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Conflict of Laws in the Enforcement of Foreign Awards and Foreign Judgments: the Public Policy Defense and Practice in U.S. Courts

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CONFLICT OF LAWS IN THE ENFORCEMENT OF FOREIGN AWARDS AND FORIEIGN JUDGMENTS – THE PUBLIC POLICY DEFENSE AND PRACTICE IN U.S COURTS

by

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(Under the direction of Prof. Gabriel Wilner)

ABSTRACT

Public policy is one of the defenses that a court or a party may invoke in order to resist enforcement of an unjust foreign award or judgment. The purpose of this study is to analyze the status of the public policy as a defense to enforcement in the U.S and to examine its success rate. The thesis will contain suggestions to make public policy a more meaningful defense with respect to the enforcement of foreign judgments and its role in bringing about uniformity in the field of foreign judgments will be analyzed.

INDEX WORDS: Arbitration, Public policy, Enforcement of foreign awards, Foreign Judgments, New York Convention

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TABLE OF CONTENTS

Page

CHAPTER 1

INTRODUCTION.....1

CHAPTER 2

MEANING AND TYPES OF PUBLIC POLICY.....4

CHAPTER 3

PUBLIC POLICY DEFENSE AND ENFORCEMENT OF FOREIGN AWARDS 8

Overview of the New York Convention.....8

Public policy Defense and Standard.....9

Cases Rejecting the Public Policy Defense.....11

Case Recognizing Public Policy 16

Due Process Clause.....17

Question of Arbitrability 20

Conclusion 28

CHAPTER 4

PUBLIC POLICY DEFENSE AND ENFORCEMENT OF FOREIGN JUDGMENTS...31

Recognition and Enforcement of Foreign Judgments in General.....31

Sources of Law.....32

Requirements for Recognition.....34

Standard of Public Policy.....37

Foreign Judgements consistent with U.S public policy.....38

Judgements Contrary to Public Policy.....40

Conclusion.....43

CHAPTER 5

COMPARISON OF THE FUNCTIONING OF THE PUBLIC POLICY DEFENSE.....45

CHAPTER 6

SUMMARY AND RECOMMENDATIONS.....47

BIBLIOGRAPHY

Books.....51

Journals.....51

Case Laws.....52

CHAPTER 1

INTRODUCTION

The importance of arbitration as a tool in resolving international conflicts cannot be overstated. It offers various advantages like consistency, fairness, flexibility and confidentiality that may be lacking in a foreign judicial forum.[1] With the multifold increase in international trade and commerce, often arbitral awards and foreign judgments from one country will have to be enforced by the courts in another country.[2] For instance, the defendant's assets may be located in the other country. This is a common scenario in international commercial disputes where the litigants belong to different countries. The effectiveness of an international award or a foreign judgment in turn depends on its effective enforcement.[3] The losing party may resist an award or judgment against them by raising various defenses at the enforcement stage, public policy being one such defense.

This thesis will be an extensive study on the status of the public policy defense to the enforcement of foreign awards and judgments in the United States. Attempts will be made to compare the functioning of this defense in both these contexts. The cases reveal that courts are willing to enforce awards in

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[1] Susan Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, 28 N.Y.U. J. Int'L. & Pol.175 (1996).
[2] Kenneth-Michael Curtin*, Redefining public policy in International Arbitration of National Mandatory Laws*, 64 Def. Couns. J. 271 (1997).

order to facilitate international commerce although it may result in occasional injustice to the parties involved. The thesis will contain suggestions to make public policy a more meaningful defense with respect to the enforcement of awards and the role of this exception in bringing about uniformity in the field of foreign judgments will be analyzed.

The study is divided in six main parts. Chapter 1 is the introduction. In Chapter 2, the meaning of the term public policy is discussed. This chapter will also describe its scope, applicability and the types, namely domestic and international public policy.

Chapter 3 analyzes the role of this defense in the enforcement of foreign arbitration agreements and awards under the New York Convention. After a brief look into the New York Convention, the standard of public policy followed by U.S. courts is analyzed. A detailed study of some of the cases where this defense has been rejected and a case where it was successful is also done. Also discussed in this chapter is the arbitrability of certain national laws in the field of securities, antitrust and RICO statues.

Chapter 4 deals with the public policy defense and foreign judgments. It includes a brief description into the sources of law and the requirements in order to recognize a foreign judgment. In addition cases where foreign judgments were found to be consistent with U.S. public policy and vice-versa are illustrated.

Chapter 5 will compare the functioning of the public policy defense in the context of foreign awards and judgments followed by the conclusion in chapter 6.

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[3] Ramona Martinez*, Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: The Refusal Provisions*, 24 Int'l Law. 487 (1990).

The thesis finally concludes with a brief summary and recommendations for the continued existence and effectiveness of public policy, as a defense to enforcement.

CHAPTER 2

MEANING AND TYPES OF PUBLIC POLICY

There is no precise definition for the term public policy. To quote a famous criticism, Judge Burrough in an old English case stated that, "it is an unruly horse and once you get astride it, you don't know where it will carry you".[4] The reason for its various criticisms being that it lacks consistency, predictability and uniformity. It generally refers to the grounds on which a receiving court may vacate an award or judgment that is contrary to the law or standards of the court's jurisdiction.[5] The standard of public policy varies between countries because it is interpreted by the legislature and judiciary of each country.

This doctrine has found its way in two major areas of law. It is directly applicable in the field of contracts and is indirectly applicable in the choice of law rules. When parties make contractual agreements violating state laws they are not enforced because it is against that states public policy.[6] Rights and duties based on illegal contracts such as a gambling contract is a good example. Its applicability is more complex when parties choose foreign law as the choice of law under their contract. The question then is whether applying the foreign law

[4] Richardson, 130 Eng. Rep. at 303.
[5] Jay R. Server, *The relaxation of inarbitrability & public policy checks in U.S. and foreign arbitration: Arbitration out of control?* , 65 Tul. L. Rev. 1661, *1663 (1991).
[6] Michael Mousa Karayanni, *The Public policy exception to the enforcement of forum selection*, 34 Duq. L. Rev. 1009, *1014 (1996).

will violate the basic judicial principles of the enforcing state. As a general rule, penal and revenue judgments of one country are not enforced in another state.[7]

Public policy is divided into two major types:

Domestic public policy

When arbitration is associated to a particular country, only that country's domestic policy will be considered by the enforcing court.[8] The court analyzes whether enforcement would violate the local norms and the well established principles of that country's justice and morality.[9] Domestic public policy is expressed by the laws of that state and its judicial practices. Thus if the court or the parties involved can raise a strong case that enforcement would violate the domestic public policy, fraud in the agreement or due process violations for instance, then enforcement will be denied.

International public policy

When arbitration has an international character and different countries are involved, the enforcing court should not only consider its own public policy but also that of interested nations and the needs of international commerce.[10] There is a kind of balancing of interest and depending on the case at hand and the interests of the involved states a determination is made as to which country's policy will prevail. International public policy is generally construed more liberally than that of its domestic counterpart.[11] This is clearly exemplified in the cases of Scherk and Mitsubishi where the Supreme Court upheld the agreement to

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[7] Id. at 1015.
[8] See supra note 2 at 280.
[9] See id.
[10] Id. at 281.

arbitrate claims under the Securities and Sherman Acts purely on the basis of the international character involved. The Court balanced the interest of promotion of international arbitration on one hand and public policy on the other when deciding on the relevant issues.

