Richardson v Mellish* (1824) 2 Bing. 229 at 252.

[2] This idea is illustrated in the English Arbitration Act of the 17th June 1996, art.1 b): "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest". The same principle is maintained in the most national legislations and international arbitration treaties. Also: B.Goldman, "*Frontières du droit et lex mercatoria*" in Arch. phil. droit 1964, p.177.

[3] Loukas Mistelis, *"Keeping the unruly horse in control, or Public Policy as a bar to enforcement of arbitral awards"*, 2 International Law Forum du Droit International, 2000, p. 248, 252.

[4] Gabrielle Kaufmann-Kohler, "*Enforcement of Awards—A Few Introductory Thoughts"*, New Horizons in International Commercial Arbitration and Beyond, International Council for Commercial Arbitration Series No.. 12, Albert Jan van den Berg ed., 2005, p. 287, 287.

[5] Julian D.M. Lew, Loukas A.Mistelis, Stefan M. Kröl, "*Comparative International Commercial Arbitration*", Kluwer Law International, 2003, p.689.

[6] For this research only the public policy in sense of private law should be considered, the public policy of public law being synonym to the public security and has a specific regime.

[7] P.Lagarde, "*Recherches sur l'ordre public en droit international privé",* LGDJ, 1959, n°151, p.177. ; Megerlin, Francis, "*Ordre public transnational et arbitrage international de droit privé"*, critical essay on the methodology, 2002, p. 8.

ciple which does not permit the doing of anything that could harm the basic principles of any society".[8]

Chershire and North state that intervention on the basis of public policy is justified by reference to such "moral, social or economic principles" which are regarded as being "so sacrosanct" that they must be protected at all costs and without exception.[9]

For the international private law the public policy is, on the one hand, a reaction to the foreign laws which are contrary to the "*ius naturale principles*"[10], on the other hand, public policy appeals to the principles forming the "politic and social foundation" of the specific society civilization[11] or to the "principles of preserving certain legislative policies".[12]

In civil law systems references to good faith and good morals, as well as to public policy (*ordre public*) as a bar to parties' freedom are incorporated in codes.[13] In common law references to public policy are mainly included in judicial practice, but also in legal documents.[14]

In his famous decision in the case of «*Parsons End Whittemor*», in 1974, U.S. judge Joseph Smith ruled that a foreign arbitral award may be refused on grounds of public policy «only if the award violates the most basic principles of justice and morality ».[15]

The interpretation of the public policy adopted by the German courts is also based on a narrow interpretation of its limitations of the fundamental principles of justice: «there is violation of the foundations of German public policy with regard to foreign arbitral awards only in cases where the award is contrary to the principles that underpin the public or commercial life of Germany, as well as in cases where it is contrary to the fundamental notions of justice. In this context, the violation by the arbitrator of a rule of substantive law is not sufficient for the application of the clause on public policy by Courts».[16]

The Supreme Court of the Russian Federation explains that "the public policy of the Russian Federation' should be understood as basics of a social policy of Russian state" and this rule "can be applied only in those individual cases when application of the foreign law might cause a result inadmissible from the point of view of the Russian conscience".[17]

There have been expressed frequently that the "public policy" as understood in Common Law jurisdictions might not cover all cases of procedural injustice[18], highlighting therefore the differences between the Common Law concept of public policy and the Civil Law concept of *ordre public*, which includes certainly breaches of procedural justice. However, nowadays the "public policy" term is understood more in the sense of the French *"ordre public"* than in the restricted Common Law sense,[19] these two terms being generally used today as synonyms.

Prior the studying the public policy concept it is especially important to mention that, in view of all its varying factors, public policy has been receiving rather different denominations and interpretations in the major jurisdictions by their courts and authors.

- **Definitions of public policy**

Just to mention a few definitions, besides the term public policy, we find denominations such as *ordre public*, *lois de police*, and furthermore the distinction between domestic, international, transnational and truly international public policy. All of these concepts, of course, also receive their own distinctive interpretations which are to be distinguished.

[8] Egerton- v- Brownlow (1853) 4HLC1, cited by Audley Sheapard, « *Interim report on Public Policy as a bar to Enforcement of International Arbitral Awards* », 2000, p.3. Available at: www.ila-hq.org

[9] Cheshire and North, *« Private International Law* »,London: Butterworths, 13th Edition, p.123.

[10] P.Lerebours-Pigeonnière, « *Précis de droit international privé* », 4° éd., Paris, 1937, n°269.

[11] V.Y. Loussouarn et P.Bourel, *« Droit international privé* », Dalloz, 2007, p.291.

[12] V.H.Batiffol and P.Lagarde, *« Traité de droit international privé* », LGDJ, 1993, n° 363, p.585.

[13] Article 6 of the French Code Civil provides that parties may not, by private convention, derogate from laws which concern public order and good morals. The article §138 of the German Civil Cove (*Bürgerliches Gesetzbuch* – "BGB") provides that a legal transaction which offends good moral is void. Article 1193 Russian Civil Code refers to the "basics of law and order (public policy)" The article 9 of the Civil Code of Republic of Moldova provides that physical and legal persons should exercise their rights and obligations faithfully, in according to the law, the contract and the public policy("ordinea publica") and the good morals. The article 220(2) of the Moldavian Civil Code refers that the legal act contrary to the public policy or good morals are void.

[14] § 178(1) Chapter 8 of the Restatement of the Law, Second, Contracts of the United States of America sets out the basis on which contractual terms are unenforceable on the grounds of public policy: "A promise or other terms of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms".

[15] 508 F.2 d969 (2nd Cir.1974).

[16] BGH. 1990 – III ZR 174/89. NJW 1990. P.3210.

[17] The Decree of the Presidium of the Supreme Court of the Russian Federation of 25 September 1998, Bulletin of the Supreme Court of the Russian Federation, n°3, 1999, p.13.

[18] Aron Broches, "*Commentary on the UNCITRAL Model Law on International Commercial Arbitration*", Kluwer, 1990, p.191.

[19] "*Comparative Arbitration Practice and Public Policy in Arbitration*", ICCA Congress Series No.3, Kluwer, 1987, p.179.

Public policy, the common term, is used meaning the moral, social and/or economic considerations which are applied by courts as grounds for refusing enforcement of an arbitral award.

