

# **PUBLIC POLICY AS A GROUND FOR THE REFUSAL TO ENFORCE INTERNATIONAL COMMERCIAL ARBITRATION AWARDS**

Dissertation submitted in partial fulfilment of the requirements of the degree Magister Legum in Import and Export Law at the North West University (Potchefstroom Campus) after completion of the following modules

- LLMI 874 International Instruments of Payment and Guarantees
- LLMI 875 International Law of Contracts
- LLMI 876 International Transport Law
- LLMI 878 Tax and Foreign Exchange Law
- LLMI 884 International Commercial Arbitration

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**Subject code:** LLMI 873  
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**March 2011**

## **Abstract**

In international commercial arbitration the recognition and enforcement of the award is a very important aspect of the whole arbitration process since recognition and enforcement can ultimately ensure a successful recovery of monies due. It is therefore critically important for parties to be certain that if an award is made in their favour that the award will not be refused recognition and enforcement in the country where they will ultimately seek enforcement of the award.

The *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958* provides in article V(2)(b) that the recognition and enforcement of an award may be refused if the award is contrary to the public policy of that state. South Africa is a party to the *New York Convention*. This led to the enacting of the *Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977*. The wording of section 4(1)(a)(ii) of the *Foreign Awards Act* has the same effect as article V(2)(b) of the *New York Convention*. This dissertation attempts to determine the circumstances under which a South African court will come to the conclusion that an international commercial arbitration award is against South African public policy and accordingly unenforceable in South Africa.

When trying to resist the enforcement an international commercial arbitration award on the basis that enforcement of the award will be against public policy, then the applicable public policy is not the domestic public policy but the international public policy of the relevant country. Domestic public policy means those moral, social or economic considerations which are applied by courts as grounds for refusing enforcement of a domestic arbitral award. The term international public policy, on the other hand, indicates those considerations which are applied by the enforcing courts when enforcing foreign arbitral awards rather than domestic awards. International public policy is understood to be narrower than domestic public policy. The application of an international public policy in the enforcement of international commercial arbitration awards was envisaged by the authors of both the *New York Convention* and the *UNCITRAL Model Law*.

English arbitration law is an example of a jurisdiction that is well equipped to deal with the enforcement of international commercial arbitration awards and embraces the concept of international public policy. English law, and specifically English case law, may therefore provide a framework to compare the South African legal principles applicable to the public policy exception with, and to determine improvements that should be made.

South African law allows for the public policy exemption to be applied and case law does indicate the application of international public policy. South African courts are well capable of dealing with any issue of enforcement of a foreign arbitral award but our legislation is inadequate and our case law limited. South Africa therefore needs to urgently pass new commercial arbitration legislation to develop our arbitration law and to instil confidence in South Africa as a venue for the conduct of international commercial arbitration. In this regard English law can be of assistance, not only because of the shared heritage but also because that law is one of the most developed regimes of arbitration law.

## **Opsomming**

### **Openbare Beleid as 'n uitsluitingsgrond vir die afdwing van Internasionale Kommersiële Arbitrasie Toekennings**

Die erkenning en afdwinging van toekennings in internasionale kommersiële arbitrasie is 'n baie belangrike aspek van die arbitrasie proses aangesien dit uiteindelik aanleiding kan gee tot die suksesvolle verhaal van die toekenning. Dit is dus van kritiese belang dat partye seker is dat indien 'n arbitrasie toekenning in hul guns gemaak word, daardie party nie verhoed sal word om die toekenning af te dwing in die land waar dit uiteindelik afgedwing wil word nie.

Die *New York Konvensie* van 1958 bepaal in artikel V(2)(b) dat die erkenning en afdwinging van 'n arbitrasie toekenning geweier mag word indien die toekenning strydig is met die openbare beleid van die land waar afdwinging gesoek word. Suid-Afrika het die *New York Konvensie* onderteken en dit het gelei tot die promulgering van die *Erkenning en Afdwinging van Buitelandse Toekennings Wet* 40 van 1977. Artikel 4(1)(a)(ii) van die gemelde wet het dieselfde uitwerking as artikel V(2)(b) van die *New York Konvensie*. Hierdie skripsie poog om te bepaal onder welke omstandighede 'n Suid-Afrikaanse hof sal bevind dat 'n internasionale kommersiële arbitrasie toekenning in stryd met die Suid-Afrikaanse openbare beleid en daarom onafdwingbaar in Suid-Afrika is.

Die toepaslike openbare beleid wat in ag geneem moet word wanneer daar gepoog word om die afdwinging van 'n internasionale kommersiële arbitrasie toekenning te opponeer is nie die binnelandse openbare beleid nie maar wel die internasionale openbare beleid van die relevante land.

Binnelandse openbare beleid is daardie morele, sosiale en ekonomiese oorwegings wat toegepas sal word deur die hof as uitsluitingsgrond vir die afdwinging van 'n binnelandse arbitrasie toekenning. Die begrip internasionale openbare beleid daarenteen is daardie oorwegings wat toegepas word deur die hof wanneer internasionale arbitrasie toekennings afgedwing moet word in plaas van binnelandse arbitrasie toekennings. Internasionale openbare beleid is 'n baie nouer begrip as

binnelandse openbare beleid. Die toepassing van internasionale openbare beleid in die afdwinging van internasionale kommersiële arbitrasie toekenning is beoog deur die opstellers van die *New York Konvensie* en die *UNCITRAL Modelwet*.

Engelse arbitrasie-reg is 'n voorbeeld van 'n jurisdiksie wat in staat is om die uitdagings wat gepaard gaan met die erkenning en afdwinging van internasionale kommersiële arbitrasie toekennings te hanteer. Engelse arbitrasie-reg het ook die konsep van internasionale openbare beleid aanvaar. Engelse arbitrasie-reg en spesifiek Engelse hofsake kan dus 'n raamwerk verskaf waarteen Suid-Afrikaanse regsbeginsele, in terme van die openbare beleid uitsluitingsgrond in internasionale kommersiële arbitrasies, vergelyk kan word en kan help om te bepaal welke verbeterings of wysigings aangebring kan word aan die Suid-Afrikaanse reg.

Suid-Afrikaanse reg erken die openbare beleid verweer en daar is aanduidings dat Suid-Afrikaanse reg die toepassing van internasionale openbare beleid aanvaar. Die Suid-Afrikaanse hof is goed genoeg toegerus om enige dispuut rakende die afdwinging of internasionale arbitrasie toekennings te hanteer. Ons wetgewing is egter nie voldoende genoeg nie en ons regspraak is beperk. Dus moet Suid-Afrika dringende nuwe internasionale kommersiële arbitrasie wetgewing promulgeer, nie net om Suid-Afrikaanse arbitrasie-reg te ontwikkel nie maar ook om vertroue te vestig in Suid-Afrika as 'n bestemming vir die hantering van internasionale kommersiële arbitrasie. In hierdie verband kan Engelse reg bystand verleen as daar besluit moet word in gevalle waar veral die openbare beleid weieringsgrond geopper word teen die afdwinging van 'n arbitrasie toekenning – nie net as gevolg van ons regstelsels se gedeelde geskiedenis nie maar ook omdat Engelse reg oor een van die gevorderste arbitrasie regstelsels beskik.

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## **List of Abbreviations**

|                         |                                                                                                            |
|-------------------------|------------------------------------------------------------------------------------------------------------|
| Geneva Convention       | Geneva Convention of the Execution of Foreign Arbitral Awards, 1927                                        |
| Law Commission's Report | <i>South African Law Commission Report, Arbitration: An International Arbitration Act for South Africa</i> |
| Model Law               | UNCITRAL Model Law on International Commercial Arbitration                                                 |
| New York Convention     | New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958                    |
| UNCITRAL                | United Nations Commission on International Trade Law                                                       |

## 1. Introduction

After an international arbitral tribunal has made a final award in arbitration proceedings, its work is done. If the party, against whom the award was made, fails to comply therewith, the other party has to take steps to enforce the award. One option is to seek recognition and enforcement of the award through the national courts of the country where one would want to enforce the award, by making it an order of that national court. The award can then be enforced in the enforcing state as a judgment of that court. Enforcement can then, for instance, take place against the assets of the party against whom the award was made. In South Africa the procedure to enforce foreign arbitral awards is governed by the *Recognition and Enforcement of Foreign Arbitral Awards Act* 40 of 1977.<sup>1</sup>

The *Foreign Awards Act* is based<sup>2</sup> on the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958*.<sup>3</sup> The *New York Convention* sets out five general grounds for the refusal of recognition and enforcement of international commercial arbitration awards.<sup>4</sup> These general grounds must be raised as a defence by the respondent.

A further two grounds for refusal of the recognition and enforcement of awards relate to considerations of public policy regarding the place of enforcement.<sup>5</sup> In the *New York Convention* the refusal to enforce awards on the ground of public policy, differs

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1 Hereafter referred to as the *Foreign Awards Act*.

2 Forsyth *Private International Law* 444.

3 Hereafter referred to as the *New York Convention*.

4 The five grounds listed in art V(1) of the *New York Convention* can be summarised as follows: (a) The parties to the arbitration agreement were under some incapacity or the arbitration agreement is not valid under the applicable law, (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties and (e) the award is not yet binding or the award has been set aside.

5 The two grounds set out in art V(2) of the *New York Convention* relate to the issue of (a) arbitrability, that means whether or not the subject-matter of the dispute is capable of settlement by arbitration in the state where enforcement is sought and (b) whether or not the enforcement of the award will be contrary to the public policy of the enforcement state.

from the other general grounds<sup>6</sup> and the grounds of public policy may be raised by the court on its own accord.<sup>7</sup>

South Africa is a party to the *New York Convention* and the *Foreign Awards Act* implements the provisions thereof. The question arises under what circumstances the South African courts will find that an international commercial arbitration award is against public policy and thus unenforceable. In international commercial arbitration it is paramount to distinguish between domestic public policy and international public policy.<sup>8</sup> Domestic public policy refers to those economic, moral or social considerations which the court takes into account when deciding whether or not to enforce a domestic award. International public policy, on the other hand, refers to those considerations which are applied and taken into account by enforcing courts when enforcing a foreign commercial arbitration award.

The purpose of this research is therefore firstly to establish what are the applicable legal principles when determining whether or not an international arbitration award is in opposition to South African public policy and accordingly unenforceable. Secondly, to establish whether there is a difference between South African public policy when enforcing a foreign award, opposite to a domestic award or a foreign civil judgment. And lastly, it needs to be determined whether these legal principles needs be improved.

