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Public Policy as a Ground for Refusing Recognition and Enforcement of Foreign Arbitral Awards

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ABSTRACT

This research paper examines and analyses the public policy defense regarding refuse recognition and enforcement of foreign arbitral awards. This defense is regulated through several enforcement conventions and laws, particularly New York Convention on recognition and enforcement of arbitral award beside the UNCITRAL Model Law on International Commercial Arbitration.

Public Policy term is controversial as there is no uniform definition of the term. Different states have different meanings for 'public policy'. Therefore, if enforcement of an arbitral award is refused in one country because of public policy considerations, it might be necessary to find another country that does not apply the public policy exception. The purpose of this study is to examine and explore the role that public policy plays in the international forum, as it affects the practice of international commercial arbitration. This research will be divided to four chapters. In the first chapter, it will briefly explore the background and meaning of international commercial arbitration and its legal framework. The second chapter will explore and discuss the role of enforcement conventions and the model law that covered public policy. The third chapter covers the public policy exception and examines the concept of public policy as it applies to international commercial arbitration. It will also discuss critically the application and impact of the public policy defense in arbitration based on many cases. Finally, the fourth chapter will be the conclusion.

Overall, this paper is an attempt to trace one ground of refusing foreign arbitral award and thereby to reach satisfactory conclusions.

Keywords**: Recognition, Enforcement, Foreign Arbitral Award, public policy.**

I. INTRODUCTION

Public policy is considered one of the most significant and controversial exceptions as a ground for refusal to enforce and recognize commercial arbitral awards and is frequently invoked as a

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basis for annulling arbitral awards. Public policy empowers courts of the nation in which recognition and enforcement of awards are sought to refuse to do so when they find the award would be contrary to the public policy rules of the country[2]. This term, which is sometimes used as an alternative to the principle known as 'order public'[3], is set forth in Article V (2) (b) of the New York convention 1958. It provides that, "'Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country"[4]'. This provision has close parallels in other national arbitration regimes[5]. Moreover, the UNICITRAL MODEL LAW provides "that an award may be annulled if the court finds that 'the award is in conflict with the public policy of this state"'[6], and through many conventions.[7] This issue may be raised in an international commercial contract that includes an arbitration clause, either as an opposition to enforcement of the contract in total or to the arbitration clause. In addition, public policy may be raised before the arbitral proceedings or after the awards have been issued by arbitral tribunals once a successful party wants to enforce recognition and enforcement of existing awards[8].

Different countries have different concepts and definitions of public policy. There is no specific definition for this defense, but there is an unforgettable definition that still resonates in the warning note by an English judge: "is a very unruly horse, and when you once get astride it, you never know where it will carry you. It may lead you from sound law. It is never argued at all but when other points fail"[9].

There are many arguments regarding the public policy defense. On the one hand, many scholars have said that this exception is considered as not only to contrast with the main aim of establishment of the international conventions, particularly the New York convention of 1958, but it is also an obstacle to the enforcement and recognition of any arbitral award. Furthermore, they argue, public policy is just an 'escape sentence' Because it can cover a wide range of issues, and parties opposing enforcement attempt to argue this defense when they have no other

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[2]Domenico Di Pietro, Martin Platte Enforcement of International Arbitration Awards: The New York Convention of 1958(Cameron May 2001) p.179.

[3] Ibid 179

[4] Article V (2) (b) of the New York convention

[5] English Arbitration Act 1996, 68(2)(g) ("the award may be obtained by fraud or the award or the way in which it was procured being contrary to public policy") Jordanian civil Law article 29

[6] Art 34(2) (B) ii of the Model law on International Commercial Arbitration.

[7] Riyadh Convention article 37(e), the Arab League Convention article 3(e), Amman Convention 1987, The 1975 Panama Convention, The 1979 Montevideo Convention.

[8] Mark B Buchanan,'"Public Policy" and International commercial arbitration' [1988] 512

9 Alan Redfern Law and Practice of International Commercial Arbitration (Sweet & Maxwell) 4th Revised edition (8 Sep 2004)) 499

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basis for asking the court to vacate the award and that was necessary to encourage countries to ratify the conventions[10]**.** In addition, the broad interpretation of public policy has undermined the effectiveness and strength of the New York convention. On the other hand, other scholars see public policy as the most significant exception and state that the public policy defense goes to the heart of the New York convention.

II. LEGAL FRAMEWORK OF INTERNATIONAL COMMERCIAL ARBITRATION

The basic legal framework for international commercial arbitration was founded based on the Geneva protocol of 1923 and the Geneva Convention of 1937, with enactment of national arbitration legislations that paralleled these instruments, in addition to improvements of effective institutional arbitration systems. Based on these foundations, the current judicial system for international commercial arbitration was developed during the second half of the twentieth century, especially with the entrance of different states into many of the international arbitrations conventions (particularly the New York convention. Additional conventions specifically facilitated the arbitral process by enacting different national arbitration statutes; at the same time, domestic courts at most stages created strong consequences for these legislative instruments, often expanding or elaborating on their terms[11]. Through a highly complex interaction, national legal systems and international conventions combined their efforts to provide the framework within which international arbitration is conducted. It is important to understand this context to understand the process of international commercial arbitration. furthermore, how can the essential aim of arbitration be affected which embodies in resolve the dispute between parties by reaching to the final decision that based on many ways to refuse to enforce and recognize a foreign arbitral award as a public policy ground.

