CHALLENGES TO ENFORCEMENT OF FOREIGN ARBITRAL AWARDS UNDER PUBLIC POLICY EXCEPTION

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Abstract

Arbitration of international commercial disputes has increased and is likely to continue to grow. Many businesses prefer arbitration to litigation in court because of its relative promptness, privacy and economy. However, in some instances, arbitration requires the support of national courts to be effective when arbitral awards are not satisfied through voluntary compliance of the parties. Among many claims, the public policy defense under the New York Convention is most frequently invoked and has also become one of the most controversial grounds for refusing to enforce arbitral awards. This paper examines examples and case laws that deal with objections to enforcement of foreign arbitral awards based on substantive public policy by analysing the general international understanding. It was found that the divergent and inconsistent application of the policy between national court systems create additional barriers to the enforceability of arbitral awards highlighting the need for a clearer international definition in order to create a uniform standard of interpretation for the exception.

Keywords: Nigeria, Arbitral Awards, Public Policy, Enforcement.

Introduction

Over the past decades, arbitration has been adopted as the favourite dispute settlement form of international commercial transactions. One of the advantages of arbitration over court proceedings is the universal enforceability of arbitral awards which is secured by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign

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Arbitral Awards[1] (the New York Convention). The New York Convention (NYC) has 148 adhering members including every country of relevance in international commerce. Nigeria is a signatory to the New York Convention and has domesticated it by incorporating it as the Second Schedule to the Arbitration and Conciliation Act (ACA).[2] Thus, a foreign arbitral may be enforced in Nigeria under the ACA or directly pursuant to the NYC – Tulip Nigeria Ltd v Noleggioe Transport Maritime.[3]

The state parties to the convention undertake to recognise and enforce arbitral awards rendered in other states.[4] The almost universal acceptance of the Convention is a welcome development: Already the Convention resolved that 'greater uniformity of national laws would further the effectiveness of arbitration in the settlement of private law disputes.[5] Such effectiveness of dispute resolution is of utmost importance for international business in a globalised world. A clear-cut effective dispute resolution mechanism lowers the danger of a breach of contract by the parties and diminishes the risks of commercial transactions. This leaves more capital for further business transactions or investments which raises economic productivity. It also contributes to a more productive use of resources and lowers the cost of production. This in turn decreases the prices to be paid by consumers and increases the profits of business entities. Generally speaking, arbitration as a dispute resolution mechanism producing globally enforceable decisions in a worldwide uniform framework provides security from which the whole economy profits. The framework for that is provided by the New York Convention. However, the mere acceptance of the New York Convention by states does not in itself create such desirable uniform enforceability. It is still the state courts acting according to state laws which decide on the recognition and enforcement of awards. For example, in Nigeria, section 48 of the ACA which mirrors article V of the NYC provides that international arbitral awards can be set aside on the grounds

1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html. Accessed 29/01/18.
2 Cap A18 *LFN 2004*.
3 [2011] 4 NWLR (Pt. 1237) 254.
4 The New York Convention art. III.
5 Resolution of the Conference adopting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, in P. Sanders (gen. rapp), *International Commercial Arbitration* (1960) 289. 291.

that the award is against the public policy of Nigeria.[6] As a mechanism for accomplishing its goal, the New York Convention confers authority upon the courts of adhering nations to enforce foreign arbitral awards.

Article V of the Convention, however, enumerates seven defences, which it recognises as sufficient justification for a court to refuse recognition and enforcement of the awards.[7] The enumerated defences include the absence of a valid arbitration agreement or incapacity of a party, lack of a fair opportunity to be heard, matters not covered by the arbitration agreement, improper composition of the arbitration tribunal, non-binding award, non-arbitrability, and violation of public policy.[8] Of the seven grounds, the public policy defence is most frequently invoked and is one of the most significant and controversial bases for refusing to enforce an international arbitral award.[9] The New York Convention's failure to include what constitutes a violation of public policy results in some national courts' resistance in enforcing a foreign arbitral award based on the award's violation of that nation's domestic public policy.[10] This varied interpretation and application create a major obstacle to the enforcement of arbitral awards internationally.[11]

This paper examines the examples and case laws that deal with objections to enforcement of foreign arbitral awards based on substantive public policy concerns. Substantive grounds offered for objection have included payments of excessive interest or costs, violations of Islamic legal principles, violations of competition laws, violations of bankruptcy rules, violations of consumer protection laws, foreign exchange controls, illegal contracts, foreign policy, and the principle of comity.