International public policy is used to designate the body of principles and rules recognized by a State, which by their nature may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of the said award would entail their violation on account either of the procedure pursuant to which it was rendered(procedural international public policy) or to its contents (substantive international public policy).[20]

International public policy is a French conception of public policy when referring to international arbitration.[21] When commenting the French approach, Fouchard, Gaillard and Goldman note: "the international public policy to which Article 1502.5 refers can only mean French conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the French legal order, even in international cases".[22]

It is understood to be narrower than domestic public policy: not every rule of law belonging to the internal public policy is necessarily part of the external or international public policy.[23]

The International Law Association recommended in its "Final Report on public policy as a bar to the recognition and enforcement of international arbitral awards"(ILA Final Report) of 2002[24] that an international arbitral award can be set aside if it is contrary to the "international public policy". This term is to be understood, after the ILA Final Report in the sense given in private international law.

If the "international public policy" is specific and subjective to each State, there is another term, which shall not be confused with the former: "transnational or truly international public policy" – being a "supranational public policy".

Transnational or truly international public policy means those 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 "civilised nations".[25]

Today, in regard to the European Union law and jurisprudence of the European Court of Justice, there may be proposed a new term, the "multinational public policy", which may be interpreted as the public policy of a community of nations that prevails over the national public policies of those nations within that community.

In its first decision on the "European public policy", as a ground for refusing arbitral awards, the European Court of Justice in *Eco Swiss China Time Ltd v Benetton International NV* case [26] confirmed that the national courts of the European Union member States should allow a claim for annulment on the ground of non-compliance with article 81 of the Treaty Establishing the European Community[27]. Accordingly to the European Court of Justice, the article 81, which is a provision against anti-competition, "may be regarded as a matter of public policy within the meaning of the New York Convention" because of its mandatory and fundamental nature.

The public policy is used when recognition and enforcement of the arbitral award would entail their violation on account either of the procedure pursuant to which it was rendered - procedural public policy or of its contents - substantive public policy. Therefore, public policy includes both: procedural and substantive aspects.

Though there is no precise definition of public policy, it is an accepted norm that states have the ultimate right to refuse to enforce an arbitral award on grounds of public policy.

- **National legislation provisions on public policy**

The terminology used in referring to public policy in national legislation varies considerably, from "public policy" to "ordre public"[28] or expressly stipu-

[20] Recommendation 1(c), the International Law Association "*Final Report on public policy as a bar to the recognition and enforcement of international arbitral awards*", New Delhi Conference, 2002; available at www.ila-hq.org.

[21] The dichotomy between national and international public policy was delivered by jurisprudence and doctrine. The international public policy was referred to in the French Code of civil procedure after important amendments of 1981.

[22] Ph.Fouchard, E.Gaillard, B.Goldman, "*On International Commercial Arbitration*", Kluwer, 1999, par.1648.

[23] Albert Jan van den Berg, *"Distinction Domestic-International Public Policy*", XXI Yearbook, 1996, p.502.

[24] Available at www.ila-hq.org, reproduced also in Yearbook XXIX(2004), p.346-348.

[25] *see :* Bertold Goldman, *"Les conflicts des lois dans l'arbitrage international de droit privé*", Recueil des Cours, 1963, p. 352 ; P.Lalive, "*Ordre public transnational(ou réellement international) et l'arbitrage commercial international*", Rév.arb., 1986, n°83, p. 323, 361 ; Jean-Baptiste Racine, "*L'Arbitrage commercial international et l'ordre public*", LGDJ, 1999, p.355.

[26] Eco Swiss China Time Ltd v Benetton International NV [2000] 5 CMLR 816.

[27] Treaty Establishing the European Community 1957 (Rome, 25 March 1957).

[28] The two terms "*ordre public*" and "public policy" have the same function - either prohibit the application of or give the court discretion to refuse to apply a foreign legal act. Even if the two terms have slightly different interpretation, in this paper the term "public

lating "international public policy", etc. The legislation of a number of countries refers simply to "public policy".[29]

Most countries, however, refer to public policy of "Country X"("that country", "the country"), which is the wording of the New York Convention and the United Nations Commission on International Trade Law Model Law on the international commercial arbitration (UNCITRAL Model Law).

The enforcement legislation in France, Portugal, Algeria and Lebanon makes reference to "the principles of international public policy", or to "the international public policy".

Some countries such as Japan[30]; Libya[31]; Oman[32]; Qatar[33]; and The United Arab Emirates[34] refer to public policy (or public order) and good morals. Yemen makes reference to public order and the Moslem *Shari'a*.[35] Vietnamese legislation requires that the award should not be contrary to the "basic principles of Vietnamese legislation".

A number of countries, China for example, do not refer to public policy *per se*, and provide that enforcement of a foreign award should being refused if it goes against "social and public interest".

Australia (in 1989) and New Zealand (in 1996) have both enacted modified versions of the UNCITRAL Model Law[36]. The Australian legislation refers simply to "public policy"[37] while the New Zealand legislation refers to the "public policy of New Zealand".[38] Unusually, both enactments go on to provide that "for the avoidance of doubt" and "without limiting the generality" of Articles 34 and 36 (of the Model Law), an award is contrary to the public policy of Australia/New Zealand if:

"(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred …».

Thus, these two countries have included in their legislation the UNCITRAL Commission's "understanding" of the meaning of public policy.

Even if the majority of states adopted a narrow and pro-enforcement approach to the recognition and enforcement of foreign arbitral awards[39], the public policy bar remains a legal provision that is not explained by legislations.

- **International conventions provisions on public policy**

The main international treaty on enforcement arbitral awards is, of course, the New York Convention on recognition and enforcement of foreign arbitral awards of 1958[40]. Article V.2(b) states:

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

policy" shall be used as a common term. The Chairman of the Travaux preparatoires UNCITRAL Model Law on Commercial Arbitration said that "public policy" was a translation of the French term "ordre public" and meant the fundamental principles of law." (discussing Art. 34.2) UNCITRAL Model Law on Commercial Arbitration, Travaux Préparatoires, 318 Meeting. http://www.uncitral.org/pdf/english/travaux/arbitration/mlarb/318meeting-e.pdf

See also : Catherine Kessedjian, *"Public Order in European Law*", 1 Erasmus Law Review 25, 26 (2007); Roel de Lange, *"The European Public Order, Constitutional Principles And Fundamental Rights*", 1 Erasmus Law Review 3, 8, (2007) (on difficulties in translating and comparing the concepts of ordre public, public order, public policy).

[29] The art.9, 220(2)Civil Code of the Republic of Moldova of 2002, the art.486(2) of the Code of civil procedure of the Republic of Moldova of 2002, the Law on the International Commercial Arbitration of the Republic of Moldova of 2008, the Law on the International Commercial Arbitration of the Russian Federation of 1993, the Law on the International Commercial Arbitration of the Ukraine of 1994, the Law on the International Commercial Arbitration of the Bulgaria of 1988, art.190 al.2 of the Law on international private law of Switzerland; other states that incorporated in national law the UNCITRAL Model Law on international commercial arbitration.

