PUBLIC POLICY UNDER ARTICLE V(2)(b) OF THE NEW YORK CONVENTION: IS THERE A TRANSNATIONAL STANDARD?

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I. INTRODUCTION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards1 is one of the key instruments in international arbitration. It applies to the recognition and enforcement of foreign arbitral awards in the territory of a State other than the one in which recognition and enforcement is sought.2 The Convention unified methods of deciding whether to recognize and enforce a foreign arbitral award. Article V(1) of the Convention contains the grounds on which a party can resist recognition and enforcement and Article V(2) contains grounds on which the competent authority in a State can *sua sponte* refuse recognition and enforcement.3

This paper focuses on Article V(2)(b) of the Convention under which 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 “the recognition or enforcement of the award would be contrary to the public policy of that country.” Article V is addressed to the States in which recognition and enforcement is sought and the language in Article V(2)(b) indicates an intention to provide ultimate control to that State to decide whether it will admit a foreign arbitral award into its legal order and use its executive powers to give effect to the award. However, over the years, there has been a debate about the notion of public policy in Article V(2)(b). It has been suggested

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2 *Id.* at art. 1.
that States must defer to a “transnational” or “supranational” notion of public policy under Article V(2)(b).

In this paper, I examine whether State parties to the Convention have an obligation to defer to a transnational standard of public policy. I also address the question of whether States should defer to a transnational standard in the absence of an obligation to do so under the Convention and, in answering this question, I contest the existence and possibility of a wholly transnational conception of public policy.

II. MEANING OF PUBLIC POLICY

Public policy, whether in the domestic or international context, is of variable scope. It is often referred to as an amorphous exception: the unruly horse. It is some moral, social, or economic principle so sacrosanct as to require its maintenance at all costs and without exception.

In international arbitration, the function of public policy is seen as that of displacing the otherwise applicable law, determined in accordance with the conflict of law rules of the seat of arbitration. Three factors help to grasp the notion of public policy in international arbitration: first, traditional public policy in private

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5 Richardson v. Mellish, 2 Bing 229, 252 (1824) (Burrough, J., stating that “public policy is a very unruly horse, and when once you get astride, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.”).

6 J.J. FAWCETT & PETER NORTH, CHESHIRE AND NORTH’S PRIVATE INTERNATIONAL LAW 123 (13th ed. 2005); Pierre Lalive, Transnational (or Truly International) Public Policy and International Arbitration, in 3 COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA CONGRESS SERIES 258, 261 (1986), www.http://www.lalive.ch/data/publications/58_Transnational_(or_Truly_International)_Public_Policy_and_International_Arbitration__in_Comparative_Arbitration_Practice_and_Public_Policy_in_Arbitration_1986.pdf (defining public policy as a “general principle of private international law which exists in all legal systems even in the absence of specific rules or judicial precedents to that effect and a principle which may be opposed to the application of foreign law even though the latter would be applicable by virtue of a conflict rule contained in an international convention, whether or not such convention has expressly formulated this reserve of public policy.”). See generally James D. Fry, Desordre Public International under the New York Convention: Wither Truly International Public Policy, 8 CHINESE J. INT’L L. 81–134 (2009).

international law may contribute to the formation of specific rules (of substantive private international law) adapted to international situations, thus taking into account the needs of international trade; second, the intervention of public policy in a given case does not always result in imposing the application of a particular and mandatory rule of the *lex fori*; third, the public policy of the forum may also intervene in order to protect the (foreign) public policy of one of several states and that of the international community.8

Public policy plays an important role in international arbitration in various stages: (i) in giving effect to arbitration agreements; (ii) in the annulment of an award; and (iii) in the recognition and enforcement of a foreign arbitral award. It varies in each of these stages.

Perhaps because of its dynamic nature, international instruments and courts alike have attempted to define the boundaries of public policy, rather than its content. The term “public policy” appears in several international instruments but has not been defined in any of them.9 The Hague Convention of 1971,10 for example, provides that a judgment or award must be “manifestly” incompatible with the public policy of the State addressed. In the context of enforcement of an arbitral award, an English Court has said that “[i]t has to be shown that there is some element of illegality or that the enforcement of the award would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.”11

III. TYPES OF PUBLIC POLICY

Three types of public policy must be distinguished in international arbitration: domestic, international, and transnational. Domestic public policy is comprised of the fundamental notions of morality and justice, determined by the State to be applicable to

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8 Lalive, *supra* note 6, at 268.
9 Fry, *supra* note 6, at 92.
purely domestic disputes in its jurisdictions and includes the mandatory laws of the State. International public policy is understood to be narrower than domestic public policy, in the sense that not every rule of law which belongs to the domestic public policy is necessarily part of the international public policy. In its final report on public policy as a bar to recognition and enforcement under the Convention, the International Law Association Committee on International Commercial Arbitration produces the definition of international public policy as:

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

International public policy, according to a generally accepted doctrine, is confined to violation of truly fundamental conceptions of legal order in the country concerned. Domestic and international public policies are determined and controlled by States.

Transnational or supranational public policy is understood to imply something different from international public policy. It has been described as a concept that involves the identification of principles that are commonly recognized by political and legal systems around the world. It is said to comprise fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as civilized nations. It has been described as the standards, principles, or accepted norms of conduct that represent a universal or at least regional consensus between nations.

12 Fry, supra note 6, at 86; see also Lalive, supra note 6, at 259.
14 [Hereinafter ILA].
18 Lalive, supra note 6, at 307.
19 Buchanan, supra note 13, at 514.
Dolinger defines it as a “world public policy” that establishes universal principles in various fields of international law and relations to serve the higher interests of the world community and the common interests of the individual nations. Buchanan asserts that while transnational public policy represents the common fundamental values of the world community, international public policy reflects a particular or selfish character. Essentially, this means that unlike international public policy which is traceable in its origin to the power of a sovereign State, transnational public policy does not belong to any State.