Payment of Excessive Interest or Costs

Awards of interest or costs deemed to be excessive have been held as conflicting with public policy. Excessive costs and interest offend the

6 S 48 (ii) Cap A18 *LFN 2004*.
7 New York Convention art. V.
8 Ibid.
9 G. B. Born, *International Commercial Arbitration* (3rd edn. 2009) 2827.
10 M. S. Kurkela and H. Snellman, Due Process in International Commercial Arbitration (2005) 1, 11.
11 J. Paulsson, *The New York Convention in International Practice – Problems of Assimilation (*Marc Blessing edn. 1996).

principle of proportionality of awarded damages, and extreme violations of the principle have been held to constitute violations of public policy.[12]

In *Buyer (Austria) v. Seller (Serbia and Montenegro*),[13] the Supreme Court of Austria considered whether an interest rate of seventy-three percent per year with daily capitalisation violated public policy.[14] The contract, a purchase agreement for mushrooms, contained an arbitration clause.[15] A dispute arose when the Austrian buyer failed to pay for goods received. The seller commenced arbitration at the Foreign Trade Arbitration at the Chamber of Commerce and Industry of Serbia, in Belgrade.[16] The arbitral tribunal awarded the seller DM 22,500, and mandated that it be paid within fifteen days.[17] The arbitrators further ordered that the Austrian buyer pay: (1) the contractually agreed upon interest for late payment of 0.2 percent per day, calculated with the daily capitalisation on the main sum and (2) the contractually agreed interest of 0.2 percent per day, calculated with the daily capitalisation on the main sum plus interest of 0.2 percent per day, which corresponds to an interest rate of seventy-three percent per year.[18]

The seller sought enforcement of the award in Austria, where the District Court granted enforcement of only the main sum, holding that enforcement of a seventy-three percent annual interest rate would violate Austrian public policy.[19] The Austrian Appeal Court reversed that ruling, finding that an annual rate of seventy-three percent that resulted from a daily capitalisation of interest was 'usual practice' among merchants. Both parties appealed the decision. The Austrian Supreme Court then reversed the appellate decision, reinstating the District Court's decision to enforce only the principal sum of the award.[20] The Supreme Court reasoned that an interest rate of seventy-three percent per year with daily capitalisation, which de facto came to 107.35 percent, violated basic principles of Austrian law on debts, as interest (as compensation for late payment and thus for damages) would

12 Laminoirs-Trefileries-Cableries de Lens, S.A. v Southwire Co, [1980] 484 F. Supp. 1063.
13 [2005] XXX Y.B. COM. ARB. 421.
14 Ibid.
15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 Ibid.

exceed the main sum claimed (the outstanding sale price) already in the first year.[21] The Court elaborated on the public policy reasoning, explaining that interest should not lead to unjust enrichment of the creditor and cannot have a punitive and deterrent function. Based on national courts' decisions, it appears that arbitral awards of excessive interest or costs violate the principle of proportionality, which is considered to be part of public policy.

Violation of Islamic Legal Principles

In countries that strictly apply Islamic legal principles, the concept of public policy is based on respect for the general spirit of the Shari'a and its sources (the Koran and the Sunna, etc.).[22] Shari'a covers all aspects of Muslim life including the spiritual and daily activities.[23] The Riyadh Arab Convention on Judicial Cooperation between the States of the Arab League (Riyadh Convention) is a treaty that operates as one of the most commonly used bases in the Middle East recognition and enforcement of decisions between and among Arab nations.[24] The Riyadh Convention was signed in 1983 and went into effect in 1985.[25] Article 37 of the Riyadh Convention provides that arbitral awards and judgments from originating states will be recognised and enforced in recipient states, subject to certain exceptions.[26] One enforcement exception allows refusal if the award is contrary to Shari'a law, the constitution, public policy, or the good morals of the country in which enforcement is sought. This is the case even if the evolution of the concept of public policy in the enforcing country will authorise such provisions.[27] In Islamic countries, the Shari'a is also the primary source of moral and religious law and public policy.[28] According to Islamic

21 Ibid.

22 A. H. El Ahdab, 'Enforcement of Arbitral Awards in the Arab Countries' [1995] (11) *ARB. INTL* 169.

23 C. P. Tru, bull, 'Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts' [2006] (59) *VAND. L. REV* 626.

24 A. H. El Ahdab and J. El Ahdab *Arbitration with the Arab Countries* (2011).

25 'Arab Convention on Judicial Cooperation' (Riyadh Convention) in J Paulsson (eds) (1990).

26 Riyadh Convention art. 37.

27 Ibid.

28 A. Alkhamees 'International Arbitration and Sharia Law: Context, Scope, and Intersections' [2011] (28) *J. INTL. ARB.* 255.

jurisprudence, arbitration is only valid in disputes of a commercial nature.[29] Arbitration dealing with 'Rights of God' is not accepted, along with matters such as guardianship of orphans or incapable persons, and crimes, all of which must be settled by an official judge.