Thus most countries specifically distinguish between domestic and international public policies. U.S. courts are of the view that "international public policy cannot be equated to that of the domestic one, but needs to be given supranational emphasis."[12] Also courts are much slower in invoking the public policy grounds out of "concerns for international comity, respect for foreign law and tribunals and advancement and smooth functioning of international trade".[13]

Some scholars suggest a third classification, namely transnational public policy**.** This type is very vague and difficult to apply. General principles of law, customs and usages of the business community are to be applied without inquiring if the dispute is related to any particular country or taking into account the public policy of the interested states.[14] Critics argue that this has various advantages like uniformity and flexibility and that this type comes into play when arbitration is governed by the principles of lex mercatoria. Transnational public policy is highly controversial because of the absence of any distinguishing features from international public policy. The lack of clear guidelines as to what

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[11] See supra text accompanying note 5.
[12] Parsons, 508 F. 2d 969, 974 (2d Cir. 1974).
[13] Mitsubishi, 473 U.S. 614, 636 (1985).
[14] See supra note 8 at 282.

constitutes transnational principles and its extensive similarities with international public policy raises questions as to its very existence.[15]

[15] Id.

CHAPTER 3

PUBLIC POLICY DEFENSE & ENFORCEMENT OF FOREIGN AWARDS

Overview of the New York Convention

In the United States, arbitration is generally governed by the principles of the Federal Arbitral Association except when it conflicts with the New York Convention. The New York Convention which is the most important convention in the field of arbitration "aims to facilitate the recognition and enforcement of foreign awards between private parties".[16] It has been widely accepted and over 120 countries are parties to the Convention. The scope of the convention is laid down in Article I. Article II states that member states to the Convention shall recognize and enforce agreements that contain a subject matter that is capable of being resolved by arbitration.[17] Article III requires contracting states to enforce foreign awards in a similar manner like those of domestic awards and not to impose additional fees or conditions. Article IV relates to the procedure involved in proving the award.

Article V (1) contains a list of general defenses to enforcement. An award can be set aside if the agreement underlying the arbitration is invalid or if there is a violation of due process.[18] Irregularity in the composition of the arbitral tribunal and excess of authority by the arbitrator are also grounds for non-enforcement. If

[16] Supra note 1 at 187.
[17] Article II of The Convention on the Recognition & Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.
[18] Id art V(1)(a).

the arbitrator steps over the limits in terms of authority, that is another ground for non-enforcement. Finally courts may refuse enforcement if the award is not binding or has been set aside. Article V (2) contains two additional defenses, namely the public policy defense and the inarbitrability defense that will be dealt with in depth in the following pages.

Public Policy Defense and Standard

Art. V 2b states that" recognition and enforcement of an arbitral award may be refused if the competent authority in the country where enforcement is sought finds that doing so would be contrary to the public policy of that country".[19] It is also referred to as the "second look doctrine" because a party against whom an award has been made gets a second chance to resist it at the enforcement stage.[20] This is what happened in the famous anti trust case of Mitsubishi v Solar where the Supreme Court projected this line of thought. It is sometimes referred to as the "safety valve because it is subject to interpretation by the legislative and judicial process of each nation".[21]

A bird's eye view indicates that this defense would be a major obstacle to the smooth functioning of international arbitration. A literal interpretation would have jeopardized the meaningful purpose of the New York Convention. So courts have followed a practical interpretation and have upheld this defense only when it would be contrary to the very basic legal principles of the country where enforcement is sought. The foundation for the public policy principle was laid

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[19] New York Convention, see id. art. V(2)(b).
[20] see supra note 8 at 274.
[21] Heather R. Evans, Note, *The Nonarbitrability of Subject Matter Defense to Enforcement of Foreign Arbitral Awards in the U.S. Federal Courts*, 21 N.Y.U. J. Int'l. L. & Pol. 329, 334-35 (1989)

down in the famous case of Parsons & Whittmore Overseas Co. v Societe Generale de l'Industrie du Papier.

This case was one of the early cases to reach the appellate level after the adoption of the convention. The principle laid down in this case has become the basis for determining whether public policy of U.S has been violated or not and has been cited in almost all cases where this defense is raised. The dispute related to a contract between Parsons, an American company and Rakta, an Egyptian Corporation over the construction of a paper mill in Egypt. The outbreak of the Arab Israel Six Days War of 1967 was followed by withdrawal of financial support by the U.S. Government to the project and subsequent souring of foreign relations between the two countries.[22]

Since the U.S. Government withdrew its financial back up, Parsons invoked the "force majeure" clause of the contract that relieved responsibility if factors beyond the control of the parties justified non-performance of the contract. Rakta commenced arbitration proceeding as per the contract and obtained an award in their favor.[23] Efforts by Parsons in trying to nullify the award by raising the public policy defense failed. The second circuit court refused to identify U.S foreign policy with public policy and enforced the arbitral award that the Egyptian company had obtained for breach of contract.[24]

The principle laid down in this case was that "Enforcement will be denied only if it violates the forum states most basic notion of morality and justice."[25] The

[22] Parsons& Whittemore, 508 F.2d at 972.
[23] Id.
[24] See id. at 969.
[25] Id. at 974.

court also made a distinction between public policy and national policy and held that the former should be given a superior effect. A study of other cases will show that American courts have always rejected this defense because the Parsons standards were not duly met.

Cases Rejecting the Public Policy Defense.

The public policy defense has been given a very narrow construction by U.S. courts. Most courts have enforced arbitral awards even if circumstances compelled otherwise. A look into some of the American cases will cast light on this extra precautious approach followed by the courts.

1. Fertilizer Corporation of India v. IDI

A brief look into the facts suggests that this should have been an ideal case for non-enforcement because of the tainted nature of the arbitration. The arbitral agreement provided for a panel of three arbitrators chosen by parties. One of the arbitrators selected by FCI, the winning party, had represented them in earlier arbitrations, a fact that was not disclosed.[26] The existence of the former attorney-client relationship was not revealed and FCI, falsely denied the allegations made by IDI. The court however denied the motion to reconsider stating that the irregularity did not measure up to the Parsons standards and enforced the award.[27]

One of the most basic principles in any arbitration is that arbitrator should be neutral and free from the appearance of any bias. This was definitely a blow to public policy and the courts reasoning was that although disclosure would

[26] 517 F. Supp 948 (S.D. Ohio 1981) at 953.
[27] Id. at 955.

have been preferable, the rules governing that arbitration did not specifically require such a revelation.[28] A more compelling reason was promoting the smooth functioning of international arbitration and this could be achieved only by finality of proceedings.

2. Waterside Ocean Navigation Company v. International Navigation

In this case that involved a dispute between the owner of a shipping vessel and its charterer, the question of sanctity of oath was in issue. The latter party challenged enforcement of award claiming that it was based on inconsistent sworn testimony by the witness. The witness for the International Navigation in a prior testimony stated that the ship was sub chartered, but in a later testimony took the stand that the sub charterer in fact was an agent as he did not have a share in the financial aspects of the vessel.[29] His testimony was taken into account by the arbitrators and a decision was rendered in favor of the charterers. The court reasoned that the witness did not knowingly perjure himself. Hence the argument that U.S. policy of protecting the value of testimonial oath was being violated, did not carry sufficient weight.[30]

Both the district court and the appellate court rejected the owner's argument and refused to equate the policy against inconsistent witness statement with the basic notions of morality and justice. In the words of the Second Circuit Court, "the public policy defense must be construed in the light of the purpose of the Convention and the purpose is to encourage enforcement of

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[28] See id.
[29] 737 F.2d 150 (2d Cir. 1984).
[30] Id. at 151.

foreign arbitral awards".[31]Thus even when the integrity of the judicial system was in question the public policy defense was not effective.

3. Brandeis Intsel Ltd v. Calabrian Chemicals Corporation

This case involved a dispute was between the seller and purchaser of chemicals. The court confirmed an award that was rendered by the arbitration panel in favor of the purchaser. The seller's argument was that there was "manifest disregard of the law", since the purchaser and the members of the arbitration panel were all members of the London Mercantile Exchange.[32] The court however rejected this argument and held that although the facts implicated the public policy defense there was no mischief involved, and that manifest disregard of the law did not meet the standards of contravention of public policy.[33]

The court also distinguished this case from that of Commonwealth Coating Corp. v. Continental Gas Co. where the Supreme Court rejected an arbitration award when a financial relationship was present between one of the parties and the arbitrator, a fact which the other party had no knowledge of. However, this kind of commercial relationship was absent here.