In order to answer these questions a thorough review of the *New York Convention* will be undertaken. The provision of the *UNCITRAL*<sup>9</sup> *Model Law on International Commercial Arbitration*<sup>10</sup> relating to the recognition and enforcement of awards will also be taken into consideration.<sup>11</sup>

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6 The most notable aspects of both art V(1) and art V(2) of the *New York Convention* are that the defences are not based on the merits but on the integrity of the process. While art V(1) focuses on fairness to the parties and opportunity to state one's case, art V(2) acknowledges that even though fairness of the process has been observed by the tribunal, there may be aspects of the arbitration that offends the enforcement state's sense of justice.

7 *New York Convention* art V(2) and Redfern and Hunter *Arbitration* 445.

8 See chapter 2.5.2 below.

9 United Nations Commission on International Trade Law.

10 Hereafter referred to as the *Model Law*.

11 Not only did the *Model Law* began as a proposal to reform the *New York Convention* , but *UNCITRAL* was of the opinion that harmonisation of arbitration laws of different countries can more readily be achieved by a uniform law than by the adoption a new Convention. The

Thereafter it will be established what the legal position in English law is. The English *Arbitration Act 1996*<sup>12</sup> implements the provisions of the *New York Convention* and the *Model Law*, including the public policy exception to the enforcement of awards. The *English Arbitration Act* provides a coherent legal framework that is flexible and accessible. Against this background and in view of the over 1000 cases decided by English courts since the commencement of the *Arbitration Act*, English case law may provide the best framework to compare the South African legal principles applicable to the public policy exception with, and to determine the improvements that should be made.

After having reviewed English arbitration law, it will be established what the legal position in South African law is regarding the enforcement of foreign arbitration awards. Consideration will be given to the common law, legislation, case law, the Constitution of the Republic of South Africa, 1996<sup>13</sup> as well as the South African Law Commission's report entitled *Arbitration: An International Arbitration Act for South Africa*,<sup>14</sup> and the recommendations contained therein. Finally, a comparison will be drawn with the English law and a conclusion will be reached in order to provide answers to the above questions.

## **2. The New York Convention**

### **2.1 General**

The *New York Convention* is the most important international treaty relating to international commercial arbitration. It provides a simple and effective method of obtaining recognition and enforcement of foreign arbitral awards. It is a considerable improvement on its predecessor, the *Geneva Convention on the Execution of*

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*Model Law* can therefore be seen as the successor of the *New York Convention* and in addition many countries have adopted it as it stands or with minor changes, see Redfern and Hunter *Arbitration* 70-71.

12 Hereafter referred to as the *English Arbitration Act*.

13 Hereafter referred to as the *Constitution*.

14 Hereafter referred to as the *Law Commission's Report*.

*Foreign Arbitral Awards* of 1927.<sup>15</sup> The enforcement of awards is one of the primary objectives of the *New York Convention*. The *New York Convention* has globally been praised by jurists and has been described as the single most important instrument relating to international commercial arbitration.<sup>16</sup>

As mentioned above,<sup>17</sup> the *Foreign Awards Act* is based on the *New York Convention*. The *Model Law*<sup>18</sup> was developed to improve on the *New York Convention*.<sup>19</sup> In turn the *English Arbitration Act* is to a large extent based on the *Model Law*.<sup>20</sup> It is therefore necessary to have a clear understanding of how the *New York Convention* functions, as it is the foundation of both South African and English law in respect of the public policy defence to the enforcement of foreign arbitral awards.

As the title indicates, the *New York Convention* deals with the recognition and enforcement of foreign arbitral awards, but it also deals with the enforcement of arbitration agreements.<sup>21</sup> The last mentioned aspect, however, falls outside the scope of this study. In this chapter the focus will be on the grounds for refusing enforcement of foreign arbitral awards in terms of the *New York Convention* and more specifically public policy as a ground to refuse such enforcement. It will however be prudent to first draw the distinction between recognition and enforcement of foreign arbitral awards.

## **2.2 Recognition and enforcement**

The terms recognition and enforcement are often used together but they have different meanings.<sup>22</sup> When a court recognises an award, it acknowledges that the award is valid and binding, and it grants an effect similar to a court judgment to it. A

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15 Hereafter referred to as the *Geneva Convention* and see Tweeddale and Tweeddale *Arbitration Law* 293 and Redfern and Hunter *Arbitration* 69.

16 Redfern and Hunter *Arbitration* 441.

17 Chapter 1.

18 Specifically the parts that deal with the recognition and enforcement of foreign arbitral awards.

19 See footnote 11 *supra*.

20 Born *Arbitration* 31. In addition, s103(3) of the *English Arbitration Act* that deals with the public policy defence is similar to the corresponding provision in the *Model Law*, namely a36(1). See Chapter 4.2 below.

21 Art II of the *New York Convention*.

22 Moses *International Commercial Arbitration* 203.

recognised award can be relied upon as a set-off or defence to related arbitration or litigation so that issues decided by the award cannot be re-litigated or re-arbitrated.<sup>23</sup>

Thus, recognition comes into play when a court is requested to grant a remedy in respect of a dispute that was the subject of previous arbitral proceedings. The party in whose favour the award was made will protest against the new legal proceedings on the basis that the dispute had already been determined. To prove this, the party will produce the award to the court and request the court to recognise it as valid and binding upon the issues it dealt with. It is therefore a defensive process.<sup>24</sup> The *Law Commission's Report* illustrates recognition as follows.<sup>25</sup> Party X may successfully resist the claim of party Y in arbitration in State A. If Y subsequently institutes court proceedings against X in State B on the same grounds that were rejected in arbitration in State A, X will want the court in State B to recognise the award, since recognition of the award amounts *res judicata*.

From the above example it is clear that recognition without enforcement is possible. However, when an award is enforced, it is *a priori* recognised.<sup>26</sup> Enforcement goes a step further than recognition. A court that is prepared to grant enforcement of an award will do so because it recognises the award as valid and binding upon the parties. The court will therefore not only recognise the award's legal force and effect, but will also provide the remedies necessary to enforce it.<sup>27</sup>

### **2.3 Scope of application**

The principal goals of the *New York Convention* can be derived from its full title, namely the recognition and enforcement of arbitration awards. A signatory state must respect the binding effect of the award with regard to the recognition of awards. Where enforcement of an award is requested, the procedural rules of the state where enforcement is sought are applicable.<sup>28</sup>

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23 *Ibid.*

24 Redfern and Hunter *Arbitration* 434.

25 *Law Commission's Report* 109.

26 Moses *International Commercial Arbitration* 204.

27 Redfern and Hunter *Arbitration* 435.

28 Becker *Recognition and enforcement* 8.

Article I(1) of the *New York Convention* states the following:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

From this article it is clear that a contracting state is obliged to recognise and enforce the award as long as the award complies with the basic conditions of the *New York Convention*.<sup>29</sup>

Article I(3) of the *New York Convention* states two reservations<sup>30</sup> that signatory states may hold when assenting to the convention. States may decide that the *New York Convention* will only apply if the other state, in which the award was made, is also a signatory state<sup>31</sup> or when the dispute is considered as commercial by the enforcing state.<sup>32</sup> The commercial reservation provides that a signatory state may declare that it will apply the *New York Convention* only to disputes arising out of legal relationships, whether contractual or not, which are considered by the signatory state as 'commercial'.<sup>33</sup> Because no definition of "commercial" is provided in the *New York Convention*, the law of the enforcing jurisdiction determines what is regarded as "commercial".<sup>34</sup>

This of course can lead to confusion and different interpretations as not every country has the same legal provisions as to which legal relationships are considered "commercial". This can even lead to different interpretations within the same state.<sup>35</sup>

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29 *Ibid.*

30 Reservations limit the *New York Convention's* applicability in the signatory states.

31 Redfern and Hunter *Arbitration* 441-442. This is the reservation of reciprocity in art 1.3 of the *New York Convention*.

32 Art 1.3 of the *New York Convention*.

33 Moses *International Commercial Arbitration* 205.

34 *Ibid.*

35 Becker *Recognition and enforcement* 9 and also see Redfern and Hunter *Arbitration* 442-444 for an in depth discussion as to the problems associated with this reservation.

## **2.4 Enforcing an award**

Article IV (1) of the *New York Convention* states the following:

...the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

This article stipulates that the application made to the relevant enforcement court must be accompanied by the original award or a certified copy as well as the original agreement or a certified copy in order to bring the application properly before the court as part of the legal prerequisites.

## **2.5 Grounds for refusal**

### **2.5.1 Arbitrability**

Article V(1) lists five grounds on which a court may refuse to enforce an award if the party against whom enforcement is sought, provides the necessary proof. The five grounds listed in article V(1) fall beyond the scope of this study. Article V(2), however, lists two additional grounds:

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

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article V(2)(a) revolves around the issue of arbitrability. In other words, whether or not the dispute can be settled in the enforcement state by means of arbitration, or whether it is reserved for decision by the courts. This is of course a question of law and depends on each signatory state's law. It is largely governed by demands of public policy.<sup>36</sup> A state may want to reserve certain areas of the law for the exclusive

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36 Redfern and Hunter *Arbitration* 456.

jurisdiction of state courts,<sup>37</sup> especially disputes that will have an impact on third parties or have consequences in the public domain.<sup>38</sup> This is because arbitrators are expected to be responsible only to resolve the dispute with respect to the parties before them, and not to take into account the public interest.<sup>39</sup> Arbitrability therefore creates a fine balance between, on the one hand, the public interest of the state in the determination of certain categories of disputes exclusively through its courts, and, on the other hand, the desire of contracting parties to have their disputes decided in private.<sup>40</sup>

A practical example where the arbitrability exception was applied is found in the case of *Audi-NSU Auto Union AG (Germany) v Adelin Petit & Cie (Belgium)*.<sup>41</sup> The Belgian court held that a dispute that was arbitrated in Zurich, Switzerland, in terms of the arbitration clause in a distribution agreement,<sup>42</sup> was not capable of being adjudicated by means of arbitration in terms of Belgian law. Belgian law grants exclusive jurisdiction to Belgian courts to consider disputes arising from distribution agreements. As a result the Belgian court ruled that the dispute was not capable of being settled by arbitration.<sup>43</sup>

### 2.5.2 Public Policy

Article V(2)(b) of the *New York Convention* also stipulates that the enforcement of an award may be refused if the award is contrary to the public policy of "that" state. It is therefore clear that the "public policy" referred to in the *New York Convention*, is the public policy of the enforcing state.<sup>44</sup> Public policy is not defined in the *New York Convention* and is open for interpretation and thus presents a broad loophole for

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37 Lourens SA *Merc LJ* 363.

38 Moses *International Commercial Arbitration* 216.

39 *Ibid.*

40 Lourens SA *Merc LJ* 363.

41 *Cour de Cassation* (1<sup>st</sup> Chamber), 28 June 1979 and Redfern and Hunter *Arbitration* 456 reported in vol. V (1980) *Yearbook Commercial Arbitration* 257, hereafter referred to as *Audi-case*.