This restriction on arbitration is similar to the restrictions of the public policy exception in contemporary regulations, as many countries have intentionally excluded certain issues that may only be resolved in official courts.[30] As a result, the public policy exception has a much larger scope in Islamic Law, and Islamic public policy governs a contract.[31] For example, where a Muslim becomes a party to a contract, certain rules of Islamic law forbid clauses containing 'Riba' (interest) or 'Gharar' (uncertainty), as well as the condition associated with the contract.[32] Thus, an arbitral award could be considered contrary to the principles of the Shari'a in Kuwait, because it grants legal interest pursuant to Egyptian or Syrian law, or contractual interest under Libyan law. The Kuwaiti enforcing court could refuse to require payment of the interest based on this governing principal.[33] Similarly, in Saudi Arabia, public policy includes a strict prohibition on any form of interest. Furthermore, Saudi Arabia's Constitution states that any regulation incompatible with Shari'a law is not binding.[34] As such, arbitral awards dealing with the concept of profit are not recognized, and awards made by non-Muslim arbitrators are contrary to Saudi law.[35]

Violations of Competition Law

Competition laws may impact competitive market structure, business conduct, economic performance, and national economic policy. Many countries regulate competition through codified laws, which aim to restrict practices that distort competition, create dominant market positions and

[29] F. Kutty, 'The Sharia Law Factor in International Commercial Arbitration' [2006] available at http://papers.ssm.com/so13/papers.cfm?abstract_id=898704 accessed 30/01/18.

[30] Z Al-Qurashi 'Arbitration Under the Islamic Law' [2003] (1) *Oil, Gas and Energy Law Intelligence.*

[31] A. H. El Ahdab and J. El Ahdab (n 38).

[32] Kuwaiti Code of Procedure art. 173.

[33] A. H. El Ahdab and J. El Ahdab (n 38).

[34] Basic Law of Governance issued by Royal Order No. A/91, 1 March 1992, in Umm al-Qura Gazette No. 3397, (5 March 1992).

[35] A. H. EL-Ahdab, 'Saudi Arabia Accedes to the New York Convention' [1994] (87) (91) J. INTL ARB. 11.

monopolies, and prevent discriminatory practices.[36] The application of competition laws also can affect arbitration proceedings at different stages.[37] Competition claims may have implications on the public policy of the forum for arbitration, for enforcement, or for both.[38] At the enforcement stage, courts will review whether relevant competition laws were considered, and may refuse to enforce an award that violates the applicable competition laws under the public policy exception.

In Nigeria, The Federal Competition and Consumer Protection Commission Act (FCCPA) In broad terms prohibits actors from entering into agreements that have the effect of restraining or preventing competition[39].

In Europe the source of competition law is the Treaty Establishing the European Community (EC Treaty).[40] Article 81 of the EC Treaty governs agreements and practices between two or more parties that result in the restriction of competition in the European Union.[41] Article 82 in turn provides that 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.' In order for an award to be fully enforceable in Member States of the European Union, Articles 81 and 82 must be applied by arbitral tribunals to any dispute in which the antitrust rules of the European Union apply.[42]

In a French Court in *Thales v. Euromissiles*[43] held that if there is no manifest disregard of the European Union's competition laws, their violation alone is not considered to be a matter of international public

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36 D. Otto and O. Elwan, Article V (2), in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York convention (2010) 365.

37 F. Weigand, 'Evading EC Law by Resorting to Arbitration' [1993] (9) *ARB. INTL* 249.

38 N. Blackaby and others, *On International Arbitration* (5th edn. 2009) 118.

39 Sections 59 and 63 Federal Competition and Consumer Protection Commission Act (2019).

40 http://ec.europa.eu/index_en.htm accessed 30/01/18.

41 EC Treaty art. 81, http://ec.europa.eu/competition/legislation/treaties/ec/art81_en.html accessed 30/01/18.

42 E, Gaillard, *Extent of Court Review of Policy* (5 April 2007) http://www.shearman.com/files/Publication/6ce97c62-ca6f-4 accessed 30/01/18/

43 B. Bensuade Thales Air Defence BV v GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law [2005] (23) *INTL. ARB.* 239.

policy.[44] In this case, Thalès initiated an ICC arbitration proceeding for the cancellation of a contract entered into with Euromissiles.[45] The tribunal ruled in favour of Euromissiles, and awarded them damages.[46] Thalès challenged the ruling, arguing that the underlying contract was anticompetitive, and consequently, was void under Article 81 of the EC Treaty.[47] The French court rejected the argument, stating that the violation of European Union competition was not obvious, as the question had not been raised during the arbitration.[48] More specifically, the Court held that they could not review the merits of a challenge to the award's conformity with European Union competition law without 'an obvious, effective, and concrete violation' of French international public policy.[49]

Though the Thalès decision indicated that there is a public policy application to European Union competition law, it placed limitations on courts' authority to review the enforceability of international arbitral awards, specifically of an award's conformity with European Union competition law.[50] In other words, if there is no manifest disregard of European Union law, the violation of European Union law does not constitute a matter of international public policy. This decision seems to alter the prevailing interpretation by the Eco Swiss court, suggesting that European Union competition law has become public policy allowing the annulment of awards.