With respect to the Calabrian's argument that the arbitrators had wrongly applied the British Sale of Goods Act of 1979, the court made a distinction between enforcement of a void contract and a wrong application of the rules of a valid contract and stated that the purchaser's argument fell in the second

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[31] Id. at 152.
[32] Brandeis Intsel Ltd. v. Calabrian Chemicals Corp., 656 F. Supp. 160 (S.D.N.Y. 1987)
[33] See id. at 165.

category.[34] Thus the award was confirmed even though there was irregularity in the application of the law.

4. A case where enforcement should have been denied was that of National Oil Corp. v. Libyan Sun Oil Co**.** There was a contract by an American oil company to conduct oil exploration in Libya. However the American company failed to fulfill its part of the deal when the foreign policy between U.S. and Libya deteriorated. The U.S. government barred Americans from traveling to Libya. Arbitration was subsequently held and $20 million was awarded in damages to the Libyan company.[35] The American company invoked the public policy defense and tried to set aside the award. Their main arguments were that enforcement would result in punishing a company for simply obeying the Government's foreign policy.[36] It would also bar other companies from supporting the Government's sanctions. Secondly, it would be inconsistent with the U.S. Government's anti-terrorist policy and enforcement would result in indirect support to Libya's pro-terrorist activities.[37]

Although the court was aware of the truth involved in National Oil Corp's arguments, and that Libya was not a member to the New York Convention, it refused to equate foreign policy with public policy and held that the Parsons test was not met in this case and that enforcement would not result in violations of the

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[34] Andrew M. Campbell*, Refusal to Enforce Foreign Arbitration Awards on public policy grounds*, 144 A. L. R. Fed. 481 (1998).
[35] National Oil Corp., 733 F. Supp at 819.
[36] See supra note 34.
[37] Id. at 320.

basic principles of morality and justice. Thus the court went to the extent of confirming an award in favor of a state that sponsored terrorism.[38]

5. American Construction v Mechanized Construction of Pakistan. This is a case where the U.S. court went to the extent of enforcing an arbitration award even when there was a foreign judgment nullifying the arbitration. This case involved a contract agreement between the two parties. ACME, the plaintiff began ICC arbitration against MCP for breach of contract of supply of goods and services.[39] Although MCP initially submitted to arbitration it later was of the view that the arbitration was not valid under Pakistani laws and obtained a Pakistani judgment to that effect. An arbitration award was rendered in favor of ACME and MCP raised the public policy defense to enforcement.

The court however as in earlier cases narrowed the application of this defense and held that the Pakistani judgment was defective in nature because of certain omissions and misrepresentations and also that MCP had in fact tried to escape the results of arbitration.[40] This case shows that courts have set a stringent standard for the successful implication of the public policy defense and existence of a foreign judgment against the arbitration award does not meet this standard. Thus it should be no surprise to see that this defense has been rarely successful.

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[38] Supra note 35 at 820.

[39] American Construction Machinery & Equipment Corp., v. Mechanized Construction of Pakistan, 659 F. Supp. 426 (S.D.N.Y. 1987).

[40] Joseph T. McLaughlin, *Enforcement of Arbitral Awards under the New York Convention, Practice in U.S. Courts,* 477 PLI/Comm 275, *293.

Case Recognizing Public Policy

A detailed study of the U.S. cases shows that there have been only a couple of instances where this defense has been successful. The case of Laminoirs-Cableries de Lens, S.A. v Southwire Co. involved a dispute between a French seller and an American buyer over price and interest rates in a purchase contract for steel wire.[41] The arbitration panel applying the foreign law required defendants the payment of interest running at the rate of 9.5 and 10.5%. The argument by the losing party was that enforcement of the award was against the public policy of the U.S. The court accepted this defense only in part, and refused to enforce the award which applying the French law imposed an additional rate of 5% per annum if the award was not fully paid within a certain date.[42] The court regarded this additional fee as a penalty as it was a way of punishing someone for omission of an act instead of compensating for private loss suffered by them and held that enforcement of this portion of the award would violate the public policy of U.S.

The court however enforced the other part of the award that imposed higher interest rates. According to the Georgia law, even though the accepted rate was about 7%, parties could contract a higher rate, and there was no limit to the rate that parties could set in writing if the amount exceeded $100,000 or more.[43] Thus the court enforced the award because there were no public policy violations and it also stated that and stated that, “Americans could not have trade

[41] 484 F. Supp. 1063 (N. D. Ga. 1980).
[42] Id. at 1068.
[43] Id. at 1069.

and commerce exclusively in their own terms, governed by their own laws and decided by their own courts".[44]

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Due Process Clause

The due process clause can be found in Article V(1)(b) and V(1)(d) of the New York Convention. As the concepts of due process and public policy exist side by side, this will also be considered. Art V 1b states that, "Enforcement will be refused if the party against whom the award is invoked was not given proper notice of the proceedings or was unable to present his case".[45]

In the case of Parsons Whittmore, the due process defense was raised by the American company. Their argument was that the arbitrators had not conducted the hearing in the fair manner as one of their witnesses was not present. They claimed that the witness had a prior commitment and wanted the hearing to be postponed.[46] The court rejected this defense and stated that a speaking engagement would not justify rescheduling an international arbitration.[47] Thus this defense has also been narrowly construed by courts. U.S. courts look into the case as a whole and do not refuse enforcement if the defendant was not given the opportunity to present a portion of his case, especially if it would not reverse the outcome of the case.

On the other hand, this defense has been successful in certain other cases. In Iran Aircraft Industries v. Avco Corp., the award was not enforced

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[44] See id.
[45] New York Convention, supra note 17, art. V (1)(b).
[46] 508 F.2d at 975.
[47] See id.

because defendant was denied the opportunity to present his case in a meaningful manner. In a pre-hearing conference, the defendant was allowed to submit audited accounts instead of numerous invoices.[48] Later, when the judge was replaced, the new judge disallowed the accounts and refused to buy the explanation put forth by the defendant. The U.S. Court of Appeals for the Second Circuit refused to enforce the Iran – U.S. Claims Tribunal award, because the tribunal had previously agreed to the method in which the defense was to be presented but later rejected the manner in which it was offered even though it was duly authorized by the tribunal.[49]

Thus it can be seen that though strictly construed, this defense has been relatively more successful than its public policy counterpart and courts have given effect to the due process defense in truly egregious circumstances.

Art V 1d sates that, "Enforcement may be denied if the composition of the arbitral authority or the arbitration procedure was not in accordance with the agreement of the parties or with the law of the country where the arbitration was held".[50] The main difference between the article V(1) and article V (2) defenses is that while the latter can be raised by both the court and the parties involved, the former is raised only by the party against whom the award is invoked. This defense too, like the V(1)b defense is given effect when enforcement would result in severe injustice to the parties involved and if the basic principles of justice are violated.

Al Haddad Bros. v M/S Agapi

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[48] 980 F.2d 141, *144 (2d Cir. 1992).
[49] See supra note 16 at 208.

The arbitration agreement between the parties provided for the arbitrators to be selected by each of the parties and if consensus was not be reached by the arbitrators, they were to select a third arbitrator.[51] The nominee so elected was to decide the dispute. The decision in this case was in fact made by a single arbitrator. Al Haddad objected to the award pleading that there was violation of the due process clause as the award was not made in accordance with the agreement.