42 A distribution agreement is usually entered into between a manufacturer, in this case Audi, and a supplier. The supplier sells or distributes the goods manufactured for a fee. In addition, a distribution agreement may contain such terms and conditions as the parties may agree to.

43 *Cour de Cassation* (1<sup>st</sup> Chamber), 28 June 1979 and Redfern and Hunter *Arbitration* 456 reported in vol. V (1980) *Yearbook Commercial Arbitration* 257.

44 Redfern and Hunter *Arbitration* 456.

refusal of an award.<sup>45</sup> Accordingly, when considering the application of public policy, it is thus especially important to define what the term entails. In the field of international commercial arbitration, it is important to distinguish between domestic public policy and international public policy.<sup>46</sup>

#### 2.5.2.1 Domestic Public Policy

Domestic public policy means those moral, social or economic considerations which are applied by courts as grounds for refusing enforcement of a domestic arbitral award.<sup>47</sup> Domestic public policy was the prevailing concept of public policy when challenging the enforcement of foreign arbitral awards in the enforcing state until the adoption of the *New York Convention*. It is widely recognised that the intent of the creators of the *New York Convention* was to challenge enforcement of foreign arbitral awards only on the basis of international public policy and not domestic public policy.<sup>48</sup>

#### 2.5.2.2 International Public Policy

According to several legal scholars the public policy that is referred to in the *New York Convention* refers to an "international public policy" which is a more restrictive notion than that of domestic public policy.<sup>49</sup> It is also contended that when article V(2)(b) of the *New York Convention* refers to the public policy "of that country", it refers to the enforcing state's conception of international public policy but not to a genuinely international public policy rooted in the community of nations that can be found in the customs of international public law.<sup>50</sup>

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45 Moses *International Commercial Arbitration* 218.

46 Sheppard and Chance 2004 <http://www.transnational-dispute-management.com>.

47 *Ibid.*

48 Ryabinin *Procedural Public Policy to the Enforcement and Recognition of Foreign Arbitral Awards* 4.

49 Poudret and Besson *Comparative Law* 856.

50 Poudret and Besson *Comparative Law* 857 and Dugard *International Law* 27-36.

The International Law Association Resolution 2/2002 on International Commercial Arbitration<sup>51</sup> describes International Public Policy as follows:<sup>52</sup>

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

The term “international public policy” indicates the public policy which is applied by the enforcing courts to foreign arbitral awards rather than domestic awards. International public policy is understood to be narrower than domestic public policy. In other words, not every rule that forms part of a country's domestic public policy is part of its international public policy.<sup>53</sup> It is however very important to keep in mind that, just like the domestic public policy of each country differs, so does the international public policy of each country also differ.

There are therefore two ways to view international public policy in relation to domestic public policy:<sup>54</sup> Firstly as the application of essentially domestic public policy, narrowed somewhat; and secondly as the application of particular rules especially designed to be used in cases involving international commercial arbitration. Either way, however, international public policy, which is distinct from domestic public policy, is and should be the norm used by the enforcing court to determine whether a foreign arbitral award should be refused on the basis of public policy.<sup>55</sup>

## **2.6 Conclusion**

Articles V(2)(a) and (b) both relate to issues of public policy. Whether a dispute is open for arbitration depends very much on the legislation and law of a specific

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51 International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitration Awards, Resolution 2/2002. Hereafter *ILA's Recommendations*.

52 Recommendation 1(c) of *ILA's Recommendations*.

53 Sheppard and Chance 2004 <http://www.transnational-dispute-management.com>.

54 Ryabinin *Procedural Public Policy to the Enforcement and Recognition of Foreign Arbitral Awards* 5.

55 Redfern and Hunter *Arbitration* 458.

country and by implication the public policy of that state. In the *Audi*-case for example, should there not have been a provision to refuse enforcement of an award on the ground of arbitrability, the court could also have ruled that the award was against public policy.<sup>56</sup> But it was unnecessary for the court to make a decision on that point as the court had already found that the dispute was not capable of being decided through arbitration. It then follows that, if a dispute may not be arbitrated in the enforcing state, an award made in lieu of such an irregular arbitration, is also against the public policy of that enforcing state.

The public policy exception in terms of article V(2)(b) of the *New York Convention* is, however, rarely upheld by a court and in most countries the "pro-enforcement bias" of the *New York Convention* has been faithfully observed.<sup>57</sup> The question that arises is whether the legal principles applicable to the public policy exception differ in the case of international arbitral awards from those against domestic awards.<sup>58</sup> In most countries the line of reasoning is that in applying their own public policy to arbitration awards that fall under the scope of the *New York Convention*, they should give it an international and not a domestic dimension.<sup>59</sup> In other words, even though article V(2)(b) of the *New York Convention* refers to the public policy "of that country", the provision actually refers to "international public policy" which is a more restrictive notion than that of purely domestic public policy of a state.<sup>60</sup> Therefore, the (international) public policy of an enforcing state when dealing with the enforcement of foreign arbitral awards can be different from the (domestic) public policy of the enforcing state when dealing with purely domestic arbitration awards.

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56 Art V(2)(b) of the *New York Convention*.

57 Redfern and Hunter *Arbitration* 456-457. The "pro-enforcement bias" can be regarded as a rule of international public policy in contrast with domestic public policy where such a rule does not exist. Furthermore it can be argued that the existence of this rule adds impetus to the argument that international public policy is in fact particular rules especially designed to be used in cases involving international commercial arbitration and not just a narrower form of domestic public policy.

58 Redfern and Hunter *Arbitration* 457-458.

59 Redfern and Hunter *Arbitration* 458.

60 Poudret and Besson *Comparative Arbitration* 856.

The notion of international public policy has been applied and accepted by American,<sup>61</sup> English,<sup>62</sup> Indian,<sup>63</sup> and Swiss<sup>64</sup> courts. Courts from all over the world have expressed a willingness to limit the public policy defence as a way to have the enforcement of an award refused. However, some courts apply and interpret the public policy defence in such a manner that may seem to an outsider as a way to protect purely local interest.<sup>65</sup>

By using the words “the public policy of that country”, the drafters of the *New York Convention* do not seem, on a plain reading of the text, to explicitly attempt to harmonise public policy or to establish a common international standard. However, the Drafting Committee noted in its Report that it intended to limit the application of the public policy 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”,<sup>66</sup> thus endorsing a narrow concept of public policy or international public policy.

Article V(2)(b) of the *New York Convention* serves as the starting point in the development and application of the public policy defence in South African law and in English law. The *New York Convention* was also the first document according to which an international dimension was given to the public policy defence.<sup>67</sup> But before the English law and South African law can be assessed in respect of the public policy exception, cognisance has to be taken of the *Model Law* since it represents an important event in the development of the public policy exception.

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61 See *Parsons & Whitmore Overseas Co Inc v Societe Generale de l'Industrie du Papier (RAKTA)* 508 F 2<sup>nd</sup> 969 (2d Cir. 1974) at paragraph 10-11 (<http://cases.justia.com/us-court-of-appeals/F2/508/969/367069/>).

62 See *Westacre Investments Inc. v Jugoimport-SPDR Holding Co. Ltd.* [1999] 2 Lloyd's Rep 65 at page 75, hereafter referred to as *Westacre*.

63 See *Renusagar Power Co Ltd v General Electric Co* 1994 AIR 860, 1994 SCC Supl. (1) 644 at paragraph 681. (<http://www.indiankanoon.org/doc/86594/>).

64 *KSAG v CCSA* reported in vol XX (1995) *Yearbook Commercial Arbitration* 762 and Redfern and Hunter 459.

65 Redfern and Hunter *Arbitration* 459.

66 Report of the Committee on the Enforcement of International Arbitral Awards, 28 March 1955, UN Doc E/2704 and E/AC.42/4/Rev1 at page 13.

67 Sheppard and Chance 2004 <http://www.transnational-dispute-management.com>.

### 3. UNCITRAL Model Law

#### 3.1 General

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly of the United Nations in 1966. In establishing UNCITRAL, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and regarded UNCITRAL as the vehicle by which the United Nations could play a more active role in reducing or removing those obstacles.<sup>68</sup>

UNCITRAL plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by states in modernising the law of international trade. The *Model Law* is one such text, focussing on international commercial arbitration. UNCITRAL published the *Model Law* in 1985 for states to adopt; and a recommendation of the General Assembly of the United Nations commending the Model Law to member states was also adopted in 1985.<sup>69</sup> By adopting the *Model Law*, states have modernised their arbitration legislation.<sup>70</sup>

The *Model Law* begins with a proposal to reform the *New York Convention*.<sup>71</sup> The aim with the *Model Law* is to provide model rules for the regulation and enforcement of international commercial arbitration.<sup>72</sup> The *Model Law* is a model or blueprint legislation available for countries to adopt as their own legislation. This will contribute to the removal of differences in national laws relating to the enforcement of international commercial arbitration awards.<sup>73</sup> As more and more countries harmonise their national legislation by adopting the *Model Law*, major differences in the commercial arbitration legislation of countries will start to disappear. Many countries have, since its inception, based their laws governing international

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68 UNCITRAL's home page <http://www.uncitral.org/uncitral/en/about/origin.html>.

69 Redfern and Hunter *Arbitration* 70.

70 *Ibid.*

71 *Ibid.*

72 Cole *International Commercial Arbitration* 33.

73 *Ibid.*

arbitration on the *Model Law*, some with only minor alterations. Many more have taken it into account when modernising their laws on commercial arbitration.<sup>74</sup>

The form and structure of a model law as opposed to a convention was chosen most importantly for its flexibility.<sup>75</sup> A convention must be taken as is or be rejected, with limited flexibility through the use of reservation clauses. A model law on the other hand may be accepted in full or in part, and may be modified in any other way. It is only a recommended text and it functions by the strength of its attractiveness.<sup>76</sup>

### **3.2 Recognition and Enforcement of Arbitration Awards under the Model Law**

Article 36 of the *Model Law* deals with the recognition and enforcement of arbitration awards. This article indicates under which circumstances an enforcing court should refuse to recognise and enforce an award.<sup>77</sup> Article 36 goes a step further than the *New York Convention* in that it applies not only to arbitral awards issued outside the enforcement state, but also to domestic awards, in other words awards issued in international commercial arbitration taking place in the enforcing state.<sup>78</sup> Article 36(1)(b)(ii) reads as follows:

36 (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:  
(b) if the court finds that:  
(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

If one compares the above article with article V(2)(b) of the *New York Convention*, it is for practical purposes identical and it would therefore apply *mutadis mutandis* as set out under the *New York Convention*.<sup>79</sup> It is therefore highly unlikely that the same court would give one interpretation to article V(2)(b) of the *New York Convention* and a different interpretation to article 36(1)(b)(ii) of the *Model Law*. It

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74 Redfern and Hunter *Arbitration* 70-71.