In *Tensacciai v. Terra Armata*[51] the Swiss Supreme Court took a different approach on alleged incompatibility with both European Union and Italian competition law.[52] The Court was presented with the issue of whether the values underlying competition law were among those the violation of which could constitute a contravention of public policy.[53] The Court responded that anti-competitive practices could not qualify as violations of public

44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid.
48 Ibid.
49 Ibid.
50 D Bensuade (n 54).
51 'Swiss Supreme Court Arbitrating Competition Law Issues' [2006] *European Business Law Review* Special Edition.
52 Ibid.
53 Ibid.

policy taking into consideration the fundamental foundations of all legal orders.[54]

Violations of Bankruptcy Rules

In many countries, bankruptcy law includes mandatory rules, the violation of which may constitute a violation of public policy.[55] Accordingly, courts have considered whether national bankruptcy legislation forbids recognition or enforcement of an arbitral award against a bankrupt company. The Second Circuit Court in *Fotochrome Inc. v Copal Co*.[56] reviewed the question of whether bankruptcy provided the type of circumstance necessary to qualify for public policy exception, thereby justifying barred enforcement of those foreign arbitral awards. Fotochrome, an American camera company entered into a contract with Japanese manufacturer, Copal Co., for the purchase of Copal's cameras.[57] A dispute arose, and pursuant to the contract's arbitration clause, Copal filed a petition for arbitration with the Japan Commercial Arbitration Association (JCAA). When Fotochrome subsequently filed for bankruptcy in New York bankruptcy court, the bankruptcy referee issued a restraining order against arbitration. [58] However, the Japanese arbitral tribunal ignored the stay and rendered an award in favour of Copal. Copal then filed proof of its arbitral award in the Fotochrome bankruptcy proceeding. [59] The District Court dismissed the bankruptcy referee's restraining order as lacking personal jurisdiction over Copal, and more pertinently, because the bankruptcy court's ruling had no extraterritorial effect.[60] On appeal, the Second Circuit Court upheld the decision of the District Court and permitted Copal to seek confirmation of the arbitral award that obtained in Japan.[61] The Court justified the decision by leaning on the New York Convention's lack of identification on equal treatment of creditors in bankruptcy as a public policy covered by the

54 Ibid.
55 UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration (2012) 164.
56 [1975] 2d Cir. 512.
57 Ibid.
58 Ibid.
59 Ibid.
60 The Court stated that Copal did not have minimum contacts with the United States as required under Hanson v Denckla [1958] 57 U.S. 253.
61 Ibid.

Article V(2)(b) exception.[62] The Second Circuit Court consequently declined to address Fotochrome's argument that enforcement of the award would violate the public policy favouring fair distribution of assets under the Bankruptcy Code.[63]

Also a German court in *Seller v. Buyer* ruled that bankruptcy proceedings do not act as a bar to enforcing foreign awards, since the actual collection of awarded sums would be subject to local bankruptcy laws governing distribution of assets.[64] The Court stressed that granting enforcement under the New York Convention would have no impact on bankruptcy proceedings because satisfaction of the award would be subject to local insolvency laws governing the distribution of assets.[65] The Court further noted that it was irrelevant that the award had been rendered after the bankruptcy proceedings against the buyer had been commenced, as the commencement did not interrupt arbitration.[66]

From the above it could be safe to submit that, based on national courts' decisions it appears that potential violations of foreign bankruptcy laws would not necessarily qualify as a violation of public policy as not every violation of a mandatory rule will justify the refusal of recognition or enforcement of a foreign award. A refusal of an enforcement of an arbitral award on grounds of public policy would not be justified where enforcement of the award might be in conflict with foreign bankruptcy laws as bankruptcy proceedings do not act as a bar to enforcing foreign awards. Thus, enforcement against a bankrupt entity would not violate public policy, as the declaration of the enforceability is a preliminary measure, having no executory effect.