The court refused to accept this defense. Its reasoning was that the Convention recognized awards that were made in compliance with the laws of the state where the case was decided. According to the English laws, an award rendered by a single arbitrator was valid and hence it was enforced.[52] The court also stated that the defect could not be considered fatal to the outcome of the award and the defense was thus rejected.[53]

Courts have given narrow construction and violation of domestic notions of due process does not mean that a foreign award will not be enforced. Thus due process exception applies only to those cases in which serious abnormalities in proceedings exist.[54]

Imperial Ethiopian Government v. Baruch-Foster Corp.

In this case, the agreement provided that the arbitrator should not have had any connections with the parties involved, direct or otherwise. Baruch Foster, the losing party discovered that the arbitrator had connections to the Ethiopian

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[50] New York Convention, supra note 17, art.V(1)(d).
[51] Al Haddad, 635 F. Supp. At 209.
[52] Id. at 210.
[53] See id.

government because he had previously drafted the Civil Code for the Ethiopian Government.[55] He alleged that there was violation of due process as the selection process for the arbitrator was not consistent with the agreement. The District court rejected this defense and stated that Baruch Foster waived any objections to the selection of the arbitration panel.[56] Baruch appealed the decision of the District Court. The Court of Appeals was also of the same view that the losing party's allegations did not carry sufficient weight and confirmed the decision of the District Court.

Article V(1)(a) can also be argued to be part of the due process defense. Enforcement can be denied if the parties can prove that they lacked the capacity to consent or if the agreement was void under the applicable law.[57] The consent given by the parties can be the focus of the dispute, or there may be fraud or duress involved.

Question of Arbitrability

The defenses of public policy and non arbitrable subject matter are often intertwined by courts and as non arbitrable subject matter forms part of the general concept of public policy, article V(2)a is also discussed.

Article V(2)a states that enforcement may also be refused by courts if the subject matter of the difference is not capable of settlement by arbitration under the law of that country.[58]

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[54] See supra note 16 at 211.
[55] 535 F.2d 334, *335 (5th Cir. 1976).
[56] Id. at 336.
[57] New York Convention, supra note 17, art. V(1)(a).
[58] Id., art.V(2)(a).

It should be noted that the above condition is also stated in article II(1) of the convention which compels courts of contracting states to recognize an arbitration agreement that concerns a subject matter capable of settlement by arbitration.[59]

Thus a party challenging the arbitrability of the dispute can raise this defense before the commencement of arbitration or at the award enforcement stage. The dividing line being thin, the question of arbitrability with respect to enforcement of awards and agreements are considered together.

Arbitration in the field of Securities law.

The U.S. securities law that can be found in the Securities Act of 1933 and the Securities Exchange Act of 1934 were designed to protect investors from unscrupulous security dealers and to help them in making informed investment decisions.[60] The first case that addressed the issue of arbitrability of securities law was that of Wilko v Swan. The case involved allegations by the Petitioner of misrepresentations by the brokerage firm that had sold some stocks to the Petitioner.[61] When damages were asked for under section 12(2) of the Securities Act, the respondent's arguments were that arbitration had to be conducted as per the agreement.[62] The court rejected the arbitration policy as invalid and held that as a matter of public policy, securities law were inarbitrable.

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[59] see id., art II(1).
[60] Darrell Hall, No Way Out: An argument against permitting parties to opt out of U.S. securities laws in international transactions, 97 Colum L. Rev. 57, *59 (1997).
[61] Wilko, 346 U.S. at 428-29.
[62] See id. at 429-30.

The Supreme Court has since then reversed its original position and has allowed arbitration of the traditionally inarbitrable 1933, 1934 Securities Act and Sherman Acts.

Scherk v Alberto Culver

The case involved a forum selection clause of an agreement that provided for arbitration before the International Chamber of Commerce in Paris.[63] The choice of law was that of the laws of the state of Illinois. The dispute was over certain trademarks that were sold by a German seller to an American manufacturer. The allegations by the American buyer were that they were misrepresented and fraudulently sold to him and an action was started in the district court to rescind the contract.[64] It was argued that there was a violation of section 10(b) of the Securities and Exchange Act of 1934 and hence the arbitration clause was unenforceable. Scherk, the German seller tried to dismiss the suit and proceed with arbitration. Reversing the decisions of the District Court, the VII Circuit Court of Appeals and also that of its earlier precedents, the U.S. Supreme Court allowed arbitration of the 1933, 1934 Securities Acts.[65]

The court in the Alberto Culver's case rendered a land mark decision that paved the way for arbitration of national laws. It distinguished this particular case from that of the Wilko due to the international nature of the agreement and secondly because there would be no clarity as to the applicable law in this case in the absence of a prior agreement.[66] Also giving effect to the agreement was

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[63] Scherk v. Alberto Culver Co., 417 U.S. 506, 508 (1974).
[64] Id. at 509.
[65] See id. at 515.
[66] Id.

indispensable in order to achieve certainty in the field of international arbitration.[67] The court stated that failure to give effect to the arbitration clause would result in the parties frustrating their original intent and would be abused as a tool in following delay-tactics that would ultimately result in destroying the very purpose of international arbitration.[68]

The court proceeded to remark that if any injustice had resulted in the course of arbitration the victimized party had always the remedy against enforcement by raising the public policy defense under the Convention. Thus the Supreme Court took the initial step in allowing national laws to fall under the purview of arbitration. This was a fatal mistake as only the national courts should exercise that power and court systems should not have abdicated this primary function to the wishes of the individual parties as to who should decide on national laws. A review of this case indicates that court had based its decision purely on the international nature of the arbitration involved and similar facts, in a domestic context would have produced a different result.

Two later cases that were decided in the 1980's expanded the application of the Alberto doctrine to domestic securities disputes. In the case of Shearson/American Express v. McMahon, the claim was that a brokerage firm violated section 10(b) of the Exchange Act and Rule 10b-5.[69] The district court held that arbitration could be allowed, but the appellate court followed the Wilko doctrine. The Supreme Court decided in the context of the "federal policy

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[67] see id. at 516.
[68] Id. at 517.
[69] McMahon, 482 U.S. 220, 223 (1987).

favoring arbitration".[70] It relied on the decision in the Mitsubishi case and held that arbitral tribunals, like judicial forums were well qualified and capable of deciding legal complexities and issues of the national laws even in the absence of judicial supervision.[71]

Thus the expansion of arbitration subjected the investors at a very high risk, depriving them of the protection offered to them under the securities laws. The parties could easily escape the reach of the national laws by turning to arbitration and if abused, this will only lead to the fall of arbitration.

Arbitration and Antitrust

The Sherman Act has been described as the Magna Carta of Free Enterprise as antitrust laws protect economic freedom and the laissez faire system.[72] The purpose of the Act was to maintain unrestricted interaction of competition which is vital for economic growth and consumer protection. Due to this, American courts had long regarded antitrust laws as inarbitrable, because the nature of claim involves serious scrutiny and supervision that may be lacking in an arbitral forum. The case of American Safety Equipment v. J.P.McGuire embodied this doctrine. The Second Circuit Court after weighing various factors, rejected arbitration of a domestic licensing agreement that involved antitrust issues.[73] But with the increase in international trade and the trend favoring arbitration this was also reversed.

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[70] Id. at 225-26.
[71] 473 U.S. 614 (1985).
[72] United States v. Topco Assoc., 405 U.S. 596, 610(1972).
[73] 391 F. 2d 821 (2d Cir. 1968).

Mitsubishi v Soler

Although the case dealt with the enforcement of an arbitral agreement, article V(2)b played a part in the decision. Soler entered into a distributorship agreement with Chrysler International S.A, to sell Plymouth cars in an area in Puerto Rico. Later a sales agreement was entered into by Soler, CISA and Mitsubishi Motor Corp. that contained a clause for resolving any future disputes by arbitration under Japan Commercial Arbitration Association.[74] The business venture functioned smoothly but later a dispute arose between Soler and Mitsubishi when the former was unable to satisfy its part of the bargain.[75] The question in issue was whether arbitration could be held in Japan as per the agreement despite Soler's allegations that anti trust claims under U.S. laws were to be decided only by courts.