Some regional developments have also influenced notions of public policy. For instance, the European Court of Justice has held that Article 85 (now 81) of the Treaty Establishing the European Economic Community must be regarded as part of the public policy of member States of the European Union for the purposes of Article V(2)(b).

IV. Public Policy Under Article V(2)(b) of the Convention

The provisions of the New York Convention must be interpreted using the rules of interpretation provided by the Vienna Convention on the Law of Treaties. It is imperative to interpret the provisions of the Convention in good faith in accordance with the ordinary meaning to be given to its terms, in their context, and in the light of its object and purpose. The practice of States in the application of the Convention is also relevant in interpreting its

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24 Vienna Convention, *supra* note 23, art. 31(1). See David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 Vand. J. Transnat’l L. 565, 578 (2010) (stating that according to the rule, treaty interpretation must rely primarily on the terms of a treaty, while context and the treaty’s object and purpose must inform its mean-
provisions. Therefore, the text of Article V(2)(b), the drafting history of the New York Convention (*travaux preparatoires*), implementing domestic legislations, and the practice of contracting States must be examined to understand the conception of public policy under Article V(2)(b).

A. Text of Article V(2)(b)

Article V(2)(b) states that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

This text leaves no room for doubt on the point that Article V is addressed to the State where recognition and enforcement is sought and the intention behind V(2)(b) is to enable that State to refuse to accept into its legal order an award which contravenes its fundamental convictions. The Convention does not refer to any “universally applicable definition” or “common interpretation” of public policy.

The International Bar Association (“IBA”) Subcommittee states in its report on public policy that the notion of public policy was intentionally not defined in the Convention and its concrete manifestations may substantially vary from one jurisdiction to another. Even in the formulation of Article 36 of the 1985 UNCTRAL Model Law, there was no overt attempt to harmonize the definition or application of public policy. In the context of a similar provision in the 1968 Brussels Convention, it has been held
that the contracting States are free to determine, according to their own conceptions, what public policy requires.\footnote{Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 28, 2000, Curia I-1956, C-7/98, 2000 (Ger.), \url{http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45196&pageIndex=0&docLang=EN&mode=lst&dir=&occ=first&part=1&cid=1244585.}}

Further, Article III of the Convention contains an affirmative obligation to recognize and enforce an award in accordance with the Convention and a State cannot impose substantially more onerous obligations for recognition and enforcement of awards under the Convention than those imposed for domestic awards. The grounds in Article V are exceptions to the general obligation in Article III. Additionally, under Article (V)(2)(b), the subject of inquiry is the recognition and enforcement of the award and not the award itself. It follows from Article III and the purpose and context\footnote{See Summary Record of the Seventeenth Meeting, U.N. DOC. E/CONF. 26/SR.17, at 3.} of the Convention that Article V must be construed narrowly.

\section*{B. \textit{Drafting History of the Convention}}

The drafting history of the Convention is relied on to confirm what is derived from the text, context, and purpose of the Convention.\footnote{See U.N., Econ. & Soc. Council (“ECOSOC”) Res. 520 (VII) (Apr. 6, 1954). The ECOSOC set up an ad hoc committee to study the draft Convention submitted to it by the International Chamber of Commerce; see \textit{Maurer}, supra note 23, at 18–25 (showing a summary of the ad hoc committee’s meetings and draft).} It is clear from the drafting history of the Convention that the term “public policy” was intended to be interpreted narrowly.\footnote{See \textit{Summary Record of the Seventeenth Meeting, U.N. DOC. E/CONF. 26/SR.17, at 3.}} This is evident from the discussions of the ad hoc committee\footnote{See \textit{Maurer}, supra note 23, at 18–25 (showing a summary of the ad hoc committee’s meetings and draft).} set up by the ECOSOC and the deliberations of the United Nations...
Conference on International Commercial Arbitration\textsuperscript{36} which passed the final resolution\textsuperscript{37} to adopt the Convention.

The original provision recommended by the ad hoc Committee referred to awards “clearly incompatible with public policy or with fundamental principles of law of the country in which the award is sought to be relied upon.” The ad hoc Committee noted in its Report\textsuperscript{38} that by using the words “clearly” and “fundamental” it intended to limit the application of the provision to cases in which recognition or enforcement would be “distinctly contrary to the basic principles of the legal system of the country where the award is invoked.”\textsuperscript{39} The subsequent omission in the Convention of any reference to an award being contrary to “principles of law” confirms the approval of a narrow conception of public policy and underscores the strong pro-enforcement biases of the Convention.\textsuperscript{40} From experience under the Geneva Convention,\textsuperscript{41} it was anticipated that the originally proposed phrase may give rise to difficulties in interpretation and open the question of a revision of an award on its substance.\textsuperscript{42}

Based especially on the preparatory work of the Convention, the text of the Article, and the circumstances of its conclusion, it cannot be disputed that the negotiating parties who approved the Convention agreed on a narrow interpretation of public policy.\textsuperscript{43} Notably, the meaning of public policy was discussed neither by the ad hoc committee nor by the Conference.

\textsuperscript{36} [Hereinafter Conference].


\textsuperscript{39} Sheppard, supra note 29, at 222. \textit{See also id.} at 12.

\textsuperscript{40} UNCITRAL SECRETARIAT, \textit{supra} note 3, at 239.

\textsuperscript{41} Convention on the Execution of Foreign Arbitral Awards, Geneva (Sept. 26, 1927).