Violations of Consumer Protection Laws

Certain arbitration practices are unfair to consumers, because consumers frequently do not have equal bargaining power in contracting.[67] Arbitration agreements are sometimes contained in ancillary agreements or in small prints in other agreement and consumers often do not know in advance that

62 Ibid.
63 Ibid.
64 [2004] Y.B. COM. ARB. 697.
65 Ibid.
66 Ibid.
67 D. Otto and O. Elwan (n 40).

they agreed to mandatory pre-dispute arbitration by purchasing a product. Acknowledging the need for protection against unfair treatment, many countries have implemented laws to protect consumers.[68] National legal systems take different approaches towards the arbitration of consumer disputes.[69]

In Nigeria the Principal purpose of the Federal Competition and Consumer Protection Act (FCCPA) is to protect consumers against hazardous products and shoddy services and to provide speedy redress to consumer complaints through alternative dispute resolution mechanism.[70] The Act established the Federal Competition and Consumer Protection Commission (FCCPC) in section 163 and empowers it to make rules and regulations for the effective implementation and operation of the provisions of the FCCPA.

In the United States, the Federal Arbitration Act (FAA) has been interpreted to cover agreements between consumers and merchants, upholding the validity of standard form contracts and enforcing binding pre-dispute arbitration rulings against United States consumers.[71] Because the United States does not prohibit pre-dispute arbitration clauses in cases, the consumer has the burden of demonstrating unconscionability to render an agreement he entered into unenforceable.[72] Section 2 of the FAA provides, in pertinent part, that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract.[73] Although the section itself did not incorporate state law grounds that govern the formation of contracts, courts have generally considered this language as incorporating common defenses to the enforceability of arbitration agreements, such as unconscionability.[74] For example, California and other courts have found bans on class arbitration to

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68 Ibid.

69 G.B Born, *International Commercial Arbitration* (3rd edn. 2009) 820.

70 Section 1 Federal Competition and Consumer Protection Commission Act (2019).

71 *Re Marcia L. Pate* [1996] 198 B.R. Bankr. S. D. Ga 841, FAA preempts Georgia state statutory bar against arbitration clauses in consumer transaction.

72 *Brower v Gateway 2000 Inc*. [1998] 676 N.Y.S, 2d 569. Held arbitration with consumers enforceable despite contract of adhesion and unconscionability claims by consumers. Gilmer v Interstate/Johnson Lane Corp. [1991] 500 U.S. 20. Held: Mere inequality in bargaining power is not dismissing unconscionability claims by employee.

73 9 United States Code (2000).

74 Example *Doctor's Assocs. Inc. v Casarotto* [1996] 517 U.S. 681. E.J. Mogilnicki and K.D Jensen, 'Arbitration and Unconscionability' [1996] (19) *GA. Sr. U. L. REV*. 761.

be unconscionable under state contract law as 'when the [class] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.'[75] Therefore, if a consumer loses in arbitration, any award granted would be recognised unless it met a statutory exception under the FAA.

The European Union (EU) does prohibit agreements to arbitrate future consumer disputes, and will not enforce a binding pre-dispute arbitration agreement against an E.U. consumer.[76] The E.U. established a broad policy of consumer protection in Directive on Unfair Terms in Consumer Contracts (Directive) and allows for more stringent national legislation.[77] Under the E.U. Directive, the provisions of standard form consumer contracts are subject to statutory fairness requirements.[78] Among other things, the Directive provides that a provision is prima facie unfair, and therefore invalid, if it 'requires the consumer to take disputes exclusively to arbitration not covered by legal provision.'[79] The European Court of Justice in *Elisa María Mostaza Claro v Centro Móvil Milenium SL*[80] held that an arbitral award, found to be in violation of the Directive, must be annulled regardless of whether a consumer raises unfairness of the arbitration clause as a defense in the arbitral proceedings. The case concerned a mobile telephone contract concluded between Móvil and the consumer Ms. Mostaza Claro.[81] The contract included an arbitration clause requiring that any contract disputes be arbitrated before the European Association of Arbitration in Law and in Equity.[82] Ms. Claro failed to comply with the minimum subscription period, and Móvil initiated arbitration proceedings.[83] Ms. Claro presented arguments on the merits of the dispute, but she did not

75 *Discover Bank v Superior Court* [2005] Cal. 113 P.3d 1100.
76 D. M. Bates, 'A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes? [2003] (27) *FORDHAM INTL L.J. 823.*
77 Directive 93/13/EEC, (E.U. Directive on Unfair Terms in Consumer Contracts).
78 Ibid.
79 EU Council Directive 93/13/EEC, O.J. L 23/04/1993, Annex 1(q) requiring the consumer to take disputes exclusively to arbitration not covered by legal provision.
80 [2006] ECR 10421.
81 Ibid.
82 Ibid.
83 Ibid.

raise the invalidity of the arbitration agreement as a defense, and the tribunal found in favour of Móvil.[84]

The ECJ concluded that the Council Directive must be interpreted as meaning that a national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.[85] Further, the ECJ explained that the consumer is in a weak position vis-à-vis the seller or supplier considering the bargaining power and knowledge of the buyer and therefore protective action by an unconnected party is warranted.[86] This treatment of consumer protection as essential to the functioning of internal market under the Directive reveals their intention to incorporate the protection into European Public Policy's economic principles.