[30] The article 118(3) of the Code of Civil procedure of 1996 of Japan refers to a foreign judgement not being contrary to " the public order or good morals in Japan".

[31] Article 407(4) of the Code of Civil and Commercial procedure of Libya.

[32] Article 53 of the Arbitration Act of 1997 of Oman.

[33] Article 380(4) of the Code of Civil and Commercial Procedure of Quatar.

[34] Article 235(vi) of the Code of Civil Procedure of 1992 of the United Arab Emirates.

[35] Article 285 of the Code of Civil Procedure of Yemen.

[36] The Law on the International Commercial Arbitration of the Republic of Moldova of 2008 reproduces the text of the UNCITRAL Model Law on international commercial arbitration of 1985, but does not give any explanation of the "public policy" limit to the recognition and enforcement of foreign arbitral awards.

[37] Section 8(7)(b)of the International Arbitration Act of 1974 of Australia.

[38] Article 36(1) (b)(ii) of the Arbitration Act of 1996 of New Zealand.

[39] According to Global Legal Group, *"International Comparative Legal Guide to International Arbitration"*, 2004, the majority of the commentators conclude that their countries have adopted a narrow and pro-enforcement approach to the enforcement of arbitral awards. These states include : Australia, Canada, England, France, Germany, Malaysia, Sweden, Switzerland, United States of America.

[40] The New York Convention has been ratified by 144 states and contributed essentially to the uniformity of rules for enforcement of foreign arbitral awards.

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

Even if the drafters of the New York Convention did not seek overtly to attempt to harmonize public policy by establishing an international standard[41], the Convention refers to the "public policy of that country".

It is noted in the Committee's report that it intended to limit the application of the public policy provision to cases in which recognition and enforcement of the award would be "distinctly contrary to the basic principles of the legal system of the country where the award is invoked". In this context, it must be realized that art.V.2 of the Convention reduces the application of the public policy in two ways: firstly, in the introductory sentence, by the word "may", permits, but does not mandate refusal and thus gives the court discretion in this regard[42]; and secondly, the paragraph (b) requires that not only the award, but the recognition and enforcement itself would be contrary to public policy.

Public policy exception is referred to in most other enforcement conventions. The 1927 Geneva Convention on enforcement of foreign arbitral awards stated that an award would be enforceable unless "contrary to the public policy to the principles of the law the country in which it is sought to be relied upon"[43].The 1975 Inter-american Panama Convention on international commercial arbitration makes reference to the "public policy of that State".[44] The 1979 Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards requires that the award be "manifestly contrary to the principles and laws of the public policy of the Exequatur State".[45] While the 1983 Riyadh Convention for judicial cooperation stipulates that enforcement may be refused if the award is "contrary to the Moslem Shari'a, public policy and good morals"[46], the 1987 Amman Convention on commercial arbitration refers simply to the "public policy"[47] of the state where the enforcement is sought.

The 1965 Washington Convention on the Settlement of Investment Disputes between the States and Nationals of other States (ICSID) doesn't refer to the "public policy". Even if it provides grounds for annulment of the award, grounds that usually are included in public policy concept, it was stated that "public policy (international or otherwise) was not an issue that the judge should consider when dealing with enforcement of ICSID awards".[48]

The European Convention on International Commercial Arbitration of 1961 does not deal with the recognition and enforcement of awards, leaving this to be dealt by other treaties, including the New-York Convention, to which the European Convention is a supplement.

The UNCITRAL Model Law on international commercial arbitration of 1985 includes "public policy" as a ground for refusing arbitral awards[49], in essence reflecting the New-York Convention. It doesn't, however, define "public policy".

The OHADA[50] 1999 Uniform Arbitration Law provides in article 31 that an arbitral award shall be refused if the "award is manifestly contrary to a rule of international public policy of the member State". This is the first attempt to harmonise public policy concept, by giving the more specific notion of "international public policy".

The study of the public policy law provisions shows that the legislatures and courts are, understandably, reluctant to define public policy exhaustively, [51]given the 'great diversity in the vocabulary and ambiguities' when defining "public policy"[52].

Nor the New York Convention doesn't provide any guidance on the interpretation of public policy. Therefore, the UNCITRAL Secretariat has recommended

[41] The Report of the Committee on the enforcement of international arbitral awards, 28 March 1955, UN Doc. E/AC.42/4/Rev.1.
[42] Albert Jan van den Berg, « *An overview of the New York Convention of 1958*", International Council for Commercial Arbitration, 13-14, 6 June 2008, www.arbitration-icca.org/
[43] Article 1(e) of the Geneva Convention on enforcement of foreign arbitral awards of 1927.
[44] Article 5(2)(b) of the Inter-american Panama Convention.
[45] Article 2(h) of the Montevideo Inter-American Convention.
[46] Article 37 of the Riyadh Convention was supposed to replace the 1952 Convention of the Arab League, but did not enter in force because haven't been ratified of the required number of States. The "Moslem Shari'a" wasn't stipulated by the earlier 1952 Convention.
[47] The Amman Convention hasn't entered into force.
[48] Cass.Civ.1ère, translated in 30 ILM 1167, Carias-Borjas, "*The Decision of French Cour de Cassation in SOABI-v-Senega*l", 1991, 2 America, Review of International Arbitration, 354.
[49] Article 36 of the 1985 UNCITRAL Model Law.
[50] "*L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires*", created by the Treaty relating to the Harmonisation of Laws of Africa of 17 October 1993.
[51] In *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co and ShellInternational Co Ltd* [1987] 2 Lloyd's Rep 246, Donaldson MR in the English Court of Appeal said thatconsiderations of public policy 'can never be exhaustively defined, but they should be approached withextreme caution'.
[52] Pierre Lalive, *"Transnational (or Truly International) Public Policy and International Arbitration*", in Pieter Sanders (ed), Comparative Arbitration Practice and Public Policy in Arbitration, 1987, p.260.

further study on how the Convention countries interpret the public policy exception.[53]

These vague national law provisions and the variety of terms and interpretations indicate the relativity of the very concept of public policy.

- **The relativity of the public policy concept**

First of all, public policy has a relativity character[54] and is dependent on the judgment of the respective legal community. The public policy of one state may not be seen as a fundamental standard in another state with a different economic, political, religious or social, and therefore, legal system.

A second relativity is introduced by the time factor. The values and standards of communities are not stable, they change and develop. So public policy it is derived there from.