\textsuperscript{43} \textit{See} Government of the United Kingdom and Netherlands, \textit{supra} note 42, at 1–2, 7–8 (stating that it is thought that the reference to “principles of the law” should be omitted. The reference to public policy (“ordre public”) should enable the courts of the enforcing country to refuse to enforce awards that are fraudulent, oppressive, or scandalous. The Government of the Netherlands emphasized on restricting the scope of public policy). \textit{See also MAURER, supra} note 23, at 57.
The text of Article V(2)(b)—“public policy of that country”\(^{44}\)—and the drafting history of the Convention are consistent in the idea that States must define public policy for recognition and enforcement in their territories of awards rendered in international arbitrations seated outside. However, public policy was certainly envisaged as a narrow concept. In light of the object and purpose, drafting history of the Convention, and the text of Article V(2)(b), it is clear that the term public policy was neither conceived as the broad concept of domestic public policy of the enforcement State\(^{45}\) nor as a transnational public policy.\(^{46}\)

C. Implementing Legislations\(^{47}\)

The New York Convention is not a self-executing treaty and, therefore, requires implementing legislation by States.\(^{48}\) States that provide in their domestic legislations that enforcement may be refused if an award violates the public policy of that State comprise the largest category.\(^{49}\) For example, the arbitration law of India provides that enforcement of a (foreign) arbitral award may be refused if the Court finds that the enforcement of the award would

\(^{44}\) Born, supra note 32, at 408. See also U.N. Secretary General, supra note 42, at 5 (stating that it seems generally agreed that, on one hand, courts should remain free to refuse the enforcement of a foreign arbitral award if such action should be necessary to safeguard the basic rights of the losing party or if the award would impose obligations clearly incompatible by the public policy of the country of enforcement). Some commentators believe that the accomplishments of the Convention are marred by the public policy exception of Article V(2)(b). See also Cole, supra note 3, at 371.

\(^{45}\) Maurer, supra note 23, at 19, 49 (stating that the Conference discussed at length whether the term “public policy” in Article V(2)(b) should stand alone or include a reference to terms such as void, unenforceable contracts, material flaws, morality, etc. However, the opinion that public policy was to be interpreted narrowly was approved by an overwhelming majority of participating States).


\(^{47}\) See IBA Report, supra note 28, at 2–5 (offering a more comprehensive list of the definition of public policy in national legislations).

\(^{48}\) Maurer, supra note 23, at 8.

\(^{49}\) Fry, supra note 6, at 95–96; see also Fazilatfar, supra note 17, at 309 (stating as other examples: Antigua and Barbuda, Argentina, Australia, The Bahamas, Bahrain, Bermuda, Brazil, Canada, the Cayman Islands, Chile, Colombia, Croatia, Cyprus, Egypt, Finland, Ghana, Guatemala, Hungary, India, Indonesia, Ireland, Kenya, Korea, Lithuania, Madagascar, Malaysia, Mauritania, Mexico, Japan, Jordan, Malta, Qatar, Oman, Myanmar, New Zealand, Panama, Romania, Russia, Singapore, South Africa, Sri Lanka, Taiwan, Tunisia, Ukraine, Venezuela, and Zimbabwe).
be contrary to the public policy of India.\textsuperscript{50} A foreign award is in conflict with Indian public policy only if: (i) the making of the award was induced by fraud or corruption or was in violation of certain provisions of the (Indian Arbitration) Act that relate to confidentiality; (ii) is in contravention with the fundamental policy of Indian law; or (iii) is in conflict with the most basic notions of morality or justice.\textsuperscript{51} Brazilian law provides that enforcement may be refused if the decision is offensive to national public policy.\textsuperscript{52}

Few States expressly refer to their international public policy and France is at the forefront of the adoption of this idea. Under French Law, a foreign award is required to be recognized and enforced unless it is manifestly contrary to international public policy.\textsuperscript{53} The reference to international public policy found in French and some other statutes\textsuperscript{54} has been confused with transnational public policy.\textsuperscript{55} However, it is clear from French case law and works of European commentators that the reference is to the French conception of international public policy or, in other words, the set of values a breach of which would not be tolerated by the French legal order, even in international cases.\textsuperscript{56} It is not a norm of the international community but public policy of a State, applied in the international setting.\textsuperscript{57}

Reference to public policy (or public order) and good morals of the State is found, for example, in the legislations of Libya,\textsuperscript{58}


\textsuperscript{51} Explanation to The Arbitration and Conciliation Act, No. 26 of 1996 (India), SEC. 48(2)(b) was added by the Arbitration and Conciliation (Amendment) Act, No. 3 of 2016, \textit{India Code} (2015). The same grounds apply to the annulment of an award in case of an international commercial arbitration seated in India. In case of awards not arising out of international commercial arbitrations, the Indian courts may annul an award on the additional ground of “patent illegality.” See SEC. 34(2A). Other examples of States that have provided a legislative definition of public policy include Australia and the United Arab Emirates. \textit{See IBA Report, supra} note 28, at 2–3.

\textsuperscript{52} Art. 39.II of Brazil’s Law No. 9.307/1996 (Brazilian Arbitration Act) (stating that the request of homologation for the recognition or enforcement of a foreign arbitral award shall also be denied if the Federal Supreme Court ascertains that the decision is offensive to national public policy).

\textsuperscript{53} \textit{See generally Code de Procedure Civile [C.P.C.]} [Civil Procedure Code] art. 1498 (Fr.).

\textsuperscript{54} \textit{IBA Report, supra} note 28, at 5 (stating for domestic legislation in Lebanon, Portugal, Peru, and Paraguay).

\textsuperscript{55} \textit{See Fry, supra} note 6, at 97.

\textsuperscript{56} \textit{See Lalive, supra} note 6, at 259, 260, 263, 266, 272, 279, 288; \textit{see also Fry, supra} note 6, at 98. \textit{See generally Emmanuel Gaillard & John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration} (1st ed. 1999).

\textsuperscript{57} Fazlalatifar, \textit{supra} note 17, at 310; Fry, \textit{supra} note 6, at 99.

\textsuperscript{58} \textit{Code of Civil and Commercial Procedure}, arts. 407(4), 408 (Libya).
Oman, Qatar, and the United Arab Emirates. Yemen refers to the public order and the Islamic Shari’a.