Foreign Exchange Controls

Foreign arbitral awards often grant sums calculated in a currency different from that of the enforcing country. As a result, enforcement of arbitral awards can be complicated, where the enforcing country has exchange control restrictions as it is in Nigeria.[87] Such restrictions have been raised as grounds for public policy defenses at the enforcement stage of the dispute.[88]

In Vicerè Livio v Prodexport[89] the Supreme Court of Italy held that enforcement of an arbitration award, providing for payment in an unofficial exchange rate did not violate Italian public policy as Italian law contains provisions for appropriate conversion into Italian currency. The case involved a contract concerning a purchase of live sheep from a Romanian company Romagricola, which was later succeeded by the Romanian State enterprise Prodexport, to an Italian Vicerè.[90] When a dispute arose between the parties, Prodexport initiated arbitration proceedings in Bucharest, at the

84 Ibid.
85 Ibid.
86 Ibid.
87 D. Otto and O. Elwan (n 40).
88 Ibid.
89 [1997] XXXII Y. B. COM. ARB. 717.
90 Ibid.

Arbitration Commission of the Romanian Chamber of Commerce.[91] The arbitral tribunal ruled in favour of Prodexport who then sought to enforce the award in Italy.[92] Vicerè argued that the lack of an official exchange rate for the currency used in the arbitral award order made its enforcement a violation of Italian public policy.[93] The Court rejected the proposed use of public policy to bar enforcement of the award reasoning that, regardless of whether it was paid in foreign currency, the Romanian arbitral award could then be converted into Italian currency in accordance with Italian law.[94]

The Indian Supreme Court in *Renusagar Power Co Ltd v General Electric Company*[95] examined the Indian public policy implications of enforcing an arbitral award in contravention of the Indian Foreign Exchange Regulation Act (FERA). Specifically, the Court found that FERA was enacted to safeguard India's economic interests, and any violation of the Act would thus be contrary to Indian public policy.[96] However, the Court noted that its review was concerned specifically with the implications of enforcement rather than the amount awarded which had already been determined by the arbitral tribunal[97]. Therefore, the Court found that the enforcement alone, without reference to the awarded sum, would not violate the public policy embodied in FERA.[98]

While exchange control restrictions usually affect the currency in which a payment may be made, the New York Convention does not prescribe a particular currency in which an award can be collected.[99] Exchange control restrictions would not prevent enforcement of foreign arbitration awards under the New York Convention because most courts construe the public policy limitation very narrowly and apply it only when enforcement would violate the forum state's most basic notions of morality and justice.[100] Exchange control regulations are considered as mandatory rules protecting economic values of the nations, the violation of which may constitute a

91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.
95 [1995] XX Y. B. ARB. 681.
96 Ibid.
97 Ibid.
98 Ibid.
99 D. Otto and O. Elwan (n 40).
100 Ibid.

violation of public policy. Again, not every violation of exchange control restrictions amounts to a violation of public policy as exchange control restrictions would not prevent enforcement of awards under the New York Convention.

Illegal Contracts

Arbitral awards that enforce illegal contracts or contracts that otherwise lead to illegal actions may be contrary to public policy. However, mere allegations of bribery by the party seeking to bar enforcement are not sufficient to prove a violation of public policy. In *Soleimany v Soleimany*[101] the English Court of Appeal refused to enforce an English arbitration award on the grounds that smuggling of carpets was illegal in Iran and any payments for smuggling would offend public policy. The case involved a dispute between a father and son, Iranian Jews by origin, concerning the export from Iran of Persian carpets.[102] The son travelled to Iran to free a consignment of carpets that had been seized by the Iranian customs authorities. The export of the carpets violated Iranian revenue laws and export control laws.[103] The father then sold the carpets in England and a dispute arose between them over non-payment of amounts due from the proceeds of the sale.[104] The parties took the dispute to the Beth Din, the court of the Chief Rabbi in London.[105] The arbitral tribunal applied Jewish law and found in favour of the son.[106] The tribunal acknowledged the illegality of smuggling the carpets out of Iran, but stated such illegality did not affect the parties' contractual rights under Jewish law.[107] When the son sought enforcement in England, the father objected arguing that illegality of the arrangement rendered the award unenforceable as contrary to public policy in England.[108] Ruling in favour of the father, the English Court held that it would not enforce 'a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country.'[109] The Court further

101 [1999] Q. B. 785.
102 Ibid.
103 Ibid.
104 Ibid.
105 Ibid.
106 Ibid.
107 Ibid.
108 Ibid.
109 Ibid.