75 Hermann *UNCITRAL Model Law* 18.

76 *Ibid.*

77 Holtzmann and Neuhaus *UNCITRAL Model Law* 1055.

78 *Ibid* and A36(1) of the *Model Law*.

79 Chapter 2 above.

can therefore be argued that the *Model Law* is compatible with the *New York Convention* in respect of the public policy defence.

The authors of the *Model Law* correspond with the tendency of courts to interpret the public policy defence in a restrictive manner in *New York Convention*-related proceedings.<sup>80</sup> Even though the *Model Law* does not specifically distinguish between international public policy and domestic policy, the discussions at UNCITRAL prior to the adoption of the *Model Law* indicates that a distinction was drawn between international public policy and domestic public policy.<sup>81</sup> It was accepted that foreign arbitral awards that were against domestic public policy would not necessarily be against public policy as envisaged in the *Model Law*, since public policy in the *Model Law* refers to international public policy.<sup>82</sup> Even though this is not apparent from the plain reading of the text, it becomes clear from the reports of the drafters of the *Model Law*.<sup>83</sup>

As stated above, the *Model Law* has been adopted by many countries, including England. The *Model Law* aims to achieve uniformity in international trade law. By adopting the *Model Law*, countries immediately increase their commercial competitiveness. Sadly, South Africa has not yet adopted legislation based on the *Model Law* even though the *Law Commission's Report* recommended that the *Model Law* should be adopted with minimum changes to promote harmonisation.<sup>84</sup> A draft bill was proposed in 1998 by the South African Law Commission, but no progress has been made since then and the current South African international arbitration regime remains incompetent to deal effectively with international commercial arbitration.<sup>85</sup>

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80 Secretariat Note Reporting AALCC Decision A/CN.9/127 (20 October 1976) in Holtzman and Neuhaus *UNCITRAL Model Law* 1068.

81 Secretariat Note Reporting AALCC Decision A/CN.9/127 (20 October 1976) in Holtzman and Neuhaus *UNCITRAL Model Law* 1069.

82 *Ibid.*

83 Note by the Secretariat Model Law on International Commercial Arbitration: Draft Articles 37 to 41 on Recognition and Enforcement of Award and Recourse against Award (A/CN.9/WG.II/WP.42) as reported in Yearbook of the United Nations Commission on International Trade Law, 1983 volume XIV at page 93.

84 Becker *Recognition and Enforcement* 25.

85 Becker *Recognition and Enforcement* 26.

### **3.3 Conclusion**

As is the case with the New York Convention the public policy in the *Model Law* also refers to international public policy as opposed to domestic policy. Thus, if a country has adopted the *Model Law* and is signatory to the *New York Convention*, or has only adopted the *Model Law* as its international arbitral regime, or is still only relying on the *New York Convention* like South Africa, the notion of international public policy is the norm according to which enforcement of a foreign arbitral award should be determined. In addition, the wording of the provisions dealing with the grounds for refusal of foreign awards, in both the *New York Convention* and the *Model Law*, appear to be compatible with each other. However, it should still be kept in mind that international public policy differs from country to country.

## **4. English law**

### **4.1 General**

English arbitration law is an example of a jurisdiction that is well equipped to deal with the enforcement of international commercial arbitration awards. English law is governed by both common law and legislation.<sup>86</sup> The statute that currently governs arbitration in England is the *Arbitration Act* of 1996. As mentioned above,<sup>87</sup> the success of the *English Arbitration Act* has prompted the Law Society of England and Wales to claim that London is the superior venue for international commercial arbitration in terms of legal norms, predictability, certainty, legal expertise and arbitration friendliness.

English courts have shown a reluctance to refuse enforcement of a foreign award on grounds of public policy.<sup>88</sup> This pro-enforcement bias of the *New York Convention* is as such viewed as a public policy issue in England.<sup>89</sup> By implication English courts

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86 Becker *Recognition and Enforcement* 20.

87 See Chapter 1 above.

88 Redfern and Hunter *Arbitration* 456.

89 As confirmed by the English court in *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65.

have thus embraced the principle of international public policy by presenting a restrictive interpretation of the public policy exception.<sup>90</sup> Therefore in terms of English law, the public policy applicable to international commercial arbitration awards is a much narrower concept than the public policy applicable to domestic disputes.

The purpose of this chapter is to discuss the relevant legislation in English law governing the enforcement and recognition of foreign arbitral awards, and how the public policy exception is applied by the English courts.

#### **4.2    *The English Arbitration Act.***

The *English Arbitration Act* came into force in England on 1 January 1997.<sup>91</sup> The *English Arbitration Act* is based on the *Model Law* and was the catalyst that led to its promulgation.<sup>92</sup> The *English Arbitration Act* applies to both English domestic as well as international awards. Part III of the *English Arbitration Act* deals with the "Recognition and Enforcement of Certain Foreign Awards." Section 103(3) reads as follows:

Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

It is clear from the above that the *English Arbitration Act* does not deviate much from the public policy defence provided for in the *New York Convention* and the *Model Law*. The rest of this chapter will therefore focus on how the English courts interpret and apply the public policy exemption in practice.

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90     Ozumba 2009 <http://www.dundee.ac.uk>.

91     Cole *International Arbitration* 45.

92     Tackaberry & Marriott *Bernstein's Handbook of Arbitration* 30.

### 4.3 Public policy defences

#### 4.3.1 General

As mentioned above, public policy is not defined in the *New York Convention* or the *Model Law*. This allows for a possible loophole for the refusal of enforcement of an award,<sup>93</sup> as some international courts may interpret public policy as to protect purely local interest.<sup>94</sup> In general, however, most courts have viewed this defence narrowly.<sup>95</sup> When a party seeks to avoid enforcement of a foreign award on the grounds of public policy in English courts, there are certain rules which, if infringed, will lead to non-enforcement, whatever the proper law of the contract and wherever they are to be performed.<sup>96</sup> In *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*,<sup>97</sup> the court held that if a contract or award is contrary to the domestic public policy of the place of performance and to the laws of England, the English courts will not enforce that contract or award. However, if the contract is offensive only to a public policy peculiar to the place of performance, the English courts will take no notice of it.

That being said, English courts are reluctant to excuse an award from enforcement on the grounds of public policy.<sup>98</sup> It even prompted one scholar to state that there is no case in which this exception has been applied by an English court.<sup>99</sup> Ironically, the first case in which an English court applied the public policy exception came soon after this statement in *Soleimany v Soleimany*<sup>100</sup> and was raised in other recent cases that will be discussed hereunder.

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93 See Chapter 2.5.

94 Redfern and Hunter *Arbitration* 459.

95 Moses *International Commercial Arbitration* 218.

96 Karali and Ballantyre *England Arbitration* 413. For example terrorism, drug trafficking, prostitution, paedophilia and corruption fall within this category, see *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 at 73.

97 [1988] Q.B. 448 (Comm).

98 Redfern and Hunter *Arbitration* 456.

99 Kerr *Arbitration International* 140.

100 [1999] Q.B. 785, hereafter referred to as *Soleimany*.

#### 4.3.2 *Soleimany v Soleimany*

In *Soleimany* the Court of Appeal was faced with two questions. Firstly, the court had to determine whether or not to enforce an award that sanctioned an illegal contract.<sup>101</sup> The second question was what was the law related to the question of enforcement of a foreign arbitral award regarding the relevance of the illegality.<sup>102</sup>

The case involved a father and a son who smuggled carpets out of Iran in violation of Iranian revenue law and export control to sell it in the United Kingdom. A dispute arose between them as to the proceeds of the sale of the carpets. The parties agreed to submit their dispute to arbitration by the Beth Din, the Court of the Chief Rabbi in London. Jewish law was applicable to the dispute.<sup>103</sup> The award made by the Beth Din took cognisance of the illegality of the contract,<sup>104</sup> but as a matter of applicable Jewish law, the illegal purpose of the contract had no effect on the rights and obligations and proceeded to make an award.<sup>105</sup>

On refusal to enforce the award on the basis that an illegal contract is against public policy, the court said:<sup>106</sup>

An English court exercises control over the enforcement of arbitral awards as part of the *lex fori*, whatever the proper law of the arbitration agreement or the place where the arbitration is conducted. If a claimant wishes to invoke the executive power in this country to enforce an award in his favour, he can only do so subject to our law.

It was further held by the court that it is contrary to public policy for an English (domestic) award to be enforced if it is based on an English contract which was illegal when made.<sup>107</sup> The court reached the following conclusion:<sup>108</sup>

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- 101 Redfern and Hunter *Arbitration* 456-457.
  - 102 *Soleimany v Soleimany* [1999] Q.B.785 at 793.
  - 103 Redfern and Hunter *Arbitration* 457.
  - 104 *Soleimany v Soleimany* [1999] Q.B.785 at 790.
  - 105 Redfern and Hunter *Arbitration* 457.
  - 106 *Soleimany v Soleimany* [1999] Q.B.785 at 798.
  - 107 *Soleimany v Soleimany* [1999] Q.B.785 at 799.
  - 108 *Soleimany v Soleimany* [1999] Q.B.785 at 800.

The court declines to enforce an illegal contract... The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it... It may be that the plaintiff can enforce it in some place outside England and Wales. But enforcement here is governed by the public policy of the *lex fori*.

The court admitted that there needed to be a balancing act between the public interest that awards should be respected, and the public interest that illegal contracts should not be enforced.<sup>109</sup> The court on this point stated:<sup>110</sup>

In our view, an enforcement judge, if there is *prima facie* evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal?... We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality.

It can be concluded that the court in the *Soleimany*-case determined that a foreign arbitral award which sanctions a contract that is illegal in England, the place of performance, and in terms of the proper law, is against English international public policy. It can also be said that a smuggling contract such as this one falls within the category of contracts that would not be enforced whatever the proper law and wherever the contract is to be performed.<sup>111</sup> Illegality of a contract under the mentioned circumstances is therefore a rule of English international public policy that would result in the enforcement of an arbitral award being refused on public policy grounds.

#### 4.3.3 *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd*<sup>112</sup>

Soon after *Soleimany* the English Court of Appeal had another opportunity to consider the public policy defence to the enforcement of foreign arbitral awards. In

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109 *Ibid.*

110 *Ibid.*

111 See Chapter 4.3.1 above.

112 [1999] 2 Lloyd's Rep 65, hereafter referred to as *Westacre*.

*Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* a dispute arose with regard to a consultancy agreement for the procurement of contracts for the selling of military equipment in Kuwait. Westacre acted as the consultant to procure sale contracts with mainly the Kuwaiti Ministry of Defence on behalf of Jugoimport. Westacre would receive, as payment for services, a percentage of the value of the sales contract. Jugoimport cancelled the consultancy agreement without paying Westacre its consultancy fees, and as a result, Westacre commenced arbitration proceedings against Jugoimport. The arbitration was to be governed by Swiss law and according to the ICC rules of arbitration.<sup>113</sup>

Jugoimport defended the claim on the grounds that, in violation of Kuwaiti law and public policy, the contract involved Westacre in the bribing of various Kuwaiti officials to exert their influence in favour of entering sales contracts with Jugoimport.<sup>114</sup> Large-scale allegations of bribery and corruption were made,<sup>115</sup> but the arbitral tribunal found that there was no evidence of bribery or corruption, and that lobbying by private enterprises to procure public contracts was not illegal under Swiss law<sup>116</sup> or under Kuwaiti laws. The arbitral tribunal further found that there was nothing in relation to performance of the agreement that would offend Kuwaiti public policy.<sup>117</sup> The award was challenged in the Swiss Federal Court, which rejected it on the basis that it had already been rejected by the arbitral tribunal. The English Court of Appeal, in a challenge to enforce the award, also rejected the defence of public policy. Lord Justice Waller states the position on public policy in England as follows:<sup>118</sup>

(1) there are some rules of public policy which if infringed will lead to non-enforcement by the English Courts whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic. (2) contracts for the purchase of influence are not the former category; thus (3) contracts for the purchase of personal influence if to be performed in England would not be enforced as contrary to English domestic public policy; and (4) where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country also that the English Court would not enforce it. There

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113 *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 at 68.

114 *Ibid.* See also Redfern and Hunter *Arbitration* 457.

115 *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 at 69-

116 Redfern and Hunter *Arbitration* 457.

117 *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 at 73.

118 *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 at 74.

is also an implied recognition as it seems to me that if all that can be said of a contract is that performance in a foreign country will be contrary to the domestic public policy of that state, enforcement will only be refused if performance would be contrary to the domestic public policy in England...It must also follow, as it seems to me, that an English Court would take notice of the fact that different Courts and different tribunals might have different views as to the enforceability of contracts for the purchase of personal influence depending on the proper law of the contracts and where they were to be performed. It would be for example legitimate for a foreign tribunal to take the view (indeed consistent with the English Court's own view if I am right on the above implication), that albeit performance was contrary to domestic public policy in its place of performance, since it was not contrary to the domestic public policy either of the country of the proper law and/or the curial law, enforcement should be allowed.

The court concluded that the present contract for the purchase of public influence or lobbying did not fall within the rule that would allow English courts not to enforce an award regardless of the proper law or place of performance.<sup>119</sup> "Lobbying" was not, according to Swiss law, contrary to public policy<sup>120</sup> and accordingly there is nothing that offends English public policy if an arbitral award enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even though English domestic public policy might have a different view.<sup>121</sup> Unless Jugoimport was entitled to investigate behind the facts as found by the arbitrators (which it was not) no public policy defence that can be used successful against the enforcement of the award, exists.<sup>122</sup>

The English court therefore enforced a foreign arbitral award that was not illegal in terms of the proper law or in terms of the law of the place of performance (Kuwaiti law), even though it might have been against English domestic public policy. English international public policy therefore indicates that awards such as the one in *Westacre* are enforceable in England. *Westacre* therefore again provides evidence that international public policy is narrower than the domestic public policy of a country.

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119 *Ibid.*

120 Redfern and Hunter *Arbitration* 457.

121 *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 at 74.

122 *Ibid.*

#### 4.3.4 *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*

In *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*<sup>123</sup> the applicant applied for an order that an ICC award be refused enforcement in England under section 103 of the *English Arbitration Act*, because enforcement would be contrary to public policy. The reason given why the enforcement would be contrary to public policy was that the agreement was unlawful at its place of performance.<sup>124</sup>

The court referred to *Soleimany* when it stated that English public policy should apply when considering the enforcing of a foreign award.<sup>125</sup> The court also acknowledged that a *New York Convention* award should only be refused in certain limited cases.<sup>126</sup>

The applicant in *OTV* submitted that the enforcement of the arbitral award constituted enforcement of a contract that was illegal at the place of performance and was consequently against English public policy.<sup>127</sup> According to Algerian law it is illegal for a middleman to approach public servants in order to procure a government contract within the ambit of foreign trade. In this case, Hilmarton was used by the applicant to approach officials to secure a contract.<sup>128</sup>

The court however held that the parties explicitly chose Swiss law as the governing law. There was no evidence of bribery or corruption and thus there was no breach of Swiss law. Even though under English law the court might have held that the contract was illegal, the fact remains that the Swiss courts held that the agreement was valid under Swiss law. Therefore, it was relevant for the enforcing court to consider the enforcement of the award and not the contract.<sup>129</sup> The court stated:<sup>130</sup>

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123 [1999] 2 Lloyd's Rep 222, hereafter referred to as *OTV*.

124 *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 at 223.

125 *Ibid.*

126 *Ibid* and Sec 103(3) of the *English Arbitration Act*.

127 *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 at 223.

128 *Ibid.*

129 *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 at 224.

130 *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 at 224-225.

The English Court takes cognizance of the fact that the underlying contract, on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English Court would not enforce it whatever its proper law or place of performance. It is entitled to take the view that such domestic public policy considerations as there may be, have been considered by the arbitral tribunal. It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view.

The judgment was in line with the reasoning in *Westacre* and in many aspects similar to it. The court stated that this case was not about the direct enforcement of the underlying contract, but the enforcement of an award which was valid under the curial law, namely Swiss law, chosen by the parties.<sup>131</sup> Furthermore, OTV was distinguishable from *Soleimany* in that the element of corruption or illicit practice was not present in this case<sup>132</sup> and under the proper law of the contract the contract was not illegal. Accordingly, the award was enforced in England.

#### 4.3.5 *R v V*

In *R v V*<sup>133</sup> the facts were very similar to those in *Westacre* and OTV. It also involved a consultancy agreement that was against the law of the place of performance, namely Libya. The one difference, however, was that the agreement was to be governed by English law and the arbitration was to be conducted in London under the auspices of the ICC.<sup>134</sup>

The arbitral tribunal did not find that the agreement was contrary to Libyan law or that performance under the agreement was in violation of English public policy.<sup>135</sup> It was, however, contended that the arbitral tribunal was wrong both as a matter of fact and of law.<sup>136</sup> Therefore the court was by implication requested to go beyond the tribunal's conclusions<sup>137</sup> and to find that the agreement was illegal and against

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131 *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 at 225.

132 *Ibid.*

133 [2009] 1 Lloyd's Rep 97.

134 *R v V* [2009] 1 Lloyd's Rep 97 at page 100.

135 *Ibid.*

136 *R v V* [2009] 1 Lloyd's Rep 97 at page 101.

137 *Ibid.*

English public policy, even though the tribunal expressly found that the agreement was not illegal.

Accepting both the judgments in *Soleimany* and *Westacre*, the court found that with regard to contracts for the purchase of personal influence, it is only if performance of the contract would be contrary to the domestic public policy of the country of performance, that it would not be enforced in England. The arbitral tribunal found that it was not against domestic Libyan law and the facts of the matter did not warrant the court to reopen a full scale inquiry into the merits. The facts the court took into account for not opening a full scale inquiry were as follows: It was not against Libyan law; the arbitration tribunal expressly found that the contract was not illegal; the arbitrators were highly competent, and lastly, that there was no collusion in obtaining the award.<sup>138</sup>

The court stated that, even if the facts of the case warranted a behind the agreement inquiry as proposed in *Soleimany*, which it did not, there was no evidence that would persuade the court not to enforce the award.

#### 4.4 Conclusion

From the discussion of the above court cases, it is evident that English law embraces the concept of international public policy with respect to the enforcement of foreign arbitral awards. English international public policy is a much narrower concept than English domestic public policy. This is evident from the judgment in *OTV*, where the court conceded that under English domestic public policy the court might not have enforced the award.<sup>139</sup> The English court will only in the very clearest of cases refuse to enforce a foreign arbitral award on the ground of public policy.<sup>140</sup> This is evidence of the “pro-enforcement bias” upheld in English courts with regard to international commercial arbitration awards.<sup>141</sup>

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138 *R v V* [2009] 1 Lloyd's Rep 97 at page 104.

139 See chapter 4.3.5 above, but since the contract did not offend either the domestic public policy under either the contract or its curial, the foreign award can be enforced and is not contrary to English domestic public policy.

140 *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65

141 *Ibid.*

English courts will not enforce an award that on the face of the award appears to be illegal or is based on a contract that appears on the face of it to be illegal. The *Soleimany*-case clearly states that English courts will not enforce any award, whether foreign or domestic, granting payments on the basis of an agreement which purpose is an illegal business in the place where it is undertaken.<sup>142</sup> The rule that awards based on an illegal contract will not be enforced is part of both English domestic and international public policy. The *Soleimany*-case also places an obligation on English courts to take action at the slightest enquiry about the possible illegality of the agreement or the award on the face of both instruments. If there is evidence of illegality, the judge should enquire further according to the steps set out above.

Both the *Soleimany* and *Westacre* cases dealt with the illegality of a contract as a foundation for raising the public policy exception to the enforcement of an award. In *Soleimany* the enforcement of the award was refused, but in *Westacre* it was enforced. The main reason for the difference in decision was that in *Soleimany* the tribunal found that the contract was illegal under the proper law of the contract which was Jewish law but that fact had no influence on the rights and obligations of the parties involved in terms of the proper law. The enforcing court held that it could not enforce a contract that was illegal according to the proper law of the contract, even though the tribunal attached no value to the fact that the contract was illegal. It can therefore be argued that the contract in *Soleimany* falls completely within the ambit of award that will be refused, regardless of the proper law or place of performance. Alternatively it can be argued that due to the fact that the underlying contract was contrary to the public policy of England and contrary to the public policy of the place of performance, the award should not be enforced.

In *Westacre* the tribunal held that there was a legal contract in terms of the proper law of the contract.<sup>143</sup> This legality of the consultancy agreement in *Westacre* was confirmed in an appeal to the Swiss Court. Even though allegations of bribery and corruption were raised by Jugoimport in the enforcing court, the enforcing court refused to rule against a ruling by the Swiss Court that no evidence of bribery or

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142 Poudret and Besson *Comparative Law* 860.