As mentioned, many levels of legal regimes are governing international commercial arbitration, international agreement among countries, the various national legal systems that have an impact on arbitration, and the contractual arrangements of the parties. Among these levels of governance, the national legal systems hold a central position of governance for international commercial arbitration, because the national legal systems determine the effect and validity of the arbitration agreement and implement any relevant international conventions. Conversely, as a practical matter, the private arbitration agreement as well as 'any International conventions will only have the effect that national legal systems confer upon them'.[12]

[10] Oscar Samour,The Public Policy exception to the New York Convention on recognition and enforcement of arbitral award,2010 < http://consortiumelsalvador.com/descargas/consortium261.pdf > accessed 16 July 2012
[11]Gary B. Born, International Arbitration: Cases and Materials (Kluwer Law International 2011) 27
[12] Gary B. Born, International Arbitration: Cases and Materials (Kluwer Law International 2011) 27

Many scholars discuss about the independence of international commercial arbitration from national legal systems and the notion of a truly international 'decoalized' system of international commercial arbitration that operates independently of all national legal systems, or at least independently of the national law of the place where the arbitration is held. The independence of international commercial arbitration from national legal systems is sometimes considered an obstacle to dispute resolution in international trade, but on the one hand, the reality is that international commercial arbitration is still dominated by national legal systems, particularly by the law of the 'situs' of the arbitration.

On the other hand, and because of recent legislative reforms in many countries, the legal framework governing international commercial arbitration has become much more autonomous from national laws. However, the most important step towards a 'uniform system of International arbitration' has been achieved through several international conventions. The most notable are the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the United Nations Commission on International Trade Law (UNCITRAL MODEL LAW 1985) that dealt with international commercial arbitration.

III. PUBLIC POLICY IN INTERNATIONAL CONVENTIONS AND NATIONAL LAWS

(A) Public policy in New York Convention

The New York convention was enacted to guarantee the international respect necessary for the domestic courts of various nations to enforce private foreign arbitral awards. Not surprisingly, this international agreement contains certain exceptions under which the courts may legally refuse to enforce a foreign arbitral award. These defenses have two distinct types of grounds: those that must be raised by the party resisting and another type that can be raised by the courts of the host country on their own volition[13].

The New York convention currently governs recognition and enforcement matters. This treaty contains a public policy exception that permits domestic courts to refuse to enforce a foreign arbitral award if the award violates the public policy of the nation in which enforcement is sought[14]. The public policy defense is the exception by which the court can refuse to enforce any award, if the defendant does not raise this ground[15].

[13] Richard A. Cole. The public policy exception to the New York convention on the recognition and enforcement of arbitral award., [1985-1986] P366,
[14] Ibid, P.366
[15] p. sanders, New York Convention on the recognition and enforcement of foreign arbitral awards p 54 < DOI: http://dx.doi.org/10.1017/S0165070X00027005 (About DOI), Published online: 21 May 2009 > accessed 18 August 2012.

Under the New York Convention, a winner party can only seek enforcement of a foreign arbitral award if he or she has the original arbitral award or a duly certified copy of it and/or the original arbitral agreement or a duly certified copy of it. If a loser party wants to frustrate the enforcement, he or she must prove that enforcement of this arbitral award will be contrary to and will violate the public policy of the state where the award is sought by the winner party[16].

This ground of refusal is provided based on article V (2)(b) of the New York Convention, which provides that "Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country[17]." Unfortunately, a broad interpretation of the public policy defence in some cases undermines the strength and the effectiveness of the New York Convention[18], and in turn casts doubts on the convention's effectiveness. This will be discussed in the next chapter.

(B) Other Conventions

The 1927 Geneva Convention stated in Article 1(e)) "that an award would be enforceable unless contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon".[19]

The 1975 Panama Convention [20]refers to the 'public policy exception of that State.' The 1979 Montevideo Convention [21]goes further based on Art 2(h)), stating that" it requires that the award be 'manifestly contrary to the principles and laws of the public policy ['*orden publico'*] of the exequatur State" The 1983 Riyadh Convention[22] provides that enforcement may be refused if the award is 'contrary to "the Muslim *Shari'a* public policy or good morals" of the signatory State where enforcement is sought' and that founded on Art (37). On the other hand, the 1987 Amman Convention refers to the 'public policy' defence[23].

[16]P. SANDERS, NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS p 54 < DOI: http://dx.doi.org/10.1017/S0165070X00027005 (About DOI), Published online: 21 May 2009 > accessed 18 August 2012

[17] New York Convention art V (2) b

[18]Richard A. Cole. The public policy exception to the New York convention on the recognition and enforcement of arbitral award. 1985-1986] P366

[19] Convention on the Execution of Foreign Arbitral Awards.

[20] Inter-American Convention on International Commercial Arbitration, made in Panama, 30 January 1975. This Convention was modelled on the New York Convention and has been ratified by fifteen Latin American countries and the United States.