Although sometimes concepts of public policy were widened leading to greater restrictions in arbitrability in certain countries, the general trend is clearly that public policy limits to international arbitration have been reduced considerably.[55] In the modern practice of courts and arbitral tribunals from western countries public policy does not seem to be a major obstacle to international arbitration. At least, that can be said for international as distinct from national arbitration and mainly for the western countries where arbitration has a long standing use.

In the context of international commercial arbitration the question of public policy raises at the final stage of the arbitral procedure: the recognition and enforcement of the arbitral award, as a last resort against the application of agreements, rules and awards which otherwise would have to be respected, its abstract role is indeed a fundamental one from the viewpoint of the respective legal system.

2. Application of the public policy concept as a bar to the recognition and enforcement of foreign arbitral awards

Even if the national legislation have specific provision considering public policy as a limit to the enforcement of international awards, the New York Convention serve as an international instrument that contributed to the harmonisation of the enforcement procedure for foreign arbitral awards.

- **The New York Convention – an important instrument for application of public policy at the stage of recognition and enforcement of international arbitral awards**

In light of the article V(2) of the Convention a court may refuse enforcement of an award on its own motion if it finds that the subject matter of the difference is not capable of settlement by arbitration under its country's law(a) or enforcement would be contrary to its country's public policy(b). The division between these two grounds for refusal of the foreign award: lack of arbitrability and public policy is considered by some famous specialist as "superfluous as the question of non-arbitrable subject matter is deemed to form part of the general concept of public policy".[56] Other specialists agree with the distinction. Thus, although rules limiting arbitrability will always be meant as mandatory rules not subject to change by parties' autonomy, it is important to note, that mandatory rules are not necessarily identical with public policy rules.[57]

Nevertheless, even if the reason why article V(2)a) figures as a separate ground is historical, this research will consider and will focus on the public policy meant by (b) paragraph. In reality, art.V(2)b) appears to be a provision of residual application of those cases not covered by the other provisions of the New York Convention.[58] It is considered that it takes a "pedestrian lawyer to fail to find some basis for invoking public policy in most moderately complex commercial disputes".[59] Though, even if in practice it has been interpreted "exceedingly narrowly", public policy "appears to open an exception broad enough to swallow the New York Convention itself".[60] In reality, however, the public policy provision of article V(2)(b) co-exists with the other provisions of the Convention.

For the party seeking to resist enforcement, article V of the Convention provides seven grounds for

[53] "*Interim Report on the Survey relating to the Legislative Implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Note by the Secretariat"*,
UN GA, 38th session, UN Doc A/CN.9/585 (23 May 2005) par.61.
[54] Violeta Cojocaru, "*Recunoasterea si executarea hotarîrilor judecatoresti straine in materie civila in Republica Moldova"*, Chisinau, 2007, p.105.
[55] Karl-Heinz Böckstiegel, "*Public policy as a limit to arbitration and its enforcement", IBA Journal of Dispute Resolution,* "The New York Convention – 50 years", Special Issue 2008, p.124.
[56] Albert Jan van den Berg, *"The New York Convention of 1958. Towards a uniform judicial interpretation*", Kluwer Law International, 1981, p.368.
[57] Karl-Heinz Böckstiegel, *supra note 48*, p.123.
[58] *Idem*, p.376.
[59] Gary B. Born, *"International Commercial Arbitration",* Hotei Publishing; 2 edition, 2001, p.559, 565.
[60] Catherine Rogers, "*The arrival of the "Have-Nots" in international arbitration*", 8 Nev. L.J. 341,2007, p.370

which recognition and enforcement of foreign arbitral awards *may* be refused. The public policy ground *may* be accepted if the court finds that "the recognition and enforcement of the award would be contrary to the public policy of that country". "That country" is to be the forum of enforcement. While some commentators sustain that in article V(2)(b) is referred to "the public policy" in its common sense[61], other consider that the New York Convention refers to the international public policy and not the internal one[62].

The state courts *may* refuse an award *ex officio*, but aren't required to.

- **The public policy bar should be interpreted narrowly and applied exceptionally**

The starting point in considering application of public policy is that the test for refusing enforcement of foreign arbitral awards should be that of "international public policy",[63] this being a narrow concept of public policy.

Even if "the public policy" referred to in the New-York Convention is the public policy of the enforcement state, it is to be understood as the international public policy of the enforcement state. In cases falling under the New-York Convention, the distinction is gaining acceptance by courts. They apply it to both the question of arbitrability (ground a of Art.V(2)) and other cases of public policy (ground b of Art.V(2)).[64]

There are still exceptions to this practice. In a 1983 case the Austrian Supreme Court refused the enforcement of a Dutch award because it violated Austrian public policy(the prohibition of purchases on a margin basis). It held that Art.V2)b) of the New-York Convention doesn't contemplate a distinction between domestic and international public policy. [65] Another case doubting the narrow interpretation of Art.V(2) was decided by the High Court in Delhi, which said that it was not impressed by the argument making a distinction between domestic and international public policy. [66]

The practice of the courts of ex-sovietic countries shows inconsistencies when applying the public policy concept for refusal of enforcement of awards. Even if the majority opinion is that public policy should be interpreted narrowly[67], some experts offer a wider interpretation.[68] For example, the application of an arbitral award regarding a city-forming enterprise should be refused exequatur since the consequence of such enforcement may result in unemployment ad bankruptcy of the whole city.[69] In practice, there are number of judgements of the Russian courts confirming this interpretation.

The majority of courts of European Civil law countries courts apply international public policy, while courts of Common Law countries apply public policy restrictively.

- **The exceptional character of the substantive public policy and the pro-enforcement principle**

All modern arbitration laws provide, and beyond, there is general agreement that it is a fundamental principle of commercial arbitration that its substantive decisions are not subject to appeal before courts. Thus, claiming that arbitral tribunal misinterpreted the facts of the applicable law is no ground for refusal of enforcement. One of the advantages of arbitration is that the case be decided by a final and binding decision of the arbitrators.

In one case, the Presidium of the Supreme Court of the Russian Federation stated that the court "is not entitled to check lawfulness and reasonableness" of the award itself. "It does not matter whether the applied norms of the foreign substantive law correspond

---

[61] Matthieu de Boisseson, "*Le droit de l'arbitrage interne et international*", Paris, 1990; A.Redfern, M.Hunter, N.Blackaby, C.Partasides, "*Law and Practice of International Commercial Arbitration*", 4th ed., Sweet&Maxwell, London, 2004, § 10-52.