143 Swiss law.

corruption could be determined. It is not the duty of the enforcing courts to look into the merits of the case but the duty of the tribunal and the courts of the country where the arbitration took place to look into the merits of the case. The only obligation of the English courts where there are allegations of bribery and corruption is to apply the test laid down in *Soleimany* whether or not to reopen a full-scale trial into the alleged bribery or corruption.<sup>144</sup> In *Westacre* the test<sup>145</sup> as developed in *Soleimany* failed, because the arbitrator and the Swiss court expressly found that there was no evidence of bribery or corruption

There are certain agreements and awards that English courts will not enforce, irrespective of their proper law or their place of performance. A contract such as the purchase of personal influence does not fall within this category but does provide a ground for the refusal of enforcement of a foreign arbitral award in terms of English domestic public policy. Where such a contract is to be performed abroad it is only if the performance would also be contrary to the domestic public policy of that country that English courts would not enforce it.<sup>146</sup> If the contract is contrary to English public policy, but not illegal under the proper law of the contract or the *lex arbitri*, the English courts will enforce it.<sup>147</sup> However, in cases such as *Soleimany*, where the contract was both illegal in England and in the place of performance and where the illegality appeared obviously in the award or contract, the English courts will not enforce the award.

When deciding whether or not to enforce a foreign award, the English courts carry out a balancing act between the public policy of enforcing awards and the public policy of not enforcing illegal contracts. If the offensiveness of the alleged illegality was not at the highest level, the balance was in favour of upholding an award.<sup>148</sup>

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144 See Chapter 4.3.2 above.

145 Whether or not the enforcing court should investigate deeper into allegations of fraud, bribery, corruption or illegality than what appear on the mere face of the award or the agreement.

146 *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65.

147 Tweeddale and Tweeddale *Arbitration Law* 302.

148 *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65.

## **5. South African law**

### **5.1 Introduction**

The three most significant sources of South African law are the Constitution, legislation and the common law.<sup>149</sup> When legislation is not applicable to a situation then the common law is applied.<sup>150</sup> With regard to all law the Constitution is the highest authority in South Africa. The Constitution therefore influences both the legislation and common law. The following chapter will provide a brief overview of the development of the law of enforcement of arbitral awards and will particularly deal with the defence of public policy in relation to the enforcement of foreign arbitral awards in South Africa.

In this chapter, the defence of public policy with regard to foreign arbitral awards will be measured against the defence of public policy with regard to foreign judgments in the South African context. In cases involving the enforcement of foreign arbitral awards, the South African courts are allowed to apply the principles established in foreign judgment cases.<sup>151</sup> However, it is also true that in certain cases those principles are not applicable.<sup>152</sup> Therefore, the case law on the enforcement of foreign judgment is of significant value when determining whether the courts will refuse to enforce a foreign arbitral award due to public policy.

### **5.2 South African common law**

The South African common law is based on Roman-Dutch law.<sup>153</sup> The Roman-Dutch law of arbitration as set out by Johannes Voet was adopted in South Africa's common law.<sup>154</sup> Gane's translation of Voet's *Commentarius ad Pandectas* has become the standard work on Roman-Dutch law in South Africa, and Voet's

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149 Becker *Recognition and Enforcement* 12.

150 *Ibid.*

151 *Law Report* 153 where the Law Commission stated that the court's approach in *Jones v Krok* 1996 (1) SA 504 (T) regarding the enforcement of foreign judgments that is against public policy can also apply in the context of the enforcement of foreign arbitral awards.

152 *Seton Co v Silveroak Industries Ltd* 2000 (2) SA 215 (T) at 229.

153 Ramsden *Law of Arbitration* 13.

154 Becker *Recognition and Enforcement* 12 and Christie *Arbitration International* 153.

clarification of the Roman-Dutch law of arbitration<sup>155</sup> has also been referred to in many judgments.<sup>156</sup>

In terms of recognition and enforcement of arbitral awards according to the common law, an arbitrator's award has the same power as if it has been delivered by a judge. The successful party in the arbitration has to cite the unsuccessful party for the passing of a decree by an ordinary judge in order for the award to be executed by the successful party.<sup>157</sup> Furthermore, in order to grant firmness and finality to an arbitral award and to prevent requests for reviews of the award, the parties would, at the start of the arbitration proceedings, consent to the giving of a judgment by the court in favour of the order made by the arbitrator.<sup>158</sup>

According to common law an award will not to be enforced if it was proved to have been given from corrupt motives or from clear partiality or enmity.<sup>159</sup> Furthermore, an award will not be enforced when the arbitrator ordered something dishonourable or if the matter was repugnant to arbitration.<sup>160</sup> These examples can be described by early evidence that awards that were *contra bonos mores* or against public policy should not be enforced.

As a result of the fact that the Roman-Dutch law did not provide a complete arbitration system,<sup>161</sup> accordingly the three colonial legislatures in South Africa adopted statutes to cover the shortcomings in the Roman-Dutch arbitration law.<sup>162</sup> These statutes were based on the *English Arbitration Act* of 1889. Consequently, South African arbitration legislation was largely influenced by English arbitration and as a result English case law on arbitration was authoritative in South African courts.<sup>163</sup> English arbitration law is distinct from European continental arbitration law

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155 Voet, Book IV, Title 8.

156 Ramsden *Law of Arbitration* 13; for a full expose of the South African common law on arbitration see Gane *The Selective Voet* being the Commentary on the Pandects by Johannes Voet and the Supplement to that work by Johannes van der Linden.

157 Ramsden *Law of Arbitration* 182.

158 *Ibid.*

159 *Ibid.*

160 Ramsden *Law of Arbitration* 182-183.

161 Butler and Finsen *Arbitration in South Africa* 4.

162 These statutes were adopted in Natal by Act 24 of 1898, in the Cape Province by Act 29 of 1898 and in the Transvaal by Ordinance 24 of 1904.

163 Becker *Recognition and Enforcement* 13 and Ramsden *Law of Arbitration* 13.

in two ways. Firstly, the English arbitration system is characterised by a much closer relationship between the courts and the arbitral process. Secondly, theory and academic writers played a much more important role in the development of European continental arbitration law as opposed to the English system where answers to problems are sought through the courts when problems arise.<sup>164</sup>

If parties agreed to go to arbitration in a manner not provided for in any legislation, the arbitration would have to be conducted according to the common law.<sup>165</sup> If there has been a valid arbitration and a valid award under the common law then the courts can make the award its own judgment so that the award can be enforced.<sup>166</sup> Legislation provides for a more efficient means of having disputes submitted to arbitration and for the enforcement of awards<sup>167</sup> than our common law, since the Roman-Dutch law did not contain a well developed and complete system of arbitration.<sup>168</sup>

### **5.3. The Constitution**

Section 8(1) of the Constitution states that the Bill of Rights applies to all law in South Africa. The Bill of Rights will therefore influence the enforcement of foreign arbitral awards. The Bill of Rights applies directly to a legal dispute when the right of a beneficiary of the Bill of Rights has been infringed by a person on whom the Bill of Rights has imposed the duty not to infringe the right within the national territory.<sup>169</sup> In addition, in instances when the Bill of Rights does not apply directly to a dispute because one or more of the elements is not present, it may apply indirectly. This is due to the fact that all law must be developed, interpreted and applied in a way that conforms to the Bill of Rights.<sup>170</sup>

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164 Butler and Finsen *Arbitration in South Africa* 5.

165 Butler and Finsen *Arbitration in South Africa* 4.

166 *Ibid.*

167 Davis *Arbitration in South Africa* 4.

168 Butler and Finsen *Arbitration in South Africa* 4.

169 S39(2) of the Constitution which states that: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights" and Currie and De Waal *Bill of Rights* 32.

170 *Ibid.*

Private arbitration under the *Arbitration Act* is not unconstitutional.<sup>171</sup> It is not a departure from the requirements of the Bill of Rights for the parties themselves to freely and consensually accept principles governing their arbitration.<sup>172</sup>

An important question, for present purposes, is how the Bill of Rights will influence the public policy defence to the enforcement of foreign arbitral awards? This question was dealt with in the case of *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrew and Bopanang Construction CC*.<sup>173</sup>

In *Lufuno*, the court was called upon to determine the extent to which the Constitution impacts on private arbitration conducted in terms of the *Arbitration Act*. The relevant section of the Constitution was section 34 that provides for the right to a fair and impartial hearing. Section 34 of the Bill of Rights states the following:

34 Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

The court had to consider three issues in this case. The first question was whether or not section 34 of the Constitution applies to private arbitration. The court found that, when parties enter into a private arbitration agreement they waive the rights that they would otherwise enjoy under section 34 of the Constitution unless the agreement is *contra bonos mores*.<sup>174</sup> The court also found that on a proper construction of section 34, another independent and impartial tribunal does not include private arbitration tribunal.<sup>175</sup>

The court then went on to consider whether or not section 34 has indirect application to private arbitration. The court ruled that an arbitration agreement which contains a

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171 Ramsden *Arbitration* 16.

172 *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA).

173 CCT 97/07 [2009] ZACC 6, judgment delivered on the 20<sup>th</sup> of March 2009, hereafter referred to as the *Lufuno-case*.

174 *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC* CCT 97/07 [2009] ZACC 6 at page 99.

175 *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC* CCT 97/07 [2009] ZACC 6 at page 99-101.

provision that is contrary to public policy in the light of the values of the Constitution will be null and void to the extent that it is contrary to these values.<sup>176</sup>

The court also dealt with the question of the extent to which the judiciary may scrutinise arbitration awards.<sup>177</sup> The court took into consideration the provisions of the *Arbitration Act*, the *Foreign Awards Act*, the *New York Convention*, the *Model Law*, the *Law Commission's Report* and the *English Arbitration Act, 1996*.<sup>178</sup> The court quoted<sup>179</sup> section 52(2) of the *Law Commission's Report Draft Bill* entitled *Arbitration: a draft international arbitration act for South Africa* which proposes that an award in conflict with public policy includes:

- 52(2)(a) an award made in breach of the tribunal's duty under section 28 such as to cause substantial injustice to the applicant; or
- (b) an award induced or affected by fraud or corruption.

The court set out the position in the *Model Law*, the *English Arbitration Act* and the *Law Commission's Report* as the background for how one should properly and constitutionally interpret section 33(1) of the *Arbitration Act*. The court came to the conclusion that the values of our Constitution will not necessarily best be served by interpreting section 33(1) of the *Arbitration Act*<sup>180</sup> in a manner that enhances the power of the courts to set aside private arbitration awards.<sup>181</sup> Indeed, the contrary seems to be the case. In accordance with international and comparative law, courts should be cautious not to undermine the aims of arbitration by enlarging the powers of scrutiny of the court unwisely.<sup>182</sup> The Constitution would require a court to

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176 *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction* CC CCT 97/07 [2009] ZACC 6 at page 103.