[21] Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979.

[22] Convention on Judicial Co-operation between States of the Arab League, made in Riyadh, 6 April 1983

[23] Convention of the Arab League on Enforcement of Arbitral Awards, This Convention has not come into force, because it has not yet been ratified by the stipulated minimum requirement of seven States. made in Amman - Jordan, 14 April 1987.

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(C) National legislation

The public policy expression used in a number of national legislations varies considerably, from expressly stipulating 'international public policy' through referring to national norms[24].

In Lebanon, Algeria, Portugal, and France refer to 'the principles of international public policy'. Likewise in the Tunisian legislation and Romanian legislation that make a distinction between public policy as applied to domestic awards and public policy as applied to foreign awards. Another legislation of many countries refers simply to 'public policy'. as worded in the New York Convention and the UNCITRAL Model Law.[25]

On the other hand, the legislations in Japan, Libya, Oman, Qatar, Jordan, and the United Arab Emirates refer to public policy (or public order) and good morals, Yemen refer to public order and the Muslim *Shari'a*. On contrast, several countries do not refer to public policy. For instance, Austrian law makes a distinction between mandatory laws and "the basic principles of the Austrian legal system[26]". Polish legislation provides that an award will not be enforced if it "offends the legality or the principles of social coexistence in the Polish People's Republic"[27]. The legislation of Swedish states that enforcement of a foreign award may be refused if the court finds that "it would be clearly incompatible with the basic notions of the Swedish legal system to recognise and enforce the award"[28]. The legislation of the Republic of Korea requires that "a foreign judgment be compatible with 'good morals and the social order of the Republic of Korea."[29] In China, the legislation refers to enforcement of a foreign award it may refuse if it "goes against social and public interest."[30]

As a result, a number of national laws use the public policy term in their legislations, and others use different names, notwithstanding of these different, but the purpose of the existence of the public policy defense or whatever is called is the same and that to protect the good morals and public interest.

IV. PUBLIC POLICY DEFENSE

This ground of refusal is provided in article V (2, b) of the New York Convention and article 34(2) of The UNCITRAL Model law on International Commercial arbitration. Furthermore,

[24] INTERNATIONAL LAWASSOCIATION LONDON CONFERENCE (2000)
[25] NTERNATIONAL LAWASSOCIATION LONDON CONFERENCE (2000)
[26] Ibid, Article 595(1).6 of the Code of Civil Procedure (1983).
[27] Ibid, Articles 712(1)(4), 1146 and 1150 of the Code of Civil Procedure (1964).
[28] Ibid, Article Section 55(2) of the Swedish Arbitration Act 1999.
[29] Article 203 of the Code of Civil Procedure (1991). such as in case Judgment of 14 February 1995
[30] NTERNATIONAL LAWASSOCIATION LONDON CONFERENCE (2000) 12

many conventions have covered the public policy defense[31]. The subject of public policy is controversial because there is no uniform definition of the term. Different states have different meanings for 'public policy'. Therefore, if enforcement of an arbitral award is refused in one country because of public policy considerations, it might be necessary to find another country that does not apply the public policy exception. This controversial approach has been adopted in many countries. The two sections of this chapter will explain and discuss first the concept of public policy and then will discuss critically the application of the public policy defense by various national courts.

(A) Public Policy Concepts

Notwithstanding the differences of the determinations and definitions of public policy, at practical and theoretical levels, there is general consent that public policy reflects some good moral, economic, social, or legal principles[32]. The reason for existence of this term is to protect the fundamental principles and moral values of the society in question. Thus, the public policy exception may be described as th English House of Lords delineated it in 1853, as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good"[33]'. *Richardson v. Mellish* defined this defence as "it is a very unruly horse, and when you get astride it you never know where it will carry you" [34]. A definition that is the most often quoted was handed down by Judge Joseph Smith in *Parsons & Whittemore*[35]. He held that enforcement of a foreign arbitral award may be denied on public policy grounds 'only where enforcement would violate the forum state's most basic notions of morality and justice'.

In the context of enforcement of an arbitral award, the English Court of Appeal (Sir John Donaldson MR), in *D.S.T. v. Rakoil* (1987) [36], stated:

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

[31] Riyadh Convention article 37(e), the Arab League Convention article 3(e), Amman Convention 1987, The 1975 Panama Convention, The 1979 Montevideo Convention.
[32] Oscar Samour,The Public Policy exception to the New York Convention on recognition and enforcement of arbitral award,2010 < http://consortiumelsalvador.com/descargas/consortium261.pdf > accessed 16 July 2012
[33] Egerton -v- Brownlow (1853) 4 HLC 1.
[34] (1824) 2 Bing 229, 252.
[35] Parsons & Whitemore v Rakta,508 F.2nd 969 (2nd Cir. 1974), (United States Court of Appeals, 1974).
[36]Deutsche Schachtbau-und Tiefbohrgesellscaft mbh -v- Ras Al Khaimah National Oil Company [1987] 2 Lloyd's Rep. 246 at 254.

member of the public on whose behalf the powers of the State are exercised'.