Some States do not use the term “public policy.” For example, Sweden states that enforcement may be refused if a foreign arbitral award is “manifestly incompatible with the fundamental principles of Swedish Law”; Austria refers to a result that is “irreconcilable to the Austrian legal order”; Poland 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”; China refers to “social and public interest.” Oman requires a positive affirmation that an award complies with its public order.

Some States merely refer to the Convention in their arbitration laws and this means that the interpretation of public policy is in the exclusive domain of the courts of those States. There appears to be no national legislation that refers to principles that are based on commonly recognized or universal principles.

Evidently, States have variously given effect to Article V(2)(b). The significant similarity is the underlying supposition that defining public policy under the Convention is a State’s prerogative. In various ways, States have demonstrated that the conception of public policy is influenced by the uniqueness of each State’s system. Apart from the obvious case of the largest number of States that refer to their own public policy, this can also be inferred from legislations that have attempted to provide a precise content to the notion of public policy and those that do not use the term “public policy.” Not all States have distinguished between

59 Royal Decree 47/97, the Omani Law of Arbitration in Civil and Commercial Disputes, art. 53 (Oman).
60 Qatari Code of Civil and Commercial Procedure, ch. 13, art. 380(4) (referring to public policy and good morals in Qatar) (Qatar).
63 Swedish Arbitration Act 1999, SEC. 55(2) (Swed.).
64 Austrian Federal Statute on Private International Law (1978), art. 6 (Austria).
66 Civil Procedure Law of the People’s Republic of China, art. 268 (China).
67 See the Omani Law of Arbitration in Civil and Commercial Disputes (June 28, 1997), 602 Official Gazette, art. 58(2) (stating that it may not be permissible to issue orders for enforcement of an award in accordance with the provisions of this Law without confirmation of the following: The award does not contain any terms which are contravening the public order of the Sultanate of Oman) (Oman).
68 See German Arbitration Act, art. 1, No. 7 of the Arbitral Proceedings Reform Act, Tenth Book of the Code of Civil Procedure, § 1061 (Ger.); Swiss Law on Private International Law, art. 194 (Switz.).
domestic and international public policy, but this does not mean that these States will apply public policy broadly to foreign awards.69

D. Court Decisions

For a long time, courts have attempted to delineate domestic and international transactions in the application of mandatory domestic rules (including those falling in the ambit of public policy). In a 1950 decision, the French Cour de Cassation (Supreme Court)70 disregarded a Canadian statute that precluded gold clauses without distinguishing domestic and international transactions. The Court held that in keeping with the French concept of international public policy, the parties to an international contract were entitled to agree, even against the mandatory rules of municipal law (in this case, Canadian law) governing their contract, on the validity of a gold clause. Commentators believe that such decisions of the French Courts are based on the desire that private international relations should be governed by an international legal order.71

The American Courts have held that the expansion of American business and industry requires abandonment of the “parochial concept that all disputes must be resolved under our laws and in our courts”72 and have refused to apply mandatory domestic rules to international situations. English and Indian courts have followed a similar approach. This has contributed to the application of a narrow conception of public policy in many jurisdictions as courts recognize a distinction between public policy as applicable

69 IBA Report, supra note 28, at 5.
70 Messageries Maritimes, Court of Cassation of France, June 21, 1950, as cited in Lalive, supra note 6, at 273.
71 Lalive, supra note 6, at 273.
72 Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) (holding that the forum selection clause in an international contract is valid and enforceable); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1973) (holding that the arbitration clause in an international contract to arbitrate disputes relating to the Securities Exchange Act, 1934, is valid and enforceable); Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth Inc., 473 U.S. 614 (1985) (holding that an agreement to resolve antitrust claims arising from an international transaction is valid and enforceable).
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to domestic and international situations.\textsuperscript{73} It is nevertheless clear that the source of the distinction is national.\textsuperscript{74}

In most countries, the pro-enforcement bias of the New York Convention has been faithfully observed. Courts recognize that the principle of reciprocity requires that the awards of foreign arbitration tribunals be given due deference and enforced unless exceptional circumstances exist.\textsuperscript{75} However, the IBA Report shows that definitions of public policy in court decisions are varied and there are perhaps as many definitions of public policy as there are countries.\textsuperscript{76}

In civil law jurisdictions, the definitions generally refer to the basic principles or values upon which the foundation of the society rests without precisely naming them and, in common law jurisdictions, the definition refers to more precisely identified yet very broad values such as justice, fairness, or morality.\textsuperscript{77} Despite this expansive character, courts in most jurisdictions have been very reluctant to invoke the exception to deny recognition to foreign awards.\textsuperscript{78} It has been generally held that erroneous decisions, application of a law that is different from that of the enforcement forum’s laws, wrong application of its laws, or a result that is contrary to that which the enforcement forum’s courts would reach are insufficient to refuse recognition and enforcement under Article V(2)(b).\textsuperscript{79} Courts have attempted to underscore the purposes of the Convention and the need to exercise extreme caution in applying the public policy exception.

Decisions in civil law jurisdictions use terms like “fundamental values,” “fundamental principles,” “fundamental interests,” “fundamental norms,” “central and vital values,” “basic principles,” and “essential principles.”\textsuperscript{80}

The French courts have held that refusal to recognize and enforce a foreign arbitral award requires flagrant, effective, and con-

\textsuperscript{73} IBA Report, supra note 28, at 10 (stating that public policy must be distinguished from domestic mandatory laws. The fact that an award is in contradiction with a mandatory rule of law in the country where enforcement is sought will thus generally not lead to refusal of enforcement of the award).

\textsuperscript{74} See Lalive, supra note 6, at 276–77.

\textsuperscript{75} See comments of Prakash, J., in Re: Arbitration between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte. Ltd. [1996] 1 SLR 34, 46.