[62] Ph.Fouchard, E.Gaillard, B.Goldman, "*Traité de l'arbitrage commercial international*", Litec, 1996, p.1012; Jean Robert, *"Arbitrage civil et commercial*", Paris, Sirey, 1961, p.310-311; Viorel Roş, „*Arbitrajul Comercial Internațional*", Regia autonoma, Bucuresti, 2000, p.572.

[63] ILA *"Final Report on public policy as a bar to the recognition and enforcement of international arbitral awards"*, recommendation 1(c), 2002.

[64] Albert Jan van den Berg, "*Why are some awards not enforceable?*", ICCA series no.12, Kluwer Law International, 2005, p.309.

[65] *Oberster Gerichtshof*(Supreme Court), 11 May 1983, Dutch appellant v. Austrian Appellee, Yearbook X(1985), p.421-423.

[66] High Court, Delhi, 12 July 1985, COSID Inc. v. Steel Authority of India Ltd., Yearbook XI, 1986, p.502-507.

[67] Karabelnikov B.P., "*Recognition and execution of foreign arbitral awards: Practical commentaries to the New York Convention of 1958",* Yustitsinform*,* Moscow*,* 2001, p.199-200; Komarov A.S., *"The New York Convention of 1958 as an instrument contributing to the development of the international trade and investment cooperation",* Arbitral Tribunal journal*,* n°1, 2004, p.6-13; Traspov R.A., *"International commercial arbitration : the public policy provision as a bar to the recognition and enforcement of foreign arbitral awards",* Civil arbitral procedure journal*,* n°6,7, 2003, p.40-44, p.28-31.

[68] Neshataeva T.N., *"International Civil Procedure*", Moscow, 2001, p.166.

[69] Morozova U.G., *"Refusal in enforcement and execution of foreign judgments and arbitral awards based on public policy ground",* Vestnic of the HAC of the RF, n°7, 2000, p.146.

to Russian legislation or not, the main concern is the result of the enforcement of the judgement."[70]

In this context, some international instruments[71] require that the award be "manifestly" contrary to public policy. Thus, the infringement to the forum policy should be serious and obvious. Most courts in most jurisdictions seem to have accepted that in case of doubt, an award should be found to be enforceable, thus, to rule in favour of arbitration.

- **Categories of international public policy rules**

As it was previously mentioned, a foreign arbitral award can be refused when its recognition and enforcement encompass the public policy of the enforcement state, precisely, the international public policy of that state.

In order to identify which rules are forming the public policy of any State, the ILA Recommendations provided three such categories. The international public policy of any State includes:

(i) ***Fundamental principles, pertaining to justice or morality that the State wishes to protect even it is not directly concerned;***

The court verifying the arbitral award conformity with fundamental principles, whether substantive or procedural, should do so by reference to those principles considered fundamental in its own legal system rather than in the context of the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.[72]

The examples of substantive principles are the principle of good faith and prohibition of abuse of rights, *pacta sunt servanda*, prohibition against discrimination, and against uncompensated expropriation. Into this category comes also the prohibition of activities that are *contra bona mores:* piracy, slavery, terrorism, drug trafficking, genocide, smuggling and paedophilia.[73] There is an ongoing debate whether and to what extent the award of unlawful relief (for example, punitive damages) constitutes or not a violation of public policy.

Today, in courts' practice there is a tendency to consider as a fundamental principle the so-called principle of "appropriateness and proportionality of punishment." This trend is expressed in the practice of American courts.[74] Thus, the Court of the State of Georgia in the case of *Southwire Co*., refused recognition and enforcement of foreign arbitral award on the grounds that the interests that the arbitrator determined on the awarded sums are a punitive and not compensatory measure.[75] Later, however, with regard to punitive damages levied by the court, the U.S. Supreme Court, "clearly" indicated the need for a new standard for the reviewing of the awards establishing punitive sanctions (punitive damage).

As examples of fundamental procedural principles are the requirement that arbitral tribunal be impartial, making of the award shouldn't be affected by corruption or fraud, the parties were on unequal footing in the appointment of the tribunal, no breaches of the rules of natural justice.[76]

The ILA further concluded that a party may be considered to have waived its right to raise fundamental principles as a ground for refusing enforcement, if that party could have raised relied on any such principle before the tribunal but failed to do so. A public policy rule of the enforcement State cannot, however, be waived - intentionally or not.

(ii) ***Rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules";***

The ILA Report seeks to distinguish a "mere mandatory rule" from a rule that forms part of a State's international public policy.[77] A mandatory rule is an "imperative rule of law that cannot be excluded by agreement of the parties," yet inconsistency with such a rule should not, *per se,* be a ground for refusing enforcement of an arbitral award.[78] The Report states that only those mandatory rules which are at the same time *lois*

[70] *"Official review of judicial practice on civil matters of Supreme Court of the Russian Federation*", Bulletin of the Supreme Court of the RF, 1995, n°11.

[71] For example : the Montevideo Convention, the 2001 EC Regulation n.44/2001 on jurisdiction and enforcement of judgement in civil and commercial matters, the Rome 1980 Convention on the law applicable to contractual obligations, etc.

[72] Recommendation of 2(a) of the ILA "*Final Report on public policy as a bar to the recognition and enforcement of international arbitral awards*", 2002, available at: www.ila-hq.org/.

[73] idem , Part IV.B.3.

[74] Traspov R.A., *"International commercial arbitration : the content and criteria of public policy provision application",* available at http://www.yurclub.ru/docs/pravo/0503/3.html

[75] 484 F.Supp.1063.(ND Ga 1980).

[76] ILA Final Report. Part.IV.C.5 and 6.

[77] Pierre Mayer and Audley Sheppard, *"Final Report on Public policy as a bar to the recognition and enforcement of international arbitral awards*", Arbitrage International, n°19, 2003, p.261.

[78] *idem.*

de police may be grounds for refusing enforcement.[79]

Recommendation 3(b) is of some help in further elaborating the distinction, providing that an award contrary to a rule of public policy is to be refused to enforcement if: "(i) the scope of said rule is intended to encompass the situation under consideration; and (ii) recognition or enforcement of the award would manifestly disrupt the essential political, social or economic interests protected by the rule."[80]

An example of public policy rule is anti-trust law. In the *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.* the US Court of Appeals reserved the right to review any award that violated US anti-trust law.[81]

Within the European Union, the European Court of Justice's decision in the *Eco Swiss case* illustrates that a mandatory rule which is "of a fundamental character" may be part of multinational public policy and thereby pertains to the public policy of the member States, within the meaning of the New York Convention.[82]

Other examples that are often cited are: currency controls; price fixing rules; environmental protection laws; measures on embargo, blockade, or boycott; tax laws; and laws to protect parties presumed to be in an inferior bargaining position (e.g. consumer protection laws).[83]

(iii) ***The duty of the State to respect its obligations towards other State or international organisations.***

An example of an international obligation is a United Nations Security Council resolution imposing sanctions. The State must also respect the obligations in international conventions it has ratified.