177 *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction* CC CCT 97/07 [2009] ZACC 6 at page 106.

178 Hereafter the *English Arbitration Act*.

179 *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction* CC CCT 97/07 [2009] ZACC 6 at page 110.

180 Act 42 of 1965. Section 33 of the *Arbitration Act* states: 33(1) Where-(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or (c) an award has been improperly obtained, the court may, on application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

181 *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction* CC CCT 97/07 [2009] ZACC 6 at page 112.

182 *Ibid.*

construe the grounds for the setting aside of an award as contemplated in section 33(1) of the *Arbitration Act* reasonably strictly in relation to private arbitrations.

It can therefore be concluded from the *Lufuno*-case that when a party seeks to enforce a foreign award, the Constitution does not provide for a wider scope for concluding that an award is contrary to public policy. In addition, while parties to arbitration waive their constitutional right under section 34 of the Constitution when opting for arbitration, it does not mean that fairness is not a requirement. Fairness is one of the core values in the Constitution. It may well be that an arbitration agreement that expressly provides for an unfair procedure will be against our public policy and therefore unenforceable.<sup>183</sup>

## **5.4 South African legislation**

### **5.4.1 General**

Currently there are two South African statutes that govern arbitration in South Africa, namely the *Foreign Awards Act* and the *Arbitration Act* 42 of 1965.<sup>184</sup> A third statute, the *Protection of Business Act* 99 of 1978<sup>185</sup> also impacts on arbitration and especially on the enforcement of foreign awards.

A few cases are recorded where South Africa courts considered the public policy exception to the enforcement of foreign and/or domestic arbitral awards.<sup>186</sup> In those cases the courts interpreted the abovementioned legislation and adjudicated whether the public policy defence could be successfully invoked by the party resisting enforcement.

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183 Ramsden *Arbitration* 17.

184 Hereafter referred to as the *Arbitration Act*.

185 Hereafter referred to as the *Business Protection Act*.

186 *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A); *Bester v Easigas (Pty) Ltd* 1993 1 SA 30 (C); *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others* 2007 (5) SA 491 (SCA); *Seton Co v Silveroak Industries Ltd* 2000 (2) SA 215 (T); *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA); *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* [1984] 2 All SA 170 (D) and *Benidai Trading Co Ltd v Gouws and Gouws (Pty) Ltd* 1977 (3) SA 1020 (T).

However, in only three reported cases<sup>187</sup> did the courts specifically deal with the recognition and enforcement of foreign arbitral awards. The case law regarding the public policy defence to enforcement of foreign judgments must therefore be noted when determining South African law on foreign arbitral awards and will be discussed hereunder together with the applicable legislation.

#### 5.4.2 *Recognition and Enforcement of Foreign Awards Act 40 of 1977*

South Africa is a party to the *New York Convention*. South Africa acceded to the convention on 3 May 1976 and it entered into force on 1 August 1976,<sup>188</sup> without any reservation. This led to the enacting of the *Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977*. The wording of section 4(1)(a) of the *Foreign Awards Act* has the same effect as article V(2) of the *New York Convention* and article 36(1)(b)(ii) of the *Model Law*. Section 4(1)(a) states:

- (1) A court may refuse to grant an application for an order of court in terms of section 3 if-
- (a) the court finds that-
- (i) a reference to arbitration is not permissible in the Republic in respect of the subject-matter of the dispute concerned; or
- (ii) enforcement of the award concerned would be contrary to public policy in the Republic

It is therefore clear that the provisions regarding the public policy defence in the *New York Convention*, the *Model Law* and the *Foreign Awards Act* contain more or less the same wording.

It should be noted that in contrast to the *Model Law*, the *Foreign Awards Act* deals only with the recognition and enforcement of foreign arbitral awards and does not deal with all international commercial arbitration awards, including those made in South Africa. At first glance the *Foreign Awards Act* seems to be without any shortcomings and the procedure to recognise and enforce an award seems simple. This involves a normal application on notice to the other party supplemented by the

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187 *Seton Co v Silveroak Industries Ltd* 2000 (2) SA 215 (T); *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* [1984] 2 All SA 170 (D) and *Benidai Trading Co Ltd v Gouws and Gouws (Pty) Ltd* 1977 (3) SA 1020 (T).

188 For a full list of countries that have adopted to NYC visit [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

arbitration award and the arbitration agreement or a certified copy thereof.<sup>189</sup> However, the *Law Reform Commission* in their *Report: Arbitration: an International Arbitration Act for South Africa* identified several drawbacks of the *Foreign Awards Act* that need consideration and amendment.<sup>190</sup> However, none of the drawbacks identified by the Law Commission seem to impact on the public policy exemption to the enforcement of an award. In fact the only mentioning of the public policy exemption in the *Law Commission's Report* is in a reference to the case of *Jones v Krok*,<sup>191</sup> where the court dealt successfully with a plea of public policy and where the court refused to enforce a foreign judgment.<sup>192</sup> In fact the *Law Commission* seems satisfied that the public policy defence as worded in the *Model Law* (and by implication in the *New York Convention*) is satisfactorily and can be adopted.<sup>193</sup>

Section 5 of the *Enforcement of Foreign Civil Judgments Act*<sup>194</sup> contains a provision similar to the one found in the *Foreign Awards Act*. Section 5 of the *Foreign Judgments Act* states that a registered foreign judgment may be set aside by a court on the application of the judgment debtor if enforcement of such a judgment would be contrary to the public policy of South Africa.<sup>195</sup> In addition, the *Foreign Judgments Act* also states that a judgment that was obtained through fraud<sup>196</sup> or a judgment contrary to natural justice<sup>197</sup> can also be set aside.

Thus, in order for a foreign judgment not to be contrary to South African public policy it would firstly need to be in accordance with our notion of natural justice. Natural justice means justice that is the result of procedural justice.<sup>198</sup> That means that the hearing must take place before an impartial tribunal, that the defendant received due notice and the defendant was able to present his/her/its case.<sup>199</sup>

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189 A3 of the *Foreign Awards Act*.

190 *Law Report* 132.

191 1996 (1) SA 504 (T), hereafter referred to as the *Jones-case*.

192 See chapter 4.4 below for a full discussion of the *Jones-case*.

193 *Law Report* 153.

194 Act 32 of 1988, hereafter referred to as the *Foreign Judgments Act*.

195 S5(e) of the *Foreign Judgments Act*.

196 S5(d) of the *Foreign Judgments Act*.

197 S5(c) of the *Foreign Judgments Act*.

198 Schulze *Foreign Money Judgments* 29.

199 *Ibid*.

Secondly, the judgment should not have been obtained through fraud.<sup>200</sup> If one party commits fraud such as perjury, forgery and suppression of documents during the trial, the South African court will not recognise such a judgment.<sup>201</sup> If however the issue of fraud has been raised at the foreign court and been rejected, the defendant's remedy is to appeal against the decision of the foreign court.<sup>202</sup> Thirdly, where a foreign judgment is repugnant to a distinctive South African public policy the court will not recognise or enforce the award. Lastly, the South African courts will not enforce foreign penal or revenue judgments.<sup>203</sup>

In the *Jones*-case the South African courts had the opportunity to deal with the issue of distinctive public policy as a defence against enforcement of foreign judgments and to distinguish between South African domestic public policy and international public policy. It is therefore necessary to examine this judgment in more detail. In *Seton Co v Silveroak Industries*<sup>204</sup> fraud was raised as a defence against enforcement and will also thus be examined hereunder.

#### 5.4.2.1 *Jones v Krok*

In this case the court had to deal with the question whether to enforce a foreign judgment that included punitive damages. The trial court in California granted judgment in favour of the plaintiff for compensatory damages in the sum of US \$13 670 987 and also punitive or exemplary damages in the sum of US \$ 12 000 000. The *causa* of the compensatory damages was the contract between the plaintiff and the defendant. However, according to Californian Law, punitive damages are only awarded for breach of an obligation not arising from the contract, in other words where the defendant has been guilty of fraud, oppression or malice. In this case the defendant was found guilty of fraud. All remedies to appeal against the decision of the trial court in California were exhausted and, accordingly, the plaintiff moved to have the judgment enforced in South Africa by way of provisional sentence summons.

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200 Forsyth *Private International Law* 433.

201 *Ibid.*

202 *Ibid.*

203 *Ibid.*

204 *Seton Co v Silveroak Industries* 2000(2) SA 215 (T).

The court clearly stated that it is South African domestic public policy that, in the case of a claim based on a breach of contract, the injured party is entitled only to the damages actually suffered by him. The quantum is in no way influenced by the reprehensible behaviour of the defendant or the flagrancy of the breach.<sup>205</sup>

However, the court stated that it would be incorrect to refuse to enforce a foreign order for punitive damages merely because the concept of punitive damages is unknown to South African.<sup>206</sup> The principle of punitive damages is not necessarily unconscionable, excessive or exorbitant.<sup>207</sup> The court however found that award of an amount of US \$ 12 000 000 was excessive and exorbitant, and that fact was contrary to public policy.<sup>208</sup> The court accordingly refused to enforce the award for punitive damages.

Even though the above case involved the enforcement of a foreign judgment<sup>209</sup> and not a foreign award, the court also drew a distinction between what can be labelled domestic public policy for domestic judgments and "international" public policy for foreign judgments. Schulze<sup>210</sup> points out that mere inconsistency regarding a South African rule does not mean that a judgment will be refused enforcement.<sup>211</sup> The situation in the *Jones*-case clearly illustrates the possibility that, even though a foreign judgment is found contrary to domestic public policy, a foreign judgment is not necessarily contrary to public policy in the international context. This case is a clear example of an instance where the judgment can be enforced due to the fact that international public policy is narrower than domestic public policy.

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205 *Jones v Krok* 1996 (1) SA 504 (T) at page 515.

206 *Jones v Krok* 1996 (1) SA 504 (T) at page 516.

207 *Ibid.*

208 *Jones v Krok* 1996 (1) SA 504 (T) at page 517.

209 There are four conditions that need to be fulfilled before a foreign judgment will be recognised under South African law: (1) The foreign court had international jurisdiction or competence to decide the case; (2) the judgment rendered was final and conclusive; (3) the judgment does not fall short of s1 of the *Protection of Business Act* 99 of 1978; (4) recognition and enforcement of the judgment must not be against South African public policy. This approach that was first established in the *Jones v Krok* 1995 (1) SA 677 (A) has since been cited with approval many South African court cases: *Purser v Sales* 2001 (3) SA 445 (A); *Pinchas and another v Pienaar* [2000] 3 All SA 632 (W); and *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA).