stated that smuggling is an illegal activity, which an English court would condemn, even where the law governing the original dispute took a more relaxed view of the illegality.[110]

The decision in *Westacre Investments Inc. v Jugoimport-SPDR Holding Co.*[111] might change that trend. This dispute arose from a consultancy agreement between Westacre Investments and Jugoimport for the sale of military equipment to Kuwait.[112] The contract, which was governed by Swiss Law and provided for ICC arbitration in Geneva, stipulated that Westacre was to receive a substantial percentage of the value of the contracts.[113] When Jugoimport terminated the agreement Westacre sought payment of its consulting fees through ICC arbitration in Switzerland.[114] Jugoimport alleged that the consulting contract was void because Westacre bribed Kuwaiti officials in violation of Kuwaiti law and public policy.[115] The arbitrators rejected this reasoning and issued an award in favour of Westacre.[116] The arbitral tribunal held the consultancy agreement did not violate international public policy, as lobbying by private enterprises to obtain public contracts was not an illegal activity.[117] Westacre sought enforcement of the award in England and Jugoimport issued a challenge on the grounds that the underlying contract was essentially used for the purchase of personal influence and therefore was contrary to public policy in England.[118] The English Court considered the issue of whether to consider the new evidence that might show that the contract violated English public policy.[119] The Court refused to reopen the facts, holding that the award should be enforced.[120] The Court stated that it was not their place to consider new information on the matter of illegality, as the arbitral tribunal had already dismissed the issue.[121] The Court confirmed that there were very limited circumstances in which enforcement of a foreign award

110 Ibid.
111 [2000] 1 Q. B. 288.
112 Ibid.
113 Ibid.
114 Ibid.
115 Ibid.
116 Ibid.
117 Ibid.
118 Ibid.
119 Ibid.
120 Ibid.
121 Ibid.

would be refused[122]. Finally, the Court concluded that 'that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption.'[123]

Based on national courts' decisions, it appears that enforcement of foreign arbitral awards based on illegal contracts is contrary to public policy. Severe illegal practices will be qualified as a violation of public policy exception.

Foreign Policy

Under certain circumstances, foreign policy concerns are raised as the basis for a public policy defense to enforcement of an award. The question then is whether foreign policy should be treated as equal to public policy. To many courts, foreign policy cannot be regarded as equal to the fundamental category of public policy.

In *Parsons & Whittemore Overseas Co. v Societe Generale de L'Industrie du Papier (SGLP*),[124] the Second Circuit Court found that the violation of United States foreign policy did not qualify for the public policy defence under the New York Convention. In that case an American business refused to complete the construction of a plant in Egypt, when Egypt severed relations with the United States in the wake of the Six Days War.[125] The Egyptian corporation, SGLP, sought enforcement of an award granted pursuant to ruling against the United States Corporation Parsons, for breach of contract.[126] Parsons argued that further work on its project during that period would contravene United States public policy against the actions of the Egyptian government.[127] The Court found that this argument sought to equate 'national' policy with 'public' policy and rejected the argument.[128] In enforcing the award, the Court held that 'the public policy defence was not meant to enshrine the vagaries of international politics under the rubric of public policy.[129] The Court further explained, that to read the public

122 Ibid.
123 Ibid.
124 [1974] F.2d 969.
125 Ibid.
126 Ibid.
127 Ibid.
128 Ibid.
129 Ibid.

policy defence as a parochial device protective of national political interests would seriously undermine the utility of the Convention.[130] Observing the general pro- enforcement position of the Convention, the Court concluded that an expansive reading of the public policy defense would vitiate the Convention's basic effort to remove pre-existing obstacles from the enforcement of foreign arbitration awards.[131]

Similarly, a United States District Court in *Nat'l Oil Corp. v Libyan Sun Oil Co.*[132] held that confirmation of an award granted to Libya, a country known to sponsor international terrorism, did not violate public policy. In that case, the party opposing enforcement emphasised the United States' disaffection with Libya's policies.[133] Rejecting the public policy challenge, the Court noted that the United States had not declared war on Libya, nor had the Executive branch withdrawn recognition of the Gaddafi government.[134] Quoting the Parsons case, the Court found that the United States government endorsed Libya's action in bringing the enforcement action, thus making it particularly difficult to conclude that to confirm a validly obtained foreign arbitral award in favour of the Libyan Government would violate the United States' most basic notions of morality and justice.[135]

Here, it could be said that, based on national courts' decisions, it appears that foreign policy is not qualified for the public policy exception under the New York Convention, as the public policy exception is intended to apply only in a narrow range of cases, involving major violations of the forum's most fundamental principles.