In *Parsons & Whittemore* case[84], the United States Court of Appeals held that public policy did not equate with "national policy" (in the diplomatic or foreign policy sense), and it would not refuse to enforce an award in favour of the Egyptian party simply because of tensions at that time between the United States and Egypt. In *National Oil Corp. -v- Libyan Sun Oil Corp.* case[85], the Delaware court rejected a challenge to an award at the enforcement stage on the ground that it was in favour of Libya - "a state known to sponsor international terrorism". The Delaware court noted that the United States still recognised the government of Libya had not declared war on it and had specifically given it permission to bring an action to confirm the award. The Court said: "To read the public policy defence as a parochial device protective of national political interests would seriously undermine the [New York] Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'".

- **Extent of review by courts**

One of the issues that haven't been studied enough is the extent to which the enforcement court should review the reasoning behind the award and/or the evidence considered by the tribunal and/or any new evidence. The interdiction to revise the substance of the matter is a consecrated principle of the international commercial arbitration, but when such difficult allegations as corruption or false depositions are invoked as a public policy breach, the court finds itself in the necessity of looking deeper in the arbitral award.

In the doctrine there have been distinguished three modalities of awards' review: "minimal judicial review", "maximal judicial review" and "contextual approach of judicial review"[86].

The first conception is illustrated by the Swiss Federal Tribunal that concluded that the courts couldn't revise the facts considered by the arbitral tribunal, only because the respondent invoked a public policy violation.[87]

It goes different in French jurisprudence, where the "maximal judicial review" has been consecrated. In its SPP decision of 1987, the Cour de Cassation stated that the Appeal Court disposed of a full power to review, in fact and in law, on the request under the 1502 and 1504 of the NCPC.[88] This trend has been confirmed later by the Cour d'Appel of Paris in *Westman* case[89] in 1994 and in 1998 in the *Thomson* decision of the Cour de Cassation.[90]

---

[79] The ILA Final Report, Recommendation 3(a).
[80] The ILA Final Report, recommendation 3(b).
[81] 373 U.S. 614, (1985).
[82] *Eco-Swiss China Time Ltd(Hong Kong) v. Benetton International NV,* Court of Justice of the European Union,Case C-126/97, paragraph 39. Also : *Gallay v. Fabricated Metals Inc.,* French Cour de Cassation decision of 5 January 1999, Revue d'Arbitrage, n°4, 2000, p.805.
[83] The ILA Final Report, recommendation 1(e), p.30.
[84] *Parsons Whittemore Overseas Co., Inc v. Société Générale de l'Industrie du Papier RAKTA and Bank of America,* 508 F 2d, 969, 1974.
[85] 733 F. Supp. 800 at 819, (Del.1990).
[86] J-F Poudet, S.Besson *"Droit compare de l'arbitrage international*", LGDJ, 2002, p.911.
[87] Chap.9.5.2 N.788.
[88] Revue d'Arbitrage, Paris, 1987, p.469.
[89] Revue d'Arbitrage, Paris 1994, p.359.
[90] Revue d'Arbitrage, Paris 2001, p.583.

The third, "contextual approach", is adopted by the English jurisprudence. In the cases *Soleimany v. Soleimany*[91] and *Westacre v. Jugoimport*, the court has refused to be enclosed by the rigid rules concerning the judge power to review an award considered contrary to the public policy. The court declared that "*it is performing a balancing exercise between the competing public policies of finality and illegality; between the finality that should prima facie exist particularly for those that agree to have their disputed arbitrated, against the policy of ensuring that the executive power of the English court is not abused. It is for those reasons that the nature of the illegality is a factor, the strength of the case that it was an illegality is also a factor, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal is a factor*"[92].

As it may be seen from these three examples, the judge power to review the arbitral award is very different from State to State. These divergences have, though, a crucial importance for the measurement of the efficiency of the public policy defence. Depending on the modality of reviewing chosen by the court, there may be open a very serious breach in the finality of the award.

Even if the art.V(2)b) of the New York Convention provides an exhaustive list of challenges to the award, that list doesn't include mistakes in fact or in law by arbitrators, these latter cannot therefore be relied on for a challenge, let alone for one under public policy.

Nevertheless, the courts may, in some exceptional cases look into the substance of the case and find the recognition and enforcement to be contrary to the public policy. Such cases may be when the fulfilment of the award would constitute a criminal offence or would protect prohibited actions, such as drug trafficking, money laundering, terrorism, etc.

As we have seen before, public policy is of such importance for upholding the values of the State that the majority of the ILA Committee concluded that the enforcement court should be entitled to review the underlying evidence presented to the tribunal and, in exceptional cases, any new evidence. However, the court should undertake a reassessment of the facts only where there is a strong prima facie argument of violation of international public policy.

Most courts in most jurisdictions seem to have accepted although that in case of doubt, an award should be found enforceable.

3. Conclusions and future perspective

Public policy gives expression to certain fundamental principles underpinning a civilization and its legal system, and it should be no different in the arbitration context. Public policy within arbitration should reflect its instrumental principles and values, such as party autonomy, neutrality, efficiency, predictability, finality, justice, and the validity of the procedure in the eyes of the law, all of which may combine to weigh in favour of a pro-enforcement approach to international arbitral awards.[93]

Any definition of public policy, or any delimitation of the scope of the public policy exception, should represent an appropriate balance between respecting arbitral finality and party autonomy on the one hand, and preventing unjust, prejudiced awards on the other hand. It should maintain a balance between protectionism and liberalism, as well as between parochialism and globalism.

Whilst the New York Convention has been acclaimed by many, it was considered by some that the public policy exception could undermine the objectives of the Convention. A review of the cases shows that Article V.2(b) has not created any serious mischief and the attempts to resist enforcement on grounds of public policy have rarely been successful.[94] Nevertheless, uncertainty and inconsistencies concerning the interpretation and application of public policy by State courts encourage the losing party to rely on public policy to resist, or at least delay, enforcement.

The desire for harmonization in application of the public policy defense is clearly a driving impetus in the civilisation of arbitration. The ILA Final Report recommendations are intended to guide the exercise of discretion of the enforcement court in three ways: first, by emphasizing the exceptional nature of the public policy defence while stressing that the particular public policy principle in any given case must be sufficiently fundamental; second, by cataloging the various elements that fall within the concept of public policy; and third, by specifying the source of law (while excluding other sources) that may be considered when assessing a potential public policy violation.