The district court's ruling in favor of arbitration was reversed by the circuit court which applied the American safety doctrine. The Supreme Court enforced the agreement and the arbitration clause. It held that the American safety doctrine was inapplicable in this context as the dispute arose from an international context**.** The reasons listed were concerns for international comity, respect for capacity of foreign tribunal and the need for certainty in the resolution of disputes.[76]

Also the court had in the earlier cases of Bremen and Scherk, decided that contracts made freely indicating choice of forum clauses were to be enforced, as this would be consistent with the intent of the New York

[74] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 3349 (1985).
[75] See id.

Convention.[77] Appearance of an antitrust dispute and assumption that the arbitral panel lacked competence were not sufficient to nullify a freely negotiated agreement between the parties.[78] As Japan also possessed a body of highly developed antitrust laws, and as the arbitrators were well qualified, arbitration was to go forward as U.S. courts always had the power to refuse enforcement if the antitrust issues were not properly decided by the panel.[79] The public policy defense was to come into the picture at that stage.

The dissent by Justice Stevens was very strong. He correctly stated that, "vague concerns over comity were not to outweigh public policy".[80] He distinguished this case from Scherk as this case did not involve foreign laws and was totally under the realm of U.S. antitrust laws.[81] He rightly pointed out that Congress did not authorize the transfer of decision-making authority of statutory claims from courts to that of arbitrators.[82] He stated that under the New York Convention, "agreements requiring arbitration of disputes that were non arbitrable under domestic law were not to be honored".[83]

This case is a clear example of how the Supreme Court sacrificed public policy in the name of international comity. It made certain assumptions that treble damages would be awarded by arbitral forums, parity of the effectiveness of arbitration to litigation, even though arbitrators are not required to state their

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[76] Id. at 3355.
[77] See id at 3357
[78] John R. Allison, *Arbitration of Private Antitrust claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 N.Y.U.J. Int'l L. & Pol. 361, *428 (1986).
[79] Supra note 74 at 3357-58.
[80] Id. at 3365-65 (Stevens, J., dissenting).
[81] See id. at 3373.
[82] Id. at 3364.

reasons in arriving at the award.[84] The majority failed to give proper construction to the articles of the New York Convention and stressed the importance of the public policy defense although a study of the cases indicates that it is rarely successful.

Arbitration and RICO statutes

The Mitsubishi rationale has been extended by lower courts to another important arena of national laws namely the RICO statutes. The Racketeer Influence and Corrupt Organization statute allows the successful party to claim treble damages and litigation expenses in civil suits. The RICO statues have not made provisions for arbitration for such civil actions. In the case of Jacobson v. Merrill Lynch, the third circuit court held that claims under RICO were inarbitrable as jurisdiction was obtained by violating section 10(b) of the Securities Exchange Act of 1934.[85]

However in the case of Shearson/American Express, Inc. v. McMahon, the Supreme Court held that claims under section 10(b) of Securities Act of 1934 and RICO must be arbitrated according to the arbitration agreement.[86] As there was no specific legislation mandating non-enforcement of arbitration agreements arising under RICO suits, the court decided that the agreement to be valid.[87]

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[83] See id. at 3371.
[84] Id. at 3357-60.
[85] 797 F.2d 1197 at 1199 (3d Cir. 1986).
[86] 107 S. Ct. 2332 (1987).

for arbitration for such civil actions. In the case of Jacobson v. Merrill Lynch, the third circuit court held that claims under RICO were inarbitrable as jurisdiction was obtained by violating section 10(b) of the Securities Exchange Act of 1934.[88]

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Conclusion

Most countries have recognized the advantages of arbitration in international trade and have attributed parity to that of litigation. Although this is to be welcomed, a careful look reveals that freedom if unchecked leads to abuse. Courts are extremely hesitant to use the defenses that are provided under the New York Convention. For instance, the public policy defense is interpreted so narrowly that it has become a ground for vacation in theory only.

Article V 2 b was intended to be a safeguard against unfair awards. However the pattern of monotonous rejection followed by U.S courts because of the failure to meet the Parson standard, sometimes leads to unjust results to the parties.[91] The Parsons standards in turn is very vague and in the last thirty years the success rate of the public policy defense is negligent, thus indicating that

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[87] See id.
[88] 797 F.2d 1197 at 1199 (3d Cir. 1986).
[89] 107 S. Ct. 2332 (1987).
[90] See id.

better guidelines are required interpreting the “basic notions of morality and justice” standard.

The reluctance in erecting barriers initially could be understood as arbitration was in its early days of birth and required a lot of nurturing. But now that arbitration as an institution has been firmly established, it is now up to the courts to oversee its proper functioning in order to ensure its perpetual existence. The public policy exception should be made a more meaningful defense and this in turn will uphold the integrity of arbitration and ensure its long-term survival.

The inarbitrability defense under article V(2)a, is another valuable tool given to courts and the parties under the NYC. Its original intent was to remove form the ambit of arbitration certain public issues of a significant nature, that only adjudication by national courts would be appropriate.[92] For example, as discussed above, security, antitrust, RICO and other national laws are to be decided by courts. The main reason being, arbitrators resolve dispute between the parties but the court system goes a step further and are responsible for upholding the integrity of national laws.

The Supreme Court’s position with respect to the arbitrability of certain federal Acts should be viewed with extreme caution because disputes relating to certain federal statutes are best left to national courts.[93] At the rate at which arbitration has been spreading steadily into all matters, it will come as no surprise one day if almost every international dispute can be arbitrated. Courts

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[91] See supra note 1at 200.
[92] Mitsubishi, 105 S. Ct. 3346, 3371 (1985).

should oversee the smooth functioning of arbitration without erecting too many hurdles but at the same time should not sacrifice its own public policies.[94] Otherwise parties may use arbitration as a tool to avoid laws that are of national importance which in turn will shake the foundation of this neutral and fair institution.[95]

[93] See note 5 at 1675.
[94] Supra note 8 at 283.
[95] See id.

CHAPTER 4

PUBLIC POLICY DEFENSE & ENFORCEMENT OF FOREIGN JUDGMENTS

Recognition and Enforcement of Foreign Judgements in General

This section deals with the public policy defense and the enforcement of foreign country judgments. Within the U.S, the "full faith and credit clause applies to sister state judgments".[96] This means that judgments from other states are recognized and enforced in the same manner as that of judgments made within the state. Foreign judgments on the other hand are not accorded the same standing that is given to sister state judgments.[97] Also, unlike in the field of arbitration, there are no international treaties and there is also the lack of federal legislation. Thus most of it has been left to the individual states and common law plays a predominant role.[98]

When a foreign judgment is sought enforcement in the court, the procedure is that the court will have to analyze and decide whether it can be recognized and enforced. Although in common parlance, these two terms are interchangeably used, there is a vital distinction between the two.[99] Recognition always precedes enforcement. Recognition means that the U.S. court after a detailed study of the case at hand is of the view that the matter in dispute has been thoroughly decided by the foreign court and that it does not require further

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[96] Article IV, section 1 of the constitution.
[97] Joseph J. Simeone*, The Recognition and Enforceability of Foreign Country Judgments*, 37 St. Louis U. L.J. 341, *342 (1993).
[98] Id

litigation.[100] Enforcement means that a court will deliver the relief or the judgment of the foreign court.[101] Another feature to be noted is that although recognition is essential for enforcement, it is does not always ensure enforcement. For instance, a plaintiff may require only recognition in order to dismiss a suit that has been instituted in another court. In most cases, once recognition is received, the foreign judgment is given the same status as that of sister state judgments.[102] There is a lack of uniformity in U.S courts regarding the enforcement but the modern trend is that foreign judgment is conclusive if all the necessary requisites are met.