Principle of Comity

The doctrine of international comity sets forth that a court with proper jurisdiction should recognise and give effect to judicial decrees and decisions rendered in foreign jurisdictions, unless to do so would offend the

130 Ibid.
131 Ibid.
132 [1990] 733 F. Supp. 800.
133 Ibid.
134 Ibid.
135 See *Antco Shipping Co. v Sidermar S. p.A.* [1976] 417 F. Supp. (that disputed contracts had clause prohibiting use of Isreali ports did not prevent enforcing agreement to arbitrate).

nation's public policy.[136] The concept of comity arises from the 1895 United States Supreme Court decision in *Hilton v Guyot*.[137] The Court held that comity dictates that United States courts should grant recognition where the foreign proceeding affords 'a full and fair trial abroad before a court of competent jurisdiction'[138] However, the Court further held that comity should not operate in such a way that any nation will suffer the laws of another to interfere with her own to the injury of her citizens.[139] The comity doctrine has served as a principle of deference to foreign law and foreign courts.[140] It follows then that, in the interest of international comity, courts should balance competing public and private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns.[141] By doing so, courts apply general principles of comity in determining whether to recognise and enforce foreign arbitral awards. Enforcing courts will not enforce an arbitral award in a country whose public policy conflict with the forum's public policy. In July 2000, the International Law Association (ILA) issued their Interim Report on Public Policy as a bar to Enforcement of International Awards and issued its Final Report on the subject in 2002.[142] The ILA Final Report addresses international comity as international obligations within the category of the international public policy. Recommendation 4 of the Final Report provides that 'a court may refuse recognition or enforcement of an award where such recognition or enforcement would constitute a manifest infringement by the forum State of its obligations towards other States or

136 *Brown v Babbitt Ford Inc*. [1997] 117 Ariz. App. P. 2d 689.

137 [1895] 159 U.S. 113 stated that, comity in the legal sense is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.

138 Ibid.

139 Ibid.

140 Ibid.

141 *Joel v Paul.* The Transformation of International Comity, available at: http://scholaeship.law.duke.edu/cgi/viewcontent.cgi?article=1477&context=1cp. Accessed 01/02/18.

142 A. Sheppard, 'Interim ILA Report on Public Policy as a Bar t Enforcement of International Arbitral Awards' [2003](19) *ARB. INTL*. 217.

international organisations.'[143] Thus, each country is obliged to respect the judicial processes of foreign countries and international organisations.

In *Sea Dragon Inc. v Gebr. Van Weelde*[144] the Southern District of New York declined to enforce the arbitral award against the charterer of a vessel because the decree of a foreign court prohibited the charterer from paying its debt to the owner of the vessel. The Court stated that the arbitration award requiring the charterer to pay the freight due to the owner, notwithstanding the order of the Dutch court, exposed the charterer to the dilemma of conflicting orders; whether to pay as the panel ordered or to retain the funds as decreed by the Dutch court.[145] More importantly, the Court stated that the doctrine of comity, founded on diplomatic respect for valid foreign judgments, militated against disregard of the Dutch order since comity is to be accorded a decision of a foreign court so long as the court is a court of competent jurisdiction and as long as the laws and public policy of the forum state are not violated.[146] The Court, therefore, held that the Dutch order must be recognised as confirmation of the arbitration award under the circumstances would violate public policy.[147]

Conclusion

The widely varied interpretation and application standards for the New York Convention's public policy defence by national court systems has greatly influenced the development of international arbitration practice as jurisdictions look to foreign decisions for guidance. The divergent and inconsistent application of the exception between national court systems creates additional barriers to the enforceability of arbitral awards, highlighting the need for a clearer international definition in order to create a uniform standard of interpretation for the exception.

The need for international public policy reform arises from the special features of international cases, which face problems as a result of mechanical application of domestic public policy to international cases. Also, the inherently different and often conflicting goals of domestic

[143] Ibid stating the preview that only the public policy of the state where enforcement is sought should be applied.
[144] [1983] B.V. 574 S. D. N. Y. F. Supp. 367.
[145] Ibid.
[146] Ibid.
[147] Ibid.

policies between countries necessitates a separate standard, because what may be considered public policy in domestic matters does not necessarily pertain to public policy in international matters.[148] Furthermore, the principal purpose of the New York Convention is to reduce a parochial refusal and facilitate the recognition and enforcement of arbitral awards between private parties. Therefore, consistency with the Convention would seem to require that courts employ a narrow reading of the public policy exception in enforcement proceedings, despite the language of Article V (2) allowing for more expansive interpretation. If construed narrowly, which would be in accordance with the Convention's intent in drafting the provision, the exception would not justify denied recognition of international arbitral awards that often arise from variations in national value hierarchies across the globe.

[148] A. J. Berg, Consolidated Commentary Cases Reported in Volumes XXVII [1997] – XXVII [2002] XXVIII [2003] *Y. B. COM*. 518.