Notwithstanding that most developed arbitral jurisdictions have similar conceptions of public policy[37], each state has its own concept, and different countries have different concepts of what is required by its 'public Policy' or (policy order) especially Islamic countries[38]. It is possible to imagine, for instance[39], a dispute occurred because of the division of gaming profits from a casino. This dispute is taken to arbitration, and an award is made by the arbitral tribunal. In different countries, the division of gaming profits that led to the award would be enforced as a valid transaction because is a legal transaction. However, in states that don't tolerate gambling[40], the award might be set aside because it is contrary to the public policy of the place where the award is sought because gambling is illegal there. Similarity, it is possible to envisage a dispute between a wine producer and a distributor being regarded as subject to arbitration in many countries except in some Islamic countries[41] in which the manufacture, trade, or consumption of alcohol is forbidden[42].

As a result, the term 'public policy' term is easier to exemplify than to define. Thus, the basis is that every state has its own fundamental interests within which it must weigh a foreign arbitral award. If an award, for example, involves bribery or corruption, such an award is not enforceable because it is against the interests of that state, which prohibits such acts. On the other hand, other laws may consider an action as being against the interests of state under some circumstances or at a particular time, such as trading with an enemy in wartime[43].

Three types of public policy have been identified although those provisions of the New York Convention and the Model Law refer only to international public policy[44]. The three types are

[37] Such as the Swiss Federal Supreme Court provides '"that Public Policy denotes fundamental legal principles as a departure from which would be incompatible with the Swiss legal and economic system. Similarly, German courts have held that an award will violate public policy only if it conflicts with fundamental notions of justice, bonos mores or conflict with the principles which are fundamental nations or economic value's", for more details see Alan Redfern, and others, Law and Practice of International Commercial Arbitration (Sweet & Maxwell 2004) 4th Revised edition (8 Sep 2004) 497

[38] Dr El-Ahdab provides that "the concept of public policy is based on the respect of the general spirit of the *Shari'a* and its sources (the Koran and the *Sunna*, etc.) and on the principle that 'individuals must respect their clauses, unless they forbid what is authorized and authorize what is forbidden "'. For more details **see** El-Ahdab, "General Introduction on Arbitration in Arab Countries", *International Handbook on Commercial Arbitration* (hereinafter "*Handbook*") (Kluwer), Suppl. 27, Dec. 1998, Annex 1, p.12. See also El-Ahdab, "Enforcement of Arbitral Awards in the Arab Countries", (1995) 11 *Arbitration International* 169.

[39] Alan Redfern & M.Hunter, Law and Practice of International Commercial Arbitration, 4th edn (London :Sweet & Maxwell 2004) 419

[40] Saudi Arabia, Jordan.

[41] Such as Saudi Arabia

[42] Alan Redfern & M.Hunter, Law and Practice of International Commercial Arbitration, 4th edn (London :Sweet & Maxwell 2004) 419

[43] Lafi Mohammad Mousa Daradkeh, Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law) 2005,197

[44] Philippe Fouchard, Emmanuale Gaillar, Berthold Goldman and John Savage, Fouchard, Gaillard, Goldman on

domestic, international, and transnational or 'truly' international public policy. Furthermore, some theorists include a fourth level, multinational public policy, when the interests to be protected belong to a particular group of nations, as will be explained below.

1. Domestic Public Policy

Domestic public policy involves any act that contradicts the mandatory rules of national laws or breaches the high and valuable morality of the local society[45]. In this type, the parties to an arbitration process are from the same country, so its public policy will apply. For instance, the Court of Cassation[46] decided that such a judgment is contrary to Jordanian public policy, since it is contrary to section 7(1, f) of Act No 8. In another case, the Court of Cassation considered a dispute of the commercial agency that was settled by arbitration to be contrary to Jordanian public policy, since it is contrary to article 20 of the Commercial Agents and Mediators Law[47]. It seems that the tendency of the Jordanian courts is to refuse enforcement as far as the arbitral award is contrary to the mandatory rules of Jordanian law.

2. International Public Policy

International public policy (rather than simply 'public policy') is an expansion of national public policy. It consists of the rules and regulations of a country's domestic public policy applied in an international context. Once enforcement of a foreign arbitration award is sought, the courts be required to look to international public policy and balance the interests of the nation's own domestic public policy with the 'public policy of interested nations and the needs of international commerce'. A country' domestic public policy is not necessarily the same as its international public policy [48]. In general, any arbitral award has been achieved by fraud,

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International Commercial Arbitration (2nd Edition, Kluwer Law International 1999) p 966. Domenico Di Pietro, Martin Platte Enforcement of International Arbitration Awards: The New York Convention of 1958, (publisher Cameron May 2001) 182

[45] Musleh Ahmad Musa Tarawneh, Recognition and Enforcement of Foreign Arbitration Agreements under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958; (1998)

[46] Court of Cassation's decision No 852/89 (Journal of Jordanian Bar Issue 5 1991) 875.

[47] Court of Cassation's decision No 47/91 (Journal of Jordanian Bar Issue 1-3 1993) 193.

[48] should be noted with respect to this matter that the Committee on International Commercial Arbitration in its final report on public policy as a bar to enforcement of international arbitral awards "recommended that:

1-The expression 'international public policy' is used in these recommendations 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 said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy) '.