\textsuperscript{76} See generally IBA Report, supra note 28.

\textsuperscript{77} IBA Report, supra note 28, at 6–10.

\textsuperscript{78} Born, supra note 32, at 409.

\textsuperscript{79} Id.

\textsuperscript{80} See IBA Report, supra note 28, at 6–8 (discussing definitions of public policy in court decisions of Civil Law countries).
crete violation of international public policy. The international public policy of France has been held to be the “body of rules and values whose violation, the French legal order cannot tolerate even in situations of an international character.”

In Excelsior Film TV, the French Cour de Cassation (Supreme Court) refused to enforce a foreign award for lack of impartiality of one of the arbitrators. The Court noted that under Article V(2)(b) and Article 1502(5) of the New Code of Civil Procedure of France, recognition and enforcement of a foreign arbitral award can be refused on procedural and substantive grounds. In this case, an arbitrator who was part of the tribunal in parallel arbitrations in Italy and France was said to have conveyed erroneous information to the Italian tribunal, which influenced the tribunal’s decision on jurisdiction. The Court held that the partiality of the arbitrator created an imbalance between the parties and amounted to a lack of due process that violated public policy under the French Code and the Convention.

In a decision rendered in 2017, the Portuguese Supreme Court of Justice refused to recognize a foreign arbitral award that gave effect to a penalty clause in the Articles of Association of an Iberian law firm as being contrary to Portuguese bonos mores, principles of good faith, and proportionality. The Court noted that, Public policy is formed by principles underpinning the legal order, and that are part of the Constitution itself and of the Acquis Communautaire, (European Union) especially those protecting fundamental rights such as good faith, bonos mores, prohibition of abuse of rights, proportionality, prohibition of expropriation and discriminatory measures, prohibition of penalties in civil matters, and basic principles and rules of competition, both of domestic and European source.

In another decision also rendered in 2017, the Brazilian Superior Court of Justice refused recognition and enforcement of an award

81 SNF SAS (France) v. Cytec Industries BV (Netherlands), 32 Y.B. COMM. ARB. 282, 287 (2007) (Cour d’appel, Paris) [Paris Court of Appeal].
82 MAURER, supra note 23, at 97–103.
award made in the United States on two grounds: (i) the lack of impartiality of the tribunal; and (ii) award of damages in violation of a limitation set forth in Brazilian law. According to the Superior Court of Justice, this violated Brazilian public policy. Notably, this decision was delivered after the award had been examined and confirmed in proceedings in the United States. Commentators state that the Brazilian Superior Court of Justice rarely interferes with the recognition and enforcement of foreign arbitral awards and in this case the award was found to be “absolutely incompatible with the Brazilian legal system,” warranting interference.

Even in a State such as Switzerland, which is known to apply the public policy exception in a very restrictive manner, enforcement of a foreign arbitral award will be denied under Article V(2)(b) of the Convention when the enforcement of the award would be contrary to Switzerland’s domestic (international) public policy. This means that the award, because of its contents or the procedure followed by the arbitral tribunal, breaches the legal principles prevailing in Switzerland in an unacceptable manner and violates fundamental principles of the Swiss legal system.

Common law jurisdictions have widely followed the definition of public policy stated by the United States Court of Appeals for the Second Circuit in Parsons & Whittemore in which the Court held that “enforcement of foreign arbitral awards may be denied . . . only where enforcement would violate the forum state’s most basic notions of morality and justice.” In arriving at this conclusion, the Court was conscious of the Convention’s pro-enforcement bias, its supersession of the Geneva Convention, and the principle of reciprocity—“lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.” In this case, the United States Corporation against which enforcement of an ICC award was sought contended that, due to

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86 Ometto v. ASA Bioenergy Holding A.G., 549 Fed. Appx. 41 (2d Cir. 2014). A petition of certiorari against this decision before the Supreme Court of the United States was denied in 2014.
88 See Maurer, supra note 23, at 177.
91 Id. at 973–77.
certain actions taken by the Government of the United States and the severance of relations between the United States and Egypt, it was required as a loyal citizen to abandon its contractual obligations in Egypt. It was argued that, therefore, enforcement of the award requiring performance under the contract would be contrary to public policy of the United States. The Court rejected this contention and noted that to read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention’s utility.92

In another decision,93 the same Court allowed enforcement of an award that related to a contract that was stated to be forged and fraudulent. The Court distinguished between a forged or fraudulent arbitration agreement and a forged or fraudulent agreement that is the subject of the dispute. The latter issue was held to be in the exclusive domain of the arbitral tribunal.94 Some commentators assert that the public policy exception has been interpreted so narrowly in the United States that the exception may no longer exist in practice.95

The Court of Final Appeal in Hong Kong96 relied on the standards established in Parsons & Whittemore to state the function of the enforcement court succinctly: to refuse enforcement under the Convention, an award must be so fundamentally offensive to that jurisdiction’s notions of justice that, despite being a party to the Convention, it cannot reasonably be expected to overlook the objection. The Court emphasized on the language “of that country” in Article V(2)(b) to hold that public policy of the seat would differ from the public policy of the enforcement State. However, to refuse recognition and enforcement, the violation must be “compelling” and “go beyond the minimum” that “would justify setting aside a domestic judgment or award.”97 Interestingly, in this decision, the court did not clearly distinguish between transnational and international public policy.98

92 Id. at 974.
93 Europcar Italia, S.P.A. v. Maiellano Tours, 156 F.3d 310 (2d Cir. 1998).
94 Id. at 315.
97 Id. at 674.
98 Id. at 667 (Mason, J., stating “No doubt, in many instances, the relevant public policy of the forum coincides with the public policy of so many other countries that the relevant public policy is accurately described as international public policy.”).
The English Courts have adopted a strong pro-enforcement policy and are reluctant to excuse an award from enforcement on grounds of public policy. In the context of enforcement of an arbitral award, the English Court of Appeal has stated that,

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 would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.