Though public policy is used less and less in practice as a limit to the recognition and enforcement of foreign arbitral awards, the numerous concepts and

[91] 3 WLR 811, 1998.
[92] 2 Lloyd's Rep., 1990, 65, 80.
[93] Christopher S.Gibson, *« Arbitration, Civilization and Public Policy: Seeking counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*", Suffolk legal studies research paper series, n°09-26 of April 2009, available at: http://ssrn.com/abstract=1394447.
[94] Albert Jan van den Berg, "*Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few",* Arbitration in the Next Decade*,* ICC Bulletin – 1999, Special Supplement, p.86.

interpretations still found in practice and legal researches produce unwarranted insecurity and lack of predictability. Additional improvement efforts will have to focus principally on the application of the New York Convention by national enforcement courts, who still have a need for more information and expertise on the Convention.

Even there is notable consistency of decisions among courts of different countries and legal traditions, and public policy is rarely successful in preventing enforcement of international awards, greater harmonization of approach will nevertheless lead to greater consistency and predictability, which would dissuade unmeritorious challenges to awards. The arbitration community has concerns for the effectiveness and legitimacy of the international arbitral system. By such documents as the ILA Final Report the arbitration system is seeking to internalize its own regulatory function. These clarifications of problematical issues would lead to a true globalization of procedural justice by arbitration to cope with the globalisation of international trade and investment.

Finally, society at large has a significant stake both in the international arbitration system and in the public policy defense to recognition and enforcement of foreign arbitral awards, which serves to give effect to important underlying societal values.

As an English judge said in response to his distinguished predecessor's observations: "*With a good man in the saddle, the unruly horse can be kept in control*."[95]

Bibliography:

Articles

1. Carias-Borjas, "The Decision of French Cour de Cassation in SOABI-v-Senegal, 1991, 2 America, Review of International Arbitration.
2. Böckstiegel, Karl-Heinz, "Public policy as a limit to arbitration and its enforcement", IBA Journal of Dispute Resolution, "The New York Convention – 50 years", Special Issue 2008.
3. Bulletin of the Supreme Court of the RF, "Official review of judicial practice on civil matters of Supreme Court of the Russian Federation", n°11.
4. De Lange, Roel, The European Public Order, Constitutional Principles And Fundamental Rights, 1 Erasmus Law Review 3, 8, (2007).
5. Goldman, Bertold, "Frontières du droit et lex mercatoria" in Arch. phil. droit 1964.
6. Goldman, Bertold, « Les conflicts des lois dans l'arbitrage international de droit privé », Recueil des Cours 352, 1963.
7. Kaufmann-Kohler, Gabrielle, "Enforcement of Awards—A Few Introductory Thoughts", NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION CONGRESS SERIES NO. 12, 287, Albert Jan van den Berg ed., 2005.
8. Kessedjian, Catherine, Public Order in European Law, 1 Erasmus Law Review 25, 26, 2007.
9. Komarov, A.S.., "The New York Convention of 1958 as an instrument contributing to the development of the international trade and investment cooperation", Arbitral Tribunal journal, n°1, 2004.
10. Lagarde, Paul, Recherches sur l'ordre public en droit international privé, LGDJ, 1959, n°151.
11. Lalive, Pierre, « Ordre public transnational(ou réellement international) et l'arbitrage commercial international », Rév.arb., 1986.
12. Megerlin, Francis, Ordre public transnational et arbitrage international de droit privé, critical essay on the methodology, 2002.
13. Mayer, Pierre and Sheppard, Audley, « Final Report on Public policy as a bar to the recognition and enforcement of international arbitral awards", Arbitrage International, n°19, 2003.
14. Morozova, U.G., "Refusal in enforcement and execution of foreign judgments and arbitral awards based on public policy ground", Vestnic of the HAC of the RF, n°7, 2000.
15. Rogers, Catherine, « The arrival of the « Have-Nots » in international arbitration », 8 Nev. L.J. 341,2007, p.370
16. The Report of the Committee on the enforcement of international arbitral awards, 28 March 1955, UN Doc. E/AC.42/4/Rev.1.
17. "The Interim Report on the Survey relating to the Legislative Implementation of the 1958 New York
18. Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Note by the Secretariat",
19. UN GA, 38th session, UN Doc A/CN.9/585 (23 May 2005).
20. Revue d'Arbitrage, 1987, 1994, 2001.
21. Sheapard, Audley, « Interim report on Public Policy as a bar to Enforcement of International Arbitral Awards », 2000.
22. Traspov, R.A., "International commercial arbitration : the content and criteria of public policy provision application", available at http://www.yurclub.ru/docs/pravo/0503/3.html.
23. Traspov, R.A., "International commercial arbitration : the public policy provision as a bar to the recognition and enforcement of foreign arbitral awards", Civil arbitral procedure journal, n°6,7, 2003.
24 V an den Berg, Albert Jan, « Distinction Domestic-International Public Policy », XXI Yearbook, 1996. Available at www.ila-hq.org, reproduced also in Yearbook XXIX(2004).
25. Van den Berg, Albert Jan, « An overview of the New York Convention of 1958", International Council for Commercial Arbitration, 13-14, 6 June 2008, www.arbitration-icca.org/ .
26. Van den Berg, Albert Jan, « Why are some awards not enforceable ? », ICCA series no.12, Kluwer Law International, 2005.
27. Van den Berg, Albert Jan, "Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few", Arbitration in the Next Decade, ICC Bulletin – 1999, Special Supplement.
28Decision of the Cour de Justice of Geneva of 11 December 1997, Yearbook Commercial Arbitration, vol.V, 1980.

Books:

1. Batiffol, V.H. and Lagarde, P., « Traité de droit international privé », LGDJ, 1993.
2. Blackaby, N., Partasides, C., "Law and Practice of International Commercial Arbitration", 4th ed., Sweet&Maxwell, London, 2004.
3. Born, Gary B., «International Commercial Arbitration», 2001.
4. Cojocaru, Violeta, "Recunoasterea si executarea hotarîrilor judecatoresti straine in materie civila in Republica Moldova", Chisinau, 2007.

[95] Lord Denning MR in *Enderby Town Football Club Ltd -v- The Football Association Ltd* [1971] Ch. 591 at 606.