'2- The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned, (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'; and (iii) the duty of the State to respect its obligations towards other States or international organizations'.

'3- An example of a substantive fundamental principle is prohibition of abuse of rights. An example of a procedural fundamental principle is the requirement that tribunals be impartial. An example of a public policy rule is anti-trust law. An example of an international obligation is a United Nations resolution imposing sanctions.

corruption, and bribery or if the subject of the award is drug smuggling and trafficking, it is considered as violating international public policy. Consider, for example, Transport de cargaison (Cargo Carriers) v. Industrial Bulk Carriers[49] .

3. Transnational or Truly International Public Policy

"The conception of 'transnational public policy' or 'truly international public policy' is of even more restricted scope, but of universal application, incorporating fundamental rules of natural law, principles of universal justice, in public international law, and the general principles of morality accepted by what are referred to as 'civilized nations'".[50]

While there are no cases in which a court has explicitly applied 'transnational public policy', only some decision clearly refers to this concept[51]. For illustration, the Milan Court of Appeal decision referred to it. The Swiss Federal Tribunal in *W. -v- F. and V.* (1994) was in favour of considering a 'universal conception of public policy, under which an award will be incompatible with public policy if it is contrary to the fundamental moral or legal principles recognized in all civilized countries. And many cases have recognised certain activities, such as corruption, drug trafficking, smuggling and terrorism, to being illicit virtually the world over[52].

4. Multinational Public Policy

This type of public policy expresses that a group of nations often reflect the interests that are shared within that group. For instance, consider the 'European public policy' of the European

Some rules, such as those prohibiting corruption, fall into more than one category".

[49]Case 185, Canada: Quebec Court of Appeal (Vallerand, Brossard and Dussault, JJ. A.) in details; "Cargo Carriers, whose cargo ship travels between Niger and Spain, contracts with Industrial Bulk for port services. A dispute arose concerning sums incurred and paid by Industrial for services rendered while Cargo's ship was moored in Bilbao. Cargo opposed the enforcement of the arbitral award rendered in Industrial's favour for two reasons. First, the award was said to order payment by Cargo of a sum greater than that expended by Industrial. The court rejected this argument on the grounds that it was equivalent to an application for the setting aside of the award and that this was within the exclusive jurisdiction of the arbitral tribunal under article 34 MAL. Second, Cargo argued that the award provided for reimbursement of a bribe paid by Industrial to the port authority in Bilbao and that it would be contrary to Canadian public policy for Quebec courts to enforce such an award. The court rejected this argument, accepting the arbitrator's interpretation of the nature of the payment in question. The court further stated that the payment was a ransom as opposed to a bribe because Industrial had no other choice but to pay the escalating demurrage charges to enable the ship to leave the port. The court distinguished between a bribe, which it defined as intrinsically immoral for both the offeror and the receiver, and a ransom, which involves immorality only on the part of the blackmailer. An arbitral award imposing the reimbursement of a sum paid as ransom does not violate Canadian public policy and therefore Cargo could not resist recognition and execution of the award because of article 36(b)(ii) MAL. A motion for leave to appeal to the Supreme Court of Canada was denied.", <http://interarb.com/clout/clout185.htm> accessed 28 August 2012

[50]International Law association, London Conference (2000) Committee on International Commercial Arbitration 7

[51]NTERNATIONAL LAWASSOCIATION LONDON CONFERENCE (2000) COMMITTEE ON INTERNATIONAL COMMERCIALARBITRATION,

[52]International Lawassocation London Conference (2000) commitee on International commercial arbitration 7

Union and the public policy of Muslim countries as expressed in the Shari'ah. The multinational public policy of a group of nations may prevail over the national public policies of nations within that group. In *Eco Swiss China Time Ltd. v Bennetton International NV*[53], the European Court of Justice ('ECJ') rendered its first decision since the establishment of the European Union ('EU') on 'European public policy' as a ground for annulling arbitral awards[54].

As shown above, many levels of public policy have been identified, but the provisions of the New York Convention and the Model Law certainly refer to international public policy, not to domestic public policy or other types[55]. Therefore, the next section will discuss the implementation of international public policy.

(B) Application of Public Policy Defence

This section will explore the application of the public policy exception through many cases in which courts were unwilling to refuse enforcement based on the public policy grounds (based on narrowly interpretation), as well as others cases in which courts refused to enforce foreign arbitral awards on the basis of the public policy defense.

Regarding cases in which the courts enforced the arbitral award (narrow interpretation)

1- Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA) [56]

In this case, Parsons an American corporation contracted with RAKTA, an Egyptian company to construct and manage a paperboard mill in Egypt, The U.S. Agency for International Development (USAID), would finance the project through offering RAKTA funds to this project. This contract between these parties included an arbitration clause and a force majeure clause[57]. the work commenced as planned until May 1967, because the Arab-Israeli Six Day War arose and that made the Parsons' work crew leave from Egypt[58]. The problem escalated

[53] Eco Swiss China Time Ltd v Benneton International NV (2000) 5 CMLR 816

[54] In this case, In this case, the Dutch Supreme Court referred to the ECJ for a in concerning to the applicability antitrust provision (Article 81) of the Treaty Establishing the European Community ("the EC Treaty"), specially, the question was whether the noncompliance with Article 81 is considered as a ground for setting aside the award on the base of public policy, when national law in Netherlands does not consider infringe of national competition law as falling within the public policy grounds for annulment. In the sense of The ECJ that provides that every national court of the EU member states should allow a claim for annulment on the ground of non-compliance with Article 81 of the EC Treaty.