England’s obligations under the New York Convention have been incorporated into the English Arbitration Act, 1996. In Nigerian National Petroleum, the English Court noted that “the public policy exception in Section 103(3) [of the English Arbitration Act, 1996] is confined to the public policy of England (as the country in which enforcement is sought) in maintaining fair and orderly administration of justice.” Although the English Courts recognize a distinction in the application of public policy in purely municipal and conflict of laws situations, the applicable public policy is, nevertheless, that of England. It is also clear from English court decisions that a narrow conception of public policy under the Convention is in itself part of its public policy.

India has, to a large extent, followed the English policy of distinguishing between purely municipal and conflict of laws situations. In Sri Lal Mahal, the Supreme Court of India reviewed the decisions on public policy and cleared any confusion that existed on the notion of public policy for enforcement of foreign agreements.
awards in India. The court distinguished the meaning of the term “public policy of India” occurring in the provision on annulment and the provision on recognition and enforcement of foreign awards under the (Indian) Arbitration & Conciliation Act, 1996. It was held that the meaning of public policy in the latter context is narrower and the decision in Renusagar was cited in support of this conclusion. In Renusagar, the Supreme Court of India distinguished between public policy as applicable to matters governed by domestic law and matters involving conflict of laws. It was held that in order to ascertain whether the rule is all-pervading or merely local, it must be examined in the light of its history, the purpose of its adoption, the object to be accomplished by it, and the local conditions. In 2015, India amended its arbitration laws to include a definition of public policy, delineating its scope in enforcement proceedings.

The European Court of Justice has stated in Eco Swiss China Time Ltd. v. Benetton International N.V. that “[i]t is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances.”

The judgment of the Court of Appeals, Milan, in Tecnoski snc is one of the few that refers to the international public policy of the Italian Courts as the “body of universal principles shared by nations of similar civilization, aiming at the protection of funda-

107 SEC. 34(2)(b)(ii).
108 SEC. 48(2)(b).
109 Renusagar Power Co. Ltd. v. General Electric Co., AIR 1994 SC 860 (India) (The decision pertained to SEC. 7 of the Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961 (India), which was repealed by the Arbitration and Conciliation Act, No. 26 of 1996 (India)).
110 Id. at 51; R.H. Graveson, Conflict of Laws 165 (7th ed. 1969) (stating that the concern of law in the protection of social institutions is reflected in its rules of both municipal and conflict of laws. Although the concept of public policy is the same in nature in these two spheres of law, its application differs in degree and occasion, corresponding to the fact that transactions containing a foreign element may constitute a less serious threat to municipal institutions than would purely local transactions).
111 Id. at 52.
113 Eco Swiss China Time Ltd. v. Benetton Int’l N.V., Court of Justice of the European Communities, 24 Y.B. COMM. ARB. 629, 636 (1999). Although the case pertained to annulment, the Court’s observations apply with equal force to recognition and enforcement proceedings under the Convention; Fry, supra note 6, at 109.
mental human rights, often embodied in international declarations or conventions.”

The Highest Arbitrazh Court of the Russian Federation has also stated that an award would be contrary to public policy if it produces results contrary to “universally recognized moral and ethical rules or threatening the citizens’ life and health, or the State’s security.”115 However, both the decisions are obscure and do not go beyond holding that the award in those cases were not contrary to public policy. The Milan Court appears to be referring to obligations in the realm of public international law (that may rarely influence outcomes in international arbitration) and which States have undertaken to adhere to under a treaty or other international instrument. The Russian court, on the other hand, provides an incongruent definition—the idea of universally recognized principles that affect the life and health of citizens in Russia and the security of the Russian State is inconceivable. Therefore, these decisions are not useful in assessing the scope and application of a transnational notion of public policy.

A review of court decisions as a measure of State practice under the Convention strongly indicates a pro-enforcement stance and remarkable consistency on this point. It is also representative of the fact that Courts also perceive that defining public policy under Article V(2)(b) is the prerogative of each of the State parties to the Convention. It has also been found that the prevailing view amongst States is that only the public policy of the State where enforcement is sought should be applied.116 The application of the provision in a restrictive manner, and its limitation to exceptional circumstances that affect the most fundamental values of a State, once again indicates that public policy under Article V(2)(b) does not mean the domestic public policy of a State or transnational public policy, but only the international public policy of the enforcement State.

V. SHOULDS STATES APPLY TRANSNATIONAL PUBLIC POLICY IN THE ABSENCE OF AN OBLIGATION UNDER THE CONVENTION?

Interpretation of the Convention in accordance with the Vienna Convention makes it apparent that States do not have an obligation to apply a transnational notion of public policy in recognizing and enforcing foreign arbitral awards. The tension between the obligation to recognize and enforce awards under the Convention and to safeguard the enforcement State’s values is managed by restricting the application of the public policy exception to cases in which the international public policy of the State is violated.

The function of public policy under the Convention is basically to safeguard the fundamental notions of morality and justice of the forum. According to Goldman, the judge is the ultimate guardian of international public policy.117 The intention in formulating the Convention in this manner was to clearly provide some measure of control to the States in the enforcement of international arbitration awards. The situation requiring a State to exercise its executive powers to give effect to an award and take measures such as attachment and freezing of assets, detention in civil prison, etc., must be distinguished from other situations in international arbitration in which transnational standards are advocated. An enforcement State must be in a position to decide what amounts to an abuse of its executive powers118 in light of its notions of public policy.