Sources of Law

In most cases involving the enforcement of a foreign judgment, state law is applied. However the Supreme Court has not specifically decided on this issue. A brief look into the sources of law will shed light on the applicability of the governing law.

1. Federal common law.

Although the Erie Railroad v Tompkins case removed the applicability of federal common law in diversity cases, the common law principle has been adopted by most states.[103] The principle is embodied in the early case of Hilton v Guyot. The liquidator of a firm residing in France brought a suit against Hilton and Libbey, residents of New York to enforce a French judgment that allowed recovery of a

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[99] Jonathan H. Pittman, *The Public Policy Exception to the Recognition of foreign judgments*, 22 Vand. J. Transnat'l L. 969, *969 (1989).
[100] Von Mehren & Patterson, *Recognition and Enforcement of Foreign Country Judgments in the U.S.* , 6 Law & Policy Int'l Bus, 37,38 (1974).
[101] Id at 38.
[102] See Uniform Foreign Money-Judgments Recognition Act, s.3, 13 U.L.A. 265 (1988).
[103] 304 U.S. 64, *76-78 (1938).

certain sum of money.[104] The federal Court held the foreign judgment to be valid but the Supreme Court reversed the decision. Justice Gray in his often quoted decision held that "Enforcement of foreign judgment is not based on statute, treaty or the constitution but on the basis of comity."[105] "Comity is neither a matter of absolute obligation nor mere courtesy and good will. It is the recognition which one nation accords to the judicial processes of another nation, having due regard …… to the rights of its own citizens who are under the protection of its laws."[106]

This decision placed much emphasis on the reciprocity agreement between nations, and the lack of it resulted in the reversal. Although this rule of reciprocity has not been followed by most states, the doctrine of comity laid down in this case has come to play an important role in the courts decisions.

2. Uniform Foreign Money Judgments Recognition Act

The common law modified by the Recognition Act that has been adopted by half of the U.S states.[107] This act was proposed by National Conference of Commissioners on Uniform State laws 30 years ago. It lays down the grounds for non-recognition of a foreign judgment. It not only applies to money judgments but is applicable to other judgments as well.

3. Restatement (third) of foreign relations law.

Like the Recognition Act, the purpose of the Re-statement was to codify the common law and to increase the likelihood that U.S judgments will be recognized

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[104] 159 U.S. 113, *114 (1895).
[105] Id. at 227.
[106] See id. at 164-165.
[107] Supra note 93 at 352.

abroad in states with reciprocity requirements.[108] There a couple of minor differences between the two namely, lack of subject matter jurisdiction mandatory ground for non - recognition under the act while only discretionary ground under the re-statement. Secondly, the act has forum non conveniens, a discretionary ground for non recognition.[109]

Requirements for Recognition

The principles laid down in the Hilton case that were later codified in the Act and the Restatement lists certain requirements that are to be satisfied if a foreign judgment is to be recognized. The factors considered by courts are as follows:

1. Jurisdiction is an essential element. The foreign court delivering the judgment must have had "jurisdiction over the cause" in order to be recognized by U.S. courts.[110] The standard applied is similar to that of sister state judgments and the "minimum contacts" test is the key in deciding this issue.[111] When the defendant consents to the foreign court's jurisdiction, the question is whether it was direct or indirect. Voluntary appearance by the defendant for other than the purpose of contesting jurisdiction is considered as giving consent.[112]

2. The foreign judgment needs to be final and conclusive. In order to enforce a foreign judgment the court should be satisfied that the dispute was conclusively settled by the foreign court.[113] If the decision can be appealed, it does not mean

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[108] Ronald A. Brand, *Enforcement of foreign money judgments in the U.S.: In search of uniformity and International Acceptance*, 67 Notre Dame L. Rev., 253, *266 (1991).
[109] Id.,
[110] Supra note 100 at 167.
[111] The test was laid down in the case of International Shoe v. Washington, 326 U.S. 310 (1945).
[112] Uniform Recognition Act, supra note 98, s. 5(a)(2).
[113] See e.g., Curacao v. Solitron Devices, Inc., 489 F.2d 1313, 1323 (2d Cir. 1973).

that the foreign judgment will not be enforced. The defendant can show that the he intends to appeal or that one is pending, and the court has the option of staying the case until the resolution of the appeal.[114]

3. A court may refuse enforcement of a foreign judgment if the judgment was defective because of fraud. Generally if the fraud is intrinsic, that is if it was related to an issue that could have been disputed, a foreign judgment is enforced.[115] However if it is extrinsic in nature, then recognition is denied. The standard to be met by the defendant is by "clear and convincing evidence".[116]

4. Due process and foreign judgments.

A foreign judgment is refused recognition if the basic principles of due process are not met. The court looks into whether the parties were given proper notice and opportunity to present their case in a meaningful manner.[117] Differences between U.S. courts and foreign courts will not result in non-recognition. The foreign court procedures cannot be expected to be similar but needs to be compatible to those of U.S. due process requirements

Thus U.S. courts have enforced foreign judgments even when there was a lack of jury trial, pre-trial discovery procedures, absence of cross examinations and oral examinations. When enforcing a foreign judgment, the court analyzes the gravity of the due process violation and examines whether if not for the violation a different decision would have been forthcoming.

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[114] Supra note 98, s.6
[115] see supra note 104 at 980.
[116] Clarkson Co., v. Shaheen, 544 F.2d 624, 631 (2d Cir. 1976).
[117] See Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981).

The court of Appeals for the District of Columbia, held that a notice to the defendant in Hebrew language, would constitute proper notice.[118] The defendant doing business in Israel for many years alleged that he did not understand the Hebrew language. The court was of the opinion that since the defendant was aware of the fact the documents served were legal in nature, ignoring it was his fault and found no due process violations.[119]

However in the case of Bank of Iran v. Pahlavi, a default judgment obtained by the bank against the sister of the former Shah of Iran was refused recognition by the California court.[120] The political conditions in Iran made her entry into that country at high risk and as she did not have the opportunity to contest that case, it was not enforced. Due process also requires the foreign tribunal to be fair and impartial.[121] Courts normally do not judge the judicial system of other countries and mere allegations of due process violations are not entertained by U.S. courts unless they have a solid basis. In one case, the federal court refused non-enforcement of an East German judgment as those courts "did not speak as an independent judiciary".[122]

5**.** Public policy exemption to the enforcement of foreign judgments.

The Court in Hilton v Guyot held that foreign judgment would not be recognized if doing so contravenes the public policy of United States.[123] Although, this defense may be raised whenever there is a difference in the

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[118] Id at 866.
[119] Id at 865.
[120] 58 F. 3d 1406 (9th Cir. 1995).
[121] Supra note 100 at 202-03 (1895).
[122] Carl Zeiss Stifting v. V.E.B, Carl Zeiss, Jena, 293 F. Supp. 892, modified 433 F.2d 686 (2nd Cir. 1970), cert. denied, 403 U.S. 905 (1971).
[123] Supra note 100 at 164-65 (1895).

procedure, or if the result of the foreign court varies from that of the enforcing court, in practice the effectiveness of this defense is extremely restrictive. Under the Act, recognition is refused if the judgment is repugnant to the public policy of the state.[124] Although no clear definition has been forthcoming, a certain standard has been followed in deciding whether public policy has been violated.

Standard of Public Policy

The principle laid down in the case of Somportex Ltd. V Philadelphia Chewing Gum Corp. forms the basis for setting public policy standards and has been cited very often. The case involved an agreement by which the plaintiff was to distribute the defendant's goods in U.K.[125] When the agreement did not materialize, the plaintiff sued for breach of contract, obtained a default judgment and sought enforcement in the U.S. courts.[126] In addition to jurisdiction issues, the defendant contested that awarding of attorney fees and compensation of loss of good will was against the public policy of Pennsylvania but the district court for the eastern district of Pennsylvania held the damages awarded to be valid.[127]

The court took the view that "recognition will be refused only if it injures public health, morals, confidence in the purity of administration of law or undermines the sense of security for individual rights which any citizen ought to feel".[128] Thus a foreign judgment will normally be enforced unless it is contrary to the notions of justice and fairness.