[55] Philippe Fouchard, Emmanuale Gaillar, Berthold Goldman and John Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration (2nd Edition, Kluwer Law International 1999) 966

[56] *Parsons & Whitemore v Rakta*,508 F.2nd 969 (2nd Cir. 1974)

[57] Ibid. The arbitration clause provided that the parties would use arbitration if any dispute arose in the course of performance Id, and The force majeure clause "excused delay in performance due to causes beyond [Parsons'] reasonable capacity to control" Id.

[58] Since the United States was the principal ally of the Israeli enemy, Egyptian hostility toward Americans was

the Egyptian government broke diplomatic ties with the United States and ordered all Americans expelled from Egypt except those who would apply and qualify for a special visa

Based on the arbitration clause this dispute that led to arbitration, the Parsons an American corporation argued that postponement is excused by the force majeure clause the RAKTA opposed and sought damages for breach of contract. The arbitration tribunal made its final award in favor of RAKTA.

At the enforcement stage, Parsons refused the arbitral award and sought to resist enforce it through arguing that enforcing the award would infringe the public policy of the United States. Parsons claimed that since USAID's withdrawal of financial support because of U.S. diplomatic ties with the Egyptian government, the company was required as a loyal American citizen to abandon the project. The U.S. Court of Appeals for the Second Circuit rejected this argument and confirmed the arbitral award[59]. In the analysis of the court, that to deny enforcement of this award mainly because of the United States' severance with Egypt would mean converting the interpretation of public policy defense from narrowly scope into a major loophole, so refused to enforce any an international arbitral award on public policy defense only accepted when the arbitral award would violate the 'most basic notions of morality and justice' of United State.

As a result of the Parsons court, the public-policy defense should be narrowly construed, not broad interpreted.

2- Westacre Investments, Inc. v. Jugoimport-SPDR Holding Co. Ltd.,[60]

The Westacre award was challenged in the United Kingdom, where the allegations of bribery and corruption were raised The Court of Appeal of England and Wales held this issue, however, the Westacre was hired by the Yugoslavian directorate in order to get contracts for the sale of military equipment to the Kuwait country, even the operation required to use its personal influence and to pay bribes, later than Westacre could secure sale contracts for the Yugoslavian directorate with the Kuwaiti government. But the Yugoslavian directorate denies the contract and refused to pay Westacre the contracted commission. So Westacre submitted the dispute to arbitration based on to the arbitration agreement, then the arbitration tribunal made an award for Westacre. Once the winner party "Westacre" attempted to enforce the arbitral award in

prevalent.

[59] May Lu, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to Oppose Enforcement in the United States and England, 23 Arizona Journal of International and Comparative Law No 3, p. 773-774 (2006)

[60] [2000] Q.B. 288, 294 (C.A.) (Eng)

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England, the directorate resisted enforcing by argued that the underlying contract to purchase personal influence was illegal in Kuwait, the country of performance, as well as in England, therefore, the enforcing the award would be contrary to English's public policy as well as the doctrine of international comity.

The lower court and the Court of Appeal of England and Wales refused the directorate's arguments. Whereas the courts noted that an agreement to purchase personal influence was not illegal under the Swiss law, the law governing the arbitration. "In fact, English law permitted an English court to enforce an agreement that was contrary to the public policy of the place of performance as long as enforcing the agreement was not contrary to the public policy of the governing law or of England."[61] Next, "only the most serious universally condemned activities such as terrorism, drug trafficking, prostitution and paedophilia and in any event nothing less than outright corruption and fraud would offend against English public policy." [62] "The lower court found that an agreement to purchase personal influence did not fit in this list. Additionally, the lower court evaluated which public policies the agreement implicated".[63] On the one hand, it is significant to promote the "public policy against enforcement of corrupt transactions."[64] And also it is significant to advance the "public policy of sustaining international arbitration agreements. [65]".

In conclusion, the lower court, interpreted the public-policy defense narrowly, and enforced the award**[66]**.