It is true that there is nothing to prevent each State from adopting, as part of its conception of public policy, principles having some claim to universality and, in defining the limits of public policy or its content, references can be seen in court decisions to decisions rendered by courts in other States. However, the language of Article V(2)(b), the drafting history of the Convention, and court decisions leave no room for doubt that transnational or supranational public policy lacks a mandatory role in the recognition and enforcement of foreign awards.119

119 Fazilatfar, supra note 17, at 311; Fry, supra note 6, at 118.
One instance where a transnational conception of public policy is seen to be emanating is regionally; which can be seen in the case of the European Union. It must, however, be noted that: firstly, the member States of the European Union share common values and standards on various matters;\textsuperscript{120} secondly, they have committed to obligations under regional instruments, to accept as part of their legal system, standards set by a regional consensus; thirdly, there is a common authority, in the form of the European Court of Justice, that determines the limits and contents of the public policy of the European Union.

Absent an obligation, States are unlikely to apply transnational standards of public policy and the reasons for this are beyond the scope of this paper.\textsuperscript{121} Nevertheless, it is clear that since States have discretion under Article V(2)(b), they have been using this discretion and will continue to do so to regulate the recognition and enforcement of awards in their territories within the limits of the Convention. The application of a transnational standard is challenging among other reasons because it calls for abandoning this discretion.

Some commentators, however, suggest that States must apply transnational public policy in the recognition and enforcement of foreign arbitral awards, notwithstanding the absence of an obligation to do so. Fouchard, Gaillard, and Goldman suggest that courts can apply transnational public policy although they are not required to do so under Article V(2)(b) of the Convention.\textsuperscript{122} It is asserted that since the public policy defense is the greatest threat to the use of arbitration in commercial disputes, one can limit the grounds for the public policy exception by relying more on transnational public policy, which is far narrower than national public policy and, thereby, a more uniform system for recognition and enforcement of arbitral awards would be created.\textsuperscript{123} This view assumes a precise idea of transnational public policy which, in this author’s view, does not and cannot exist.

\textsuperscript{120} Treaty Establishing the European Community, European Union, Mar. 25, 1957, http://www.refworld.org/docid/3ae6b39c0.html.

\textsuperscript{121} See Fry, supra note 6, at 117–18, citing Michael M. Harmon, Responsibility as Paradox: A Critique of Rational Discourse on Government 99–125 (1995) (stating that public administration theory is particularly useful in understanding this. Once you provide a State and its organs with discretion in any given area, you will lose the ability to talk in terms of obligations and responsibilities of that State).

\textsuperscript{122} Gaillard & Savage, supra note 56, at 997.

\textsuperscript{123} Homayoon Arfazadeh, In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception, 13 Am. Rev. Int’l Arb. 43, 44 (2003).
As already discussed, transnational public policy presupposes commonality or universality. Although a few decisions contain a reference to transnational public policy, there is none that has clearly expounded or applied the notion. The decisions examined in this paper clearly point to public policy as a concept that is closely related to moral, social, political, and economic perceptions of a State. These fundamental notions are predominantly influenced by factors that are peculiar to a State or region and reconciling diverse perceptions to formulate universal policies is nearly impossible.

Within the category of public policy, the ILA has identified the following sub-categories in its Interim Report: (1) mandatory laws/lois de police and fundamental principles of law; (2) public order/good morals; and (3) national interests/foreign relations. The differences between States in these sub-categories aid in understanding the reasons that make a transnational conception of public policy implausible.

Several of the mandatory laws of an enforcement forum may constitute part of its international public policy. For example, foreign exchange regulations—one of the subjects that may dispositively impact the enforcement of an international arbitration award—is State-specific and has been held in India to be a part of the public policy as applicable to international situations (international public policy).

In some countries, an important and inalienable part of public policy is Islamic law and these countries will not enforce awards that are contrary to the Moslem Shari’a. For example, the Civil Code of the United Arab Emirates provides that public policy includes “rules relating to personal status such as marriage, inheri-

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124 Sheppard, supra note 29, at 228.
125 F.A. MANN, THE LEGAL ASPECT OF MONEY 403 (5th ed. 1992) (stating that there remains the question whether a foreign judgment rendered in disregard of foreign exchange regulations operating in the country in which it is to be enforced may or must be reflected by the courts of the latter country as being contrary to order public; subject to local regulations, the answer would seem to be in the affirmative).
126 Renusagar Power Co. Ltd. v. General Electric Co., AIR 1994 SC 860, 72 (India) (stating that the provisions contained in the Foreign Exchange Regulation Act [India] have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India). See also the idea of international economic public policy expressed in Courreges Design v. Andre Courreges (1992) Rev. Arb. 110 (Cour d’appel, Paris) [Paris Court of Appeal].
stance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property, and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Shari'a.”

It is said that the attitude of Islamic Law towards foreign judgments and awards is based on the principle that non-Muslims are free to enter into contracts and to have business relations that are valid according to their own religions without the need to take into account the concept of prohibition and authorization in Islamic law; however, if a Muslim is a party to the contract, Islamic law and public policy apply. The Islamic concept of public policy is based on respect for the general spirit of Shari’a and its sources. It would not be far-fetched to say that these countries are unlikely to be willing to undermine the role of Islamic law in determining the content of public policy and other countries are obviously not in a position to understand and welcome Islamic law into considerations of public policy. Another example of mandatory laws where considerable variance may exist amongst States is property law.

The concept of what would be injurious or harmful to the public good or the public interest is also conditioned by the unique interplay of the social, political, moral, economic, and other relevant elements of each State and this has also varied from time to time and from State to State. For instance, the common law rule against compound interest has been abandoned in countries such as England, Canada, Australia, and India and is no longer against public policy. Russian courts have held that a penalty does not violate public policy, while on the other hand, the Portuguese courts have held that imposition of a penalty violates its public policy.

A State may formulate public policy rules based on national interests or foreign relations. For example, the ILA states in its

131 Renusagar Power Co. Ltd. at 83–91.
133 Henriques, supra note 84.
Interim Report that English courts may not enforce an award in respect of a contract with an enemy alien or any contract which has the avowed object of causing injury to a friendly government.\textsuperscript{134} Any idea of consensus in this area is inconceivable.