Foreign Judgments consistent with U.S public policy.

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[124] See Uniform Recognition Act, supra note 98, s. 4(b)(3).
[125] 453 F.2d 435 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972).
[126] Id at 437.
[127] See id. at 443.

As there is no clear definition to the term public policy, it has been invoked as a defense to the recognition of foreign judgment in numerous cases. It should however be noted that courts have construed this defense narrowly and it has not been very successful.

In the case of Tahan v Hodgson, the defendant tried to block recognition of an Israeli default judgment. He alleged that enforcement would violate the public policy and the due process principles of U.S.[129] The District Court decided in his favor holding that failure to issue the second notice violated the due process principles and also made the defendant liable for the actions of the corporation, stating that the public policy against "piercing the corporate had been violated".[130] The district court's decision was reversed by the Court of Appeals for the District of Columbia. The court was of the opinion that "mere differences in procedure would not justify non-recognition" and that the alleged due process violation was not contrary to the basic notions of fairness and decency.[131]

The court also stated that as Israel had similar corporate laws, the defendant could not claim the public policy defense especially when he had been given the notice and opportunity to contest for a similar decision that could be obtained in a U.S. court, but failed to appear.[132] The fact that the defendant had defaulted played a role in the court's decision. It can be seen that even when

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[128] Id.
[129] 662 F.2d 862, *866 (D.C. Cir. 181)
[130] see id.
[131] Id.
[132] Id. at 865.

contested, simple allegations of policy violations are insufficient. The party should be able to prove that a different result would be derived in a U.S. court.

Ingersoll Milling Machine Co. v Granger

This case involved a dispute over freedom of employment contract. A Belgian court applying Belgian law awarded termination benefits to the defendant. The plaintiff brought a suit in the U.S. state court seeking a declaratory judgment that it was not liable to pay.[133] The defendant (Granger) had the case switched to district court and sought enforcement.[134] The plaintiff's main argument was that there was a violation of public policy because the Belgian Court applied their law instead of the law of Illinois as indicated in the contract.[135] The Illinois law favored freedom of contract and this would have been conducive to the plaintiff. However the district court found no violation and held that it was proper for the Belgian court to use their law as in similar circumstances a U.S. court would have done the same.[136]

To sum up, U.S. courts have enforced foreign judgments even when based on actions or procedures that are absent or vary under U.S. law.[137] For example, courts have enforced foreign judgments for loss of good will, default judgments, repayment of gambling debts and attorney fees. In the case of Intercontinental Hotels Corp. (Puerto Rico) v. Golden, the New York Court of Appeals rejected the defendant's claim that recovery of gambling debts violated

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[133] 631 F. Supp. 314 (N.D. Ill. 1986), aff'd, 833 F.2d 680 (7th Cir. 1987).
[134] Id at 315.
[135] Id. at 318.
[136] See id.
[137] Karen E. Minehan, *The public policy exception to the enforcement of foreign judgments: Necessary or Nemesis?* , 18 Loy. L.A. Int'l & Comp. L.J. 795, *804 (1996).

the states public policy.[138] Although gambling agreements were illegal in New York, the court was of the opinion that, "the New York public does not consider authorized gambling a violation of ….. deep rooted traditions".[139]

Thus courts have accorded recognition to foreign judgments in a very liberal manner. If all the abovementioned requisites are fulfilled, and if there is no grave violation of the basic policy and judicial principles, foreign judgments are generally enforced.

Judgments Contrary to Public Policy.

U.S courts do not recognize foreign penal and revenue judgments. A Philippines judgment was denied enforcement because the Govt. of Philippines imposed sanctions that were intended "to deter future actions and to promote public good instead of compensating the plaintiff".[140] Foreign judgments are generally refused recognition when important public issue policies are at stake. In cases in which public policy violations are found, societal interests rather than merely protecting litigant's interests play a decisive role.[141] The public policy exception has been successfully invoked to refuse enforcement of foreign libel judgments especially when it is contrary to the U.S. constitution.

1. Bachchan v India abroad publications

This case involved a publication of an article in a Swedish newspaper about the Bofors scandal in which some friends of the late Indian Prime Minister, Mr. Rajiv Gandhi were accused of receiving funds from a Swedish arms dealer who tried to

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[138] 203 N.E. 2d 210, *212 (N.Y. 1964).
[139] Id. at 213.
[140] 821 F. Supp. 292, *298 (D.N.J. 1993).
[141] Von Mehren & Patterson, supra note 96, at 63.

make an arms deal with the Indian Government.[142] The plaintiff brought a suit against India Abroad publications for having published this story in both the U.S. and U.K. editions. The jury awarded damages and recovery of attorney fees which the plaintiff tried to enforce in U.S.[143]

The defendant argued that there was a violation of the public policy as enforcement would jeopardize the protections offered by the First Amendment of the Constitution.[144] The court after detailed analysis refused enforcement as British libel laws offered lesser protection and there existed fundamental differences between U.S. and British libel laws.[145] Under the former, it did not matter if malice was a part of the defamation while under the latter, negligence and fault had to be proved. As the British libel laws did not afford this protection, enforcement would have resulted in curtailing the freedom of the press. Thus when the enforcement of a foreign judgment violated the public policy, non-recognition is considered as "constitutionally mandatory".[146]

2. Ackermann v Levine

In this case, the defendant was involved with real estate dealings in New York and tried to get financial support from certain German investors.[147] In the course of the dealings with the investors, he sought the services of the plaintiff, a German attorney. The fee payment was never discussed but at the end of the negotiations, the plaintiff charged a sum of money for his services according to

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[142] 585 N.Y.S. 2d 661 (Sup. Ct. 1992).
[143] Id. at 662.
[144] See id.
[145] Jeremy Maltby, *Juggling comity & self government: The enforcement of foreign libel judgments in U.S. courts*, 94 Colum. L. Rev. 1978, *1995 (1994).
[146] Supra note 138 at 662.
[147] 788 F. 2d at 834-36.

the rate as set down in the German statute.[148] A default judgment was obtained in favor of the plaintiff in Germany and he tried to enforce in the New York Court. The district court refused enforcement because it was contrary to the public policy of the state. New York law requires disclosure of the billing procedure to the client and as this was lacking in this case, enforcement was denied.[149]

The court of appeals unlike the district court struck down only a portion of the German default judgment entered in favor of the plaintiff. It was of the reasoning that there existed a public policy violation in one aspect.[150] State law required evidence of prior authorization and work being actually performed by the counsel.[151] The judgment included fee for a particular study claimed to have been done by the counsel. As there was no proof that such a study was requested and performed, enforcement was denied because the state had a greater interest in not enforcing unconscionable attorney fees.[152]

The court was of the opinion that enforcement would make American citizens involved in international transactions vulnerable in their dealing with foreign attorneys. The court weighed the importance of international legal relations on one hand and enforcing foreign judgments on the other and voted in favor of the former.[153] Thus it can be clearly seen that when important public policies are at issue, courts have refused enforcement of foreign judgments.

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[148] Id. at 835, 837.
[149] Id. at 841.
[150] Supra note 95 at 990.
[151] Supra note 143 at 843-44.

Conclusion

A study of the cases reveal that U.S. courts have been liberally enforcing foreign judgments and that the public policy defense has been given a narrow construction by courts. However when there is a conflict of interest between enforcement of a foreign judgment and fundamental state policy, this defense has played an important role in non-enforcement. This defense has been pivotal in non-recognition of a defective judgment especially when enforcement would undermine well-established legal and national policies.