3- Northrop Corp. v. Triad International Marketing S. A[67]

Northrop, a U.S. arms supplier entered with Triad in a marketing agreement to Triad would solicit contracts for sale of military equipment to the Saudi Arabian Air Force in return for commissions on the sales. Later than Triad could bring solicited the contracts for Northrop, Saudi Arabia issued a declaration the payment of commissions for arms contracts is illegal and forbidden paid for. Consequently, because of Saudi Arabia prohibited pay for arms contracts Northrop stopped paying commissions to Triad, based on the arbitration clause in the marketing

[61] May Lu, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to Oppose Enforcement in the United States and England, 23. (Arizona Journal of International and Comparative Law No 3, p. 782 (2006)781
[62] ID 781
[63] ID 781
[64] ID 781
[65] ID 781
[66] Another case is considered a similar public-policy argument in Judgment of 14 February 1995, XXI Y.B. Comm.Arb.612(Korean S.Ct.) (1996); that the court interpreted the public policy of Korea in a narrowly construed whereas the award will be only contrary to its public policy only when the foreign arbitral award is against too good morality and other social order of Korea.
[67] 811 F.2d 1265 (9th Cir. 1987)

agreement this dispute submitted by Triad to arbitration, because the arbitration tribunal made its final award in favor of Triad, Triad sought to enforce the award in the U.S. courts. Northrop refused the enforcement by arguing that the marketing agreement was invalid under the California Civil Code as the Saudi declaration made it illegal to pay commissions for arms contracts, hence, the enforcement of the agreement and the award would violate the US's public policy.

In the sense of The U.S. Court of Appeals, that even though Saudi law prohibited to pay commissions for arms contracts, the related law was the California law if the parties decided that law to govern the arbitration. beside Northrop did not bring any evidence of a California law that prohibited the payment of such commissions, so California public policy did not apply in this context, therefore the court rejected the Northrop arguments and held that the enforce of the arbitral award would not be contrary to public policy and to require Northrop to pay Triad the owed commissions. Therefore, "the relevant public policy was not that of the country of performance but rather that of the country of enforcement, taking into consideration the governing law of the arbitration"[68].

In consequent, the U.S. Court of Appeals for the Ninth Circuit narrowly construed the public-policy defense and enforced the arbitral award.

V. REGARDING CASES IN WHICH THE COURTS REFUSED TO ENFORCE AN ARBITRAL AWARD BASED ON PUBLIC POLICY GROUNDS

1. Soleimany v. Soleimany[69]

The Court of Appeal of England and Wales accepted the public policy argument of the party opposing enforcement and refused to enforce the arbitral award. This case is based upon an illegal contract between a father and son. Both were Jewish and Iranian by origin. They used to smuggle Persian carpets from Iran to England and other places. The son lived in England, while his father lived in Iran. A dispute between them arose with respect to the division of the proceeds of the sales. After failing to resolve this dispute by mediation, both parties agreed to refer it to arbitration by Beth Din under Jewish law[70]. The award was made in favour of the

[68] May Lu, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to Oppose Enforcement in the United States and England, 23. (Arizona Journal of International and Comparative Law No 3, p. 782 (2006) 781

[69] [1998] 3 W.L.R 811

[70] 'Beth Din means house of judgment in Hebrew, there are a number of Batei Din administrated different sections of the Jewish community. But the best known is the London Beth Din'.C Rose. Op.Cit,, see footnotes 199, Lafi Mohammad Mousa Daradkeh, Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law) 2005 , ,

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son and it *referred to the illegality* of the operation and assessed his share of the profits at £576,574. Under section 26 of AA 1950, the son applied to the High Court to register the award as a judgement. Accordingly, leave to enforce an award was issued by the master. Then his father resisted the enforcement of this leave by applying to set aside the order on the grounds that the illegality rendered the son's claim void or unenforceable in the English court and contrary to English public policy. The judge refused the father's application on the basis that a contract that is unenforceable for illegality becomes enforceable if the procedural law of the arbitration attaches no significance to the illegality.

Then the father appealed this decision before the Court of Appeal, which held that an English court will not enforce an arbitral award that is contrary to English public policy because of the illegality of the underlying contract according to English law as well as to the law of performance. This is so even though the arbitrator considered the illegality irrelevant since he was applying Jewish law under which any purported illegality would have no effect on the rights of the parties. In conclusion, the appeal should be allowed and judgment on the award set aside.

2. Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co. [71]

A U.S court decided to vacate and set aside a part of the arbitral award for being contrary to public policy. Laminoirs, which is a French company, accepted to manufacture and sell galvanized steel wire at the world market price for steel wire to a Georgian company, Southwire. The disputes came up over the interpretation of the world market price, alleged corrosion of the products, and alleged flaking of the Zink coating on the wire. Laminoris submitted the disputes to arbitration in compliance with the arbitration clause enclosed in the contract, and the arbitration tribunal held that Southwire owed Laminoirs for the higher world market price in addition to the interest at the French legal interest rate.

Southwire opposed the enforcement of the award, when Laminoirs attempted to enforce it, arguing that the French interest rate went against the enforcing forum's public policy because it was usurious. Although the French interest rate was higher than the interest rate of Georgia, the court noted that the French legal rate of interest was not so offensive to Georgia's most basic notions of morality and justice. Thus, the application of the legal interest rate was not contrary to public police. However, the court went further and analysed the additional increase of 5% interest per annum. The court explained that the idea of interest is to make whole a person who is deprived of the use of his money rather than to penalize the wrongdoer.

[71] Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co., 484 F. Supp. 1063, 1069 (N.D. Ga. 1980).