It cannot be disputed that there is, in principle, universal consensus on the prohibition of certain matters. These include terrorism, drug trafficking, prostitution, pedophilia, piracy, smuggling, slavery, genocide, etc. However, such consensus is manifested in international instruments and mostly exists in the realm of public international law regarding matters that may rarely affect the enforcement of an award under the Convention.

Further, the idea of uniformity to the extent of exactness in enforcement measures is not well-founded. Even if defining global standards of public policy is assumed to be a possibility, there are no means of ensuring uniformity in the interpretation and application of those standards as long as the enforcing entity is a State.\textsuperscript{135} For instance, arguably, there is universal consensus that corruption and bribery are contrary to public policy.\textsuperscript{136} Nevertheless, a contract for the purchase of personal influence violates the public policy of England but not that of Switzerland.\textsuperscript{137} On the same set of facts, a United States Court held that an arbitral tribunal was not evidently partial while the Brazilian Superior Court of Justice held that it was.\textsuperscript{138}

Global consensus of an ever-evolving and fluid concept such as public policy and the application of a single standard is impractical. In the words of the Court of Final Appeal of Hong Kong, if public policy under the Convention means some standard common to all civilized nations, “it would become so difficult of ascertainment that a court may well feel obliged . . . to abandon the search for it.”\textsuperscript{139}

Insisting on transnational standards also means compromising flexibility without guaranteeing uniformity or consistency—a party that fails in an enforcement action in one State will be effectively

\textsuperscript{134} Sheppard, supra note 29, at 227.

\textsuperscript{135} See Fry, supra note 6, at 125–32.

\textsuperscript{136} Sheppard, supra note 29, at 286 (relying on the 1997 Convention on Combatting the Bribing of Foreign Officials in International Transactions, Dec. 17, 1997).


precluded from bringing enforcement actions in other States if a transnational standard is applied. It must also be noted that there appears to be little support amongst State courts for the application of transnational public policy.140

However, where a global or regional consensus is found to exist to any extent in an international instrument or in court decisions, it must be applied as part of the international public policy of a State. As seen in the decisions discussed in this paper, courts are conscious of the need for uniformity and consistency and, therefore, often refer to decisions of other courts in determining whether a norm rises to the level of international public policy that warrants refusal to recognize or enforce an award under the Convention.

VI. CONCLUSION

This paper demonstrates that State parties to the Convention do not have an obligation to apply a transnational notion of public policy in the recognition and enforcement of arbitral awards. It is also clear that, with regard to the object and provisions of the Convention, States must not apply domestic public policy in the recognition and enforcement of foreign awards. So far, challenges on the ground of public policy under the Convention have rarely been successful,141 and this is attributable in part to consistent emphasis by courts on a narrow conception of public policy; in other words, by the application of international public policy of the States.142

Considerations of the obligations under the Convention and the desire to be seen as pro-arbitration jurisdictions appear to be sufficient justifications for States to ensure uniformity in the recognition and enforcement of foreign arbitral awards without the need to impose a transnational standard that is clearly not required by the Convention.

Differences in the notion and application of public policy arise from fundamental social, economic, moral, and even constitutional norms.

140 Mayer & Sheppard, supra note 15, at 259.
141 Cole, supra note 3, at 373; UNCITRAL SECRETARIAT, supra note 3, at 248; Pieter Sanders, A Twenty Years’ Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 13 INT’L L. 269, 270 (1979); Gaillard & Savage, supra note 56, at 996.
142 See Fry, supra note 6, at 120 (stating that the unification of standards of enforcement is partly fulfilled when national courts interpret the public policy defense narrowly and the need to insist on a transnational standard of public policy would therefore be unnecessary).
differences underlying the legal systems of States. The understanding that the elimination of these differences is not practicable must lead to the abandonment of the urge to promote a transnational conception of public policy. It is one thing to say that States should strive to achieve uniformity in the application of the Convention and apply consistent standards where they exist, and quite another thing to say that all States must conform to a single standard. As discussed, the latter approach has manifold problems.

Nevertheless, the scope for uncertainty in the interpretation and application of the public policy defense has been a cause for concern and it remains the most significant aspect of the Convention in respect of which discrepancies may still exist. It is perceived that this encourages losing parties to rely on public policy to resist or at least delay enforcement.\textsuperscript{143}

In the author’s opinion, these concerns have been well-addressed by the recommendations made by the ILA in its “Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards.”\textsuperscript{144} The recommendations of the ILA are fairly consistent with existing practice in State courts and suggest that States should respect the finality of awards rendered in international arbitrations, save in exceptional circumstances. Exceptional circumstances exist, in the opinion of the ILA, when the recognition or enforcement of an award would be contrary to the international public policy of a State. For this purpose, the ILA defines the international public policy of any State as including: (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 \textit{lois de police} or public policy rules; and (iii) the duty of the State to respect its obligations towards other States or international organizations.\textsuperscript{145}

The ILA encourages State courts to limit public policy grounds to principles considered fundamental within the legal system of the enforcement State and, in this regard, also corroborates the findings of this paper regarding the notion of public policy that is required to be applied under the Convention.

It is hoped that the elaborate recommendations made by the ILA in its report will encourage and facilitate the management of the tension between the State’s prerogative to lend authority to

\textsuperscript{143} Mayer & Sheppard, \textit{supra} note 15, at 255.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
give effect to an award, based on its values, and the obligation to respect the finality of awards, having regard to the importance of uniform recognition and enforcement of awards under the Convention. As stated by Lord Denning M.R., “with a good man in the saddle, the unruly horse can be kept in control.”  

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146 Enderby Town Football Club v. Football Ass’n Ltd. [1971] Ch. 591 (Court of Appeal) (U.K.).