At the national level, one matter that requires serious consideration is the lack of uniformity in U.S courts as to under what circumstances a foreign judgment will be enforced.[154] This is because enforcement is left to individual state and this in turn depends on whether the state has adopted the Recognition Act or left to the states common law. One approach as Prof. Brand suggests would be the adoption of the Recognition Act by all the states or the enactment of federal legislation in this field preempting state legislations.[155]

Moreover, unlike in the field of arbitration, there are no treaties at the international level to which U.S is a party that would facilitate the enforcement of foreign judgments. The needs of international trade and commerce require one

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[152] Id. at 844.
[153] Id.
[154] Supra note 93 at 357.
[155] Supra note 104 at 285.

such multilateral convention and combined efforts have to be made to redress this situation.[156]

[156] Id. at 326.

CHAPTER 5

COMPARISON OF THE FUNCTIONING OF THE PUBLIC POLICY DEFENSE

The above study shows that both foreign awards and judgments are liberally enforced by U.S. courts. With respect to the functioning of the public policy defense, courts narrowly interpret this defense and refuse enforcement only if it violates principles of morality and justice.[157] Generally speaking, the defense has been successful only when fundamental interests of the enforcing state are violated.

Although the existence of this defense has been criticized by many as being detrimental to the free flow of foreign awards and judgments beyond a country's borders, it can be clearly seen that this criticism suffers from lack of any basis and the fact is that the public policy defense is rarely successful.[158]

However, when a making a comparison, it is to be noted that this defense is used much more meaningfully in the context of foreign judgments than in the enforcement of foreign awards. Enforcement was denied on many occasions based on public policy grounds. Especially in cases where vital national policies are at stake, courts have taken a favorable attitude towards this defense. The Bachchan case is a good example where enforcement of a libel judgment was denied when the rights under the first amendment were violated. In the

[157] See note 113 at 974.
[158] See Ackerman v. Levine, 788 F.2d 830 (2d Cir. 1981) (noting the "narrowness of the public policy exception, under which the standard is high and infrequently met".)

Ackerman case, the public policy defense was successful as the state had a greater interest in not enforcing unconscionable attorney fees.[159]

The situation in the field of arbitration is different and though often invoked there are only a couple of cases where this defense has been successful and a French award was partially denied enforcement. In most of the cases, this defense has been very ineffective and courts have allowed arbitration of national laws thereby even violating fundamental state interest.

The decision of the D.C. Court of Appeals in the case of Laker v. Sabena in affirming the lower courts holding of granting anti suit injunction against the defendants is of much relevance here.[160] In that case which involved antitrust issues, the court specifically held that, "the forum had a greater interest in seeing that important public policies are not evaded".[161] As the defendants were trying to escape application of antitrust laws to their conduct of business in the U.S., the injunction was upheld.[162] Thus the reliance that issues on national laws will be properly decided by the arbitrators may backfire as the only goal of arbitrators is to amicably settle the dispute between parties. This calls for a meaningful application of the public policy defense in the enforcement of certain arbitration awards.

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[159] supra note 95 at 991.
[160] 731 F.2d 909, *919 (D.C. Cir. 1984).
[161] Id. at 931.
[162] Id. at 932.

CHAPTER 6

SUMMARY AND RECOMMENDATIONS

It is very evident that with regards to enforcement of foreign arbitral agreements and awards, courts and the legislature have been removing all roadblocks in favor of complete arbitral freedom.[163] However absolute and unchecked power may have serious consequences in the long run. The New York Convention has provided for legal barriers like the public policy defense, to prevent the enforcement of unjust awards by the receiving country. But the U.S. courts are following the Parsons standards of morality and justice, an old precedent being subjected to the strictest of interpretations. It is very doubtful if any case would satisfy this high level of scrutiny.

An ideal solution would be for the legislature to lay down the structure and standard of public policy so that courts can effectively use this defense against unfair results. The present standard is unclear as to how much opposed to law, an award should be in order to being struck down. Hence an initiative by the legislature in setting the standard followed by uniform interpretation by the courts would effectively re-instate public policy, a meaningful defense in the enforcement of foreign awards.

Also to be noted is that when enforcing domestic awards, the standard of public policy defense is less strict and in many cases it is possible to satisfy those standards. In a case decided by the Fifth Circuit it was held that when

enforcement compels violation of law or conduct contrary to accepted policy, such circumstances necessitated non-enforcement.[164] This line of reasoning was followed in numerous domestic awards. Courts have thus taken a different stand when deciding foreign and domestic awards and this is well exemplified by looking into two similar cases with different outcomes.[165] A foreign award was upheld even though a Pakistani judgment declaring the arbitration clause and proceeding to be void existed.[166] On the other hand, even though similar public policy arguments were raised, a domestic award was vacated and the court highlighted the need to respect the judicial processes of other countries.[167] A dual standard was followed and contrasting results were also arrived at when the partiality of the arbitrator was in issue in domestic and foreign contexts.

The issue is why courts continue to follow the double standard and whether it leads to unfair results. The courts willingness to recognize the public policy defense in case of domestic rather than foreign awards is very unclear.[168] Justice demands fairness to the parties and should not be based on the domestic or foreign nature of the arbitration. A solution worth looking into will be to follow the standard of domestic arbitral jurisprudence in all cases, namely a deferential stance towards arbitration but a case by case analysis of facts in order to prevent

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[163] See note 5 at 1688.
[164] 416 F.2d 198, *201 (5th Cir. 1969).
[165] Eloise Henderson Bouzari, The Public policy exception to the enforcement of international arbitral awards: Implications for Post Nafta jurisprudence, 30 Tex. Int'l L.J. 205, *214 (1995).
[166] See note 38.
[167] Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaart Kantoor B.V., 574 F.Supp. 367 (S.D.N.Y. 1983).
[168] Supra note 163 at 217.

unjust results.[169] A middle path of protecting freedom of contract and state interest should be followed.

Since arbitration has been accorded an equal, if not greater status to that of the court system in the settlement of international commercial disputes, it is vital that there exists a limited amount of judicial review of awards.[170] This is necessary to prevent defective awards and for the healthy survival of this institution.[171] As Professor Park rightly points out, "there is no reason … that the neutrality of procedure and forum offered by arbitration cannot co-exist with limited court review of awards".[172]

With regard to enforcement of foreign judgments:

Although foreign country judgments have generally been recognized and enforced in the U.S, non - recognition of U.S judgments abroad is the rule rather than the exception. Adoption of a multilateral convention for the enforcement of foreign judgments is the only remedy to this situation.[173] The success of the New York Convention and the diminishing differences between litigation and arbitration indicates that this task may not be all that impossible.

Inclusion of the public policy defense will encourage any such efforts by the international community because a state may use it as a "safety valve" and refuse to enforce judgments that are contrary to its laws.[174] Its role as a mechanism in defining and protecting state sovereignty should be highlighted

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[169] Id. at 215.
[170] See note 5 at 1696
[171] Id.
[172] See Park, National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration, 63 Tul. L. Rev. 647 (1989).
[173] See supra note 104 at 326.
[174] Supra note 133 at 818.

and this in turn would encourage reluctant countries in joining the Convention. The only requisite is that this defense calls for a meaningfully interpretation and not a broad one. Part II of the 19 th Session of the Hague Conference on Private International Law which is scheduled to meet in the course of the year 2002, to analyze and hold successful negotiations for implementation of this project should consider the use public policy defense as an important tool in their negotiations in bringing about uniformity in this field.

To quote Prof. Behr, “in the short term, this defense is indispensable. In the long run, it is sensible to preserve an ultimate safeguard against unforeseen differences between domestic and foreign laws”.[175]

[175] Volker Behr, Enforcement of United States Money Judgments in Germany, 13 J.L. & Com. 211, 224 (1994).

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