5. Chesire and North, « Private International Law », Butterworths, 13th Edition.
6. De Boisseson, Matthieu, "Le droit de l'arbitrage interne et international", Paris, 1990.
7. Fouchard, Philippe, Gaillard, Emmanuel, Goldman, Berthold, « On International Commercial Arbitration", Kluwer, 1999.
8. Fouchard, Philippe, Gaillard, Emmanuel, Goldman, Berthold, "Traité de l'arbitrage commercial international", Litec, 1996.
Gibson, Christopher S., « Arbitration, Civilization and Public Policy: Seeking counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law", Suffolk legal studies research paper series, n°09-26 of April 2009, available at: http://ssrn.com/abstract=1394447.
9. Karabelnikov, B.P., "Recognition and execution of foreign arbitral awards: Practical commentaries to the New York Convention of 1958", Yustitsinform, Moscow, 2001.
10. Lew, Julian D.M., Mistelis, Loukas A. & Kröl, Stefan M., "Comparative International Commercial Arbitration", Kluwer Law International, 2003.
11. Lerebours-Pigeonnière, P., « Précis de droit international privé », 4° éd., 1937.
12. Loussouarn, V.Y. and Bourel, P., « Droit international privé », Dalloz, 2007.
13. Neshataeva, T.N., "International Civil Procedure", Moscow, 2001.
14. Poudet, J-F, Besson, S. "Droit compare de l'arbitrage international", LGDJ, 2002.
15. Racine, Jean-Baptiste, « L'Arbitrage commercial international et l'ordre public », LGDJ, 1999.
16. Robert, Jean, « Arbitrage civil et commercial », Paris, Sirey, 1961.
17. Roş, Viorel, „Arbitrajul Comercial Internațional", Regia autonoma, Bucuresti, 2000.
18. Van den Berg, Albert Jan, "The New York Convention of 1958. Towards a uniform judicial interpretation", Kluwer Law International, 1981.

Law cases:

1. **Austria**
Oberster Gerichtshof (Supreme Court), 11 May 1983, Dutch appellant v. Austrian Appellee, Yearbook Commercial Arbitration X(1985).
2. **France**
Gallay v. Fabricated Metals Inc., French Cour de Cassation decision of 5 January 1999, Revue d'Arbitrage, n°4, 2000.
Hilmarton v Omnium de Traitement et de Valorissation, French Supreme Court, 23 March 1994, extract in Yearbook Commercial Arbitration (France No. 23) <http://www.kluwerarbitration.com> at 26 July 2004.
Hilmarton v Omnium de Traitement et de Valorissation, Paris Court of Appeal, 19 December 1991, extract in Yearbook Commercial Arbitration (France No. 18) <http://www.kluwerarbitration.com> at 27 July 2004.
3. **India**
COSID v Steel Authority of India Ltd, High Court of Delhi, 12 July 1985, extract in Yearbook Commercial Arbitration XI (1996) 502.
4. **Switzerland**
Chap.9.5.2 N.788.
Inter Maritime Management SA v Russin & Vecchi, Tribunal Federal (Swiss Supreme Court), 9 January 1995, extract in Yearbook Commercial Arbitration XXII (1997, Switzerland No. 28) http://www.kluwerarbitration.com at 8 February 2005.
5. **United Kingdom**
Richardson v Mellish [1824-34] All ER 258.
Egerton- v- Brownlow (1853) 4HLC1
Enderby Town Football Club Ltd -v- The Football Association Ltd [1971] Ch. 591.
Soleimany v Soleimany [1999] 3 All ER 847.
Westacre v. Jugoimport, 2 Lloyd's Rep., 1990.
6. **USA**
Laminoris-Trefilieries-Cableries de Lens S.A. v Southwire Company, 484 F Supp 1063, extract in Yearbook Commercial Arbitration (US No. 32) <http://www.kluwerarbitration.com> at 27 July 2004.
Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc., 373 U.S. 614, (1985).
Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier, 508 F 2d 969 (2nd Cir, 1974).
Eco-Swiss China Time Ltd(Hong Kong) v. Benetton International NV, Court of Justice of the European Union,Case C-126/97, paragraph 39.
National Oil Corporation v Libyan Sun Oil, 733 F Supp 800 (D. Del, 1990).
7. **Russian Federation**
The Decree of the Presidium of the Supreme Court of the Russian Federation of 25 September 1998, Bulletin of the Supreme Court of the Russian Federation, n°3, p.13, 1999.

International treaties, National laws and Uniform rules:

1. The 1987 Amman Convention on commercial arbitration.
2. The European Convention on International Commercial Arbitration of 1961.
3. The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.
4. The Montevideo Inter-American Convention on Extra-territorial Validity of Foreign Judgments and Arbitral Awards of 1979.
5. The Rome 1980 Convention on the law applicable to contractual obligations.
6. The 1983 Riyadh Convention for judicial cooperation stipulates that enforcement .
7. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York, 10 June 1958.
8. The 1965 Washington Convention on the Settlement of Investment Disputes between the States and Nationals of other States .
9. Treaty Establishing the European Community 1957 (Rome, 25 March 1957
10. The EC Regulation n.44/2001 on jurisdiction and enforcement of judgement in civil and commercial matters of 2001.
11. The International Arbitration Act of 1974 of Australia.
12. The Law on the International Commercial Arbitration of the Bulgaria of 1988.
13. English Arbitration Act of the 17th June 1996.
14. The Law on the International Commercial Arbitration of the Republic of Moldova of 2008.
15. The1997 Arbitration Act of Oman.
16. The1996 Arbitration Act of New Zealand.
17. The Law on the International Commercial Arbitration of the Russian Federation of 1993.
18. The Law on the International Commercial Arbitration of the Ukraine of 1994.
19. The Law nr.105/1992 on regulation of the international private law relations of Romania.
20. The Law on international private law of Switzerland of 1987.
21. The Civil Code of Republic of Republic of Moldova of 2002.
22. The Code of civil procedure of Republic of Moldova of 2003.

23. The German Civil Code (Bürgerliches Gesetzbuch) of 1896.
24. The French Code Civil.
25. The Code of Civil and Commercial procedure of Libya.
26. The Code of Civil procedure of 1996 of Japan.
27. The Code of civil procedure of the Republic of Moldova of 2002.
28. The Code of Civil and Commercial Procedure of Quatar.
29. The Code of Civil Procedure of Yemen.
30. The Code of Civil Procedure of 1992 of the United Arab Emirates.
31. The Restatement of the Law, Second, Contracts of the United States of America.
32. The UNCITRAL Model Law on international commercial arbitration of 1985.
33. The OHADA Uniform Arbitration Law of 1999.

Copyright©Diana LAZAR, 2009.