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According to Georgia public policy, '[a] foreign law will not be enforced if it is penal only and relates to punishing of public wrongs as contradistinguished from the redressing of private injuries. therefore, the additional 5% interest was contrary to public policy because it was not reasonably related to the damage which Laminoirs suffered because of the delay in receiving the awarded sums. While the court enforced the award so far as the application of the French interest rate, it refused to enforce the additional 5% interest. In conclusion, the U.S court accepted the public policy defence with some limitations.[72]

3. In Regazzoni v. Sethia[73]

The House of Lords ruled the contract to be illegal under English law. The defendant agreed to ship and delivers 500,000 jute bags to a Swiss resident (plaintiff) from India to Italy. At first sight, nothing in the contract was illegal under English law, but it was intended that the cargo would be shipped from India to South Africa, and both parties knew that the bags were to be re-exported to South Africa. At the time, however, the Indian government had created in 1946 a regulation that prohibited and penalized export from or to South Africa because of its apartheid policy. Consequently, it was illegal under Indian law to export jute from India if the destination was South Africa. The defendant failed to deliver the cargo and argued that based on *Foster v. Driscoll*[74], the contract will be unenforceable and contrary to English public policy. This was a breach of contract between parties that violated the laws of foreign and friendly countries. On the other hand, the plaintiff sought to deflect the defendant's argument, stating that the Indian regulation could not be effect in England since it was either panel, fiscal, or political.

In conclusion, the House of Lords held it was contrary to English public policy to enforce a contract that violated the laws of foreign and friendly countries.

4. Al-Daher v. Al-Rosa an [75]

The procedures for arbitration were held in the UAE between the parties of the dispute, and the arbitral tribunal issued of in favour of Rashid Al-Dahere. When he attempted to enforce the arbitration award in Jordan, the Court of Appeal rejected the arbitral award, reasoning that the procedures of arbitration that took place in the United Arab Emirates were contrary to public

[72] May Lu, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to Oppose Enforcement in the United States and England, 23. (Arizona Journal of International and Comparative Law No 3, p. 782 (2006)
[73] Judgment of the House of Lords in Regazzoni v. Sethia, 21 October 1957, AC (1958) 301.
[74] [1929] 1 KB 470.
[75] Court of Cassation's decision No 411/84 (Journal of Jordanian Bar Issue 1-2 1985) 102 that in this case the cassations refused of the appeal that was submitted from a winner of the arbitral award.

policy and public morals in Jordan based on sub 7/1 of Article 7 of Enforcement of Foreign Judgments and Award in Jordan. The Court of appeal found that the arbitral award did not include the reasons for not referring to the existence of regulations, documents, or proceedings that competent courts have been adopted. Based upon that, it was impossible for a competent court to adjudicate the enforcement and recognition for foreign awards. For these reasons, the court decided that the judgment was subject against public policy and therefore could not be enforced in Jordan.

After that, Al-Daher appealed the appeal court's decision that the decision was contrary to Jordan's public policy and public morals. He argued that the procedures that have been applied in the UAE arose from that nation's consent of the Riyadh convention, and Jordan is also a member of this convention. Consequential, the Court of cassation refused this argument and decided that the arbitral award was subject against Jordan's public policy and therefore could not be enforced in Jordan.

Occasionally, there are many cases that court refused the objection of a loser party to refused enforce an arbitral award because arbitral award is contrast to International Public policy because it has been achieved by such as corruption, fraud and bribery, however, in many cases that a loser party may waive his right to resist enforcement and recognition for foreign arbitral award, for instance, in AAOT Foreign Economic Association (VO) Technostroy Export -v- International Development and Trade Services, Inc.[76] the (IDTS) sought to oppose enforcement in the United States of a Russian award on grounds that it had evidence that the arbitration court which had appointed the tribunal was corrupt, relying on Article V(2)(b) of the New York Convention. The United States Court of Appeals rejected his argument on the base that a party who has knowledge of facts possibly indicating bias or partiality cannot stay silent and later object and in this sense, he is considered as waive its right to resist enforce and recognize and arbitral award.

The narrow construction of the public policy notion has not been the only view adopted by scholars or national courts, there is another interpretation that was adopted by another scholars and national courts which is the broad interpretation, as shown through the cases many cases have been refused to enforcement based on the narrowly interpretation not on the broad one, and that what is the most courts and nationals and international conventions adopted either expressly or implied.

Therefore, it must be interpreted narrowly about refusing any foreign arbitral award, not

[76] 139 F. 3d 980 (2nd Cir., 1998).

broadly.

VI. CONCLUSION

An English judge in 1824 described public policy as:

"... a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail." [77]

It is clear that the public policy exception established in Article V (2) (b) of the New York Convention and also art 34 of UNCITRAL Model law, and provides that this exception should be applied only in the most restricted circumstances whereas a number of courts apply the narrowly interpretation in order to enforce or refused any arbitral awards, in other words, If an court finds, that either the party submit a proof or upon its own motion, that to enforce an award would be contrary to the public policy, then and only then should it refuse to enforce the award; unless such refusal would cause significant injustice. In the same sense, that such a part of arbitral award would be violate to a country's public policy, then the enforcing court should enforce the remainder of the award.

Consequently, if enforcing the award would violate the country's public policy where the arbitral award is sought, then the enforcing court use its right to refuse the award. On a practical base, the, courts frequently interpret the public-policy defense narrowly.

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[77] Richardson -v- Mellish (1824)

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