210 Schulze *Foreign Money Judgments* 29.

211 Forsyth *Private International Law* 112 and Schulze *Foreign Money Judgments* 30.

The principle that a foreign institution or rule which is unknown to our legal system does not *per se* constitute a reason for refusing to enforce a judgment on the ground of public policy was also followed in *Pinchas and another v Pienaar*<sup>212</sup> and in *Society of Lloyd's v Price; Society of Lloyd's v Lee*.<sup>213</sup> In the *Pinchas* case the court found nothing repugnant in an Israeli statute, which served as the foundation for the plaintiff's cause of action, which requires a party to pay damages if he does not negotiate in good faith. The fact that a foreign statute embodies a concept not recognised in our law does not constitute a reason not to enforce a judgment granted as a result of that provision.<sup>214</sup>

An international commercial arbitration award incorporating punitive damages may easily be tried to be enforced in South Africa and it is highly likely that the courts will apply the same principles as envisaged in the *Jones*-case and enforce such an arbitral award. That being said, it remains to be seen whether South African courts will enforce foreign awards for punitive damages and if so, whether the courts will attempt to limit the amount of punitive damages that can be claimed.

#### 5.4.2.2 *Seton Co v Silveroak Industries Ltd*

In *Seton Co v Silveroak Industries Ltd*<sup>215</sup> the court was requested to recognise an international arbitration award for an amount of R49 549 876-00 arising out of breach of contract. The respondent requested the court however to refuse recognition based on the fact that the award was obtained by the applicant through fraud upon the arbitral tribunal and accordingly against public policy.<sup>216</sup> In answering the question of recognising and enforcement of awards that are obtained through fraud, the court first drew a clear distinction between the recognition of foreign arbitral awards and foreign civil judgments.<sup>217</sup> In terms of section 3 of the *Enforcement of Foreign Civil Judgments Act*<sup>218</sup> a plaintiff may register a foreign judgment in the Republic of South Africa. However, in terms of section 5(1)(b) such a judgment may

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212 [2000] 3 All SA 632 (W).

213 [2006] SCA 87 (RSA).

214 *Pinchas and another v Pienaar* [2000] 3 All SA 632 (W) at page 642.

215 *Seton Co v Silveroak Industries* 2000(2) SA 215 (T).

216 *Seton Co v Silveroak Industries* 2000 (2) SA 215 (T) at page 218.

217 *Seton Co v Silveroak Industries* 2000(2) SA 215 (T) at page 228-229.

218 32 of 1998.

be set aside if the court is satisfied that it was obtained by fraud.<sup>219</sup> This is, however, not the case for arbitral awards. The *Foreign Awards Act* does not allow for a foreign award to be set aside by reason of fraud perpetrated by the party seeking enforcement. The reason for this is that, unlike a situation where a plaintiff institutes an action in a foreign country that makes it very difficult for the defendant to resist, an arbitration is voluntarily submitted to by the parties in terms of an agreement. The parties can further agree to the substantive law, the seat of the tribunal and the procedural law.<sup>220</sup> It is therefore a firmly established principle in South African law that an arbitration award is final.<sup>221</sup>

With reference to English case law<sup>222</sup> the court came to the conclusion that section 4(1)(a)(ii) of the *Foreign Awards Act* means that a court can only refuse to recognise and enforce where, on the face<sup>223</sup> of the award and/or the arbitration agreement it is clear that the award is contrary to public policy.<sup>224</sup> An allegation of fraud in obtaining the award does not fall within the ambit of the *Foreign Awards Act*. The remedy available to the respondent would then be to approach the court with jurisdiction at the seat of the arbitration, requesting the setting aside of the award due to fraud. The court where enforcement is sought is not empowered by the *New York Convention* to investigate the allegation of fraud as the award is final unless the fraud is apparent from the face of the award or the agreement.

#### 5.4.3 Arbitration Act 42 of 1965

While the *Foreign Awards Act* governs the enforcement and recognition of foreign awards in South Africa, the *Arbitration Act* governs domestic arbitration. In contrast to the *Foreign Awards Act*, the *Arbitration Act* governs the complete procedure of arbitration up to and including the enforcement of domestic awards by making it an order of court.<sup>225</sup> The *Arbitration Act* also governs the setting aside of the award by

219 *Seton Co v Silveroak Industries* 2000(2) SA 215 (T) at page 229.

220 *Ibid.*

221 *Ibid.*

222 *Soleimany v Soleimany* [1999] 3 All ER 847 (CA) and *Westacre Investment Inc v Jugoimport-SDPR Holding Co Ltd and Others* [1999] 3 ALL ER 864 (CA), also discussed hereunder, see Chapter 5.

223 Writer's emphasis.

224 *Seton Co v Silveroak Industries* 2000(2) SA 215 (T) at page 230.

225 S31 of the *Arbitration Act*.

a court of law.<sup>226</sup> The *Arbitration Act*, however, does not provide for awards made in international commercial arbitration. Therefore the *Arbitration Act* is of limited value when dealing with international commercial arbitration awards.<sup>227</sup> However, the *Arbitration Act* also makes provision for awards to be set aside on the basis of the award being against public policy. Thus the principles derived from case law dealing with the defence of public policy, in terms of the enforcement of domestic arbitral awards, will undoubtedly prove paramount and of great assistance in establishing what type of foreign awards will also be against South African international public policy, even though international public policy is a narrower concept than South African domestic public policy.

Section 33 of the *Arbitration Act* states:

33(1) Where-

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
  - (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
  - (c) an award has been improperly obtained,
- the court may, on application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

The above grounds for the setting aside of a domestic award have been considered in several court cases.<sup>228</sup> In *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd*<sup>229</sup> especially the public policy defence was raised by the respondent by way of section 33(1)(a) of the *Arbitration Act* alleging that the arbitration tribunal misconducted itself by making an award (in relation to its duties as arbitrator) that is contrary to public policy.<sup>230</sup>

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226 S33 of the *Arbitration Act*.

227 *Becker Recognition and Enforcement* 14.

228 *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A); *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) and *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others* 2007 (5) SA 491 (SCA).

229 *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A), hereafter referred to as the *Veldspun-case*.

230 *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* [1994] 1 All SA 453 (A) at page 454.

The *Veldspun*-case will be thoroughly analysed hereunder<sup>231</sup> as well as *Bester v Easigas (Pty) Ltd*<sup>232</sup> It is evident that although the *Arbitration Act* is not directly applicable to the enforcement of foreign awards, legal representatives of parties to a dispute regarding the enforcement of foreign awards, will undoubtedly refer to cases decided under the *Arbitration Act* when it comes to establishing of what it is that constitute awards that are against South African international public policy.

In the *Law Commission's Report* the commission also recommended that the concept of public policy as a ground for the setting aside of an arbitral award by the court or for the refusal of an application to court for the enforcement of an award, needs to be clarified by the inclusion of an express reference to serious procedural irregularities involving a breach of the arbitral tribunal's duty to act fairly.<sup>233</sup>

#### 5.4.3.1 *Bester v Easigas (Pty) Ltd*

The facts of the matter involved an appeal by the applicant against a finding by an arbitral tribunal that he was fairly dismissed. The *Arbitration Act* was the relevant legislation used since it involved a labour dispute. However, the principles applicable to decide whether a labour award is against domestic public policy can be relevant in international commercial arbitration cases when deciding whether an international commercial arbitration award is against South African international public policy.

The applicant contended that, contrary to the finding of the arbitral tribunal, he was in fact unfairly dismissed. The award therefore amounted to a ratification or condonation of an unfair dismissal, which in turn constituted an unfair labour practice, which will then of course be illegal or at the very least against public policy.<sup>234</sup> This argument thus involved the applicant in a circuitous argument in that the award could only be set aside on the grounds of public policy once it has already been set aside by the court on another ground advanced by the applicant, in other

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231 See Chapter 5.3.

232 *Bester v Easigas (Pty) Ltd* 1993 1 SA 30 (C). Hereinafter referred to as the *Easigas-case*

233 *Law Commission's Report* 27.

234 *Bester v Easigas (Pty) Ltd* 1993 1 SA 30 (C) at page 41 – 42.

words the applicant was unfairly dismissed.<sup>235</sup> The defence of public policy against the enforcement of an arbitration award in circumstances such as in the *Easigas*-case was thus unnecessary because the applicant could only succeed on the defence of public policy once it has already been successful on another ground.

However, what is clear from the *Easigas*-case is that illegal awards or awards that sanction illegal actions are against domestic public policy and may be against international public policy. This logic might seem straightforward, but can be better illustrated in the matter of *Amalgated Clothing & Textile Workers Union of SA and Another v Veldspun (Pty) Ltd*.<sup>236</sup>

#### 5.4.3.2 *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd*

In this case one of the issues to be decided on arbitration was whether or not the arbitrator could arbitrate on the introduction of a closed shop agreement and if so, whether the closed shop agreement should become binding on the parties in the event that the Union represented 80% or more of the company's employees by 31 March 1989.<sup>237</sup> Furthermore, it was stipulated that the arbitrator should then have the power to make an appropriate award with due regard to fairness and reasonableness.<sup>238</sup>

The arbitrator's award concluded that the arbitrator, was competent to arbitrate on the introduction of the closed shop agreement. It was then also ruled by the arbitrator that the closed shop agreement did apply to the relationship between the parties. The implication thereof was that in the event of the Union becoming representative of 80% or more of the company's weekly paid employees by a certain date, then the company shall stop to continue to employ any weekly paid employee who, while being eligible for membership of the Union, does not become a dues-paying member of the Union unless such employee authorises the company to

235 *Bester v Easigas (Pty) Ltd* 1993 1 SA 30 (C) at page 42.

236 *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 1 All SA 453 (A).

237 *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 1 All SA 453 (A) at page 454.

238 *Ibid.*

deduct from his weekly wage an amount equal to the membership fee of the Union.<sup>239</sup>

The company did not agree with the above award and then moved to have the award set aside under section 33(1) of the *Arbitration Act*. A full bench of the Eastern Cape Division upheld the appeal and set aside the award. The judgment was then appealed by the Union to the then Appellate Division of the Supreme Court.

The grounds for setting aside the award stated that the arbitrator misconducted himself in relation to his duties by making an award that was contrary to public policy.<sup>240</sup> This specific ground follows from the provision of section 33(1) of the *Arbitration Act* that allows for the setting aside of the award if the arbitrator misconducted himself or if the arbitration tribunal committed gross irregularity or exceeded its powers.<sup>241</sup>

The court assumed in favour of the company that if the award constituted an award that was contrary to public policy, then there was misconduct on the side of the arbitrator and the award could be set aside.<sup>242</sup>

The court drew a distinction between legislative or state policy, on the one hand and public policy on the other. Whereas the legislature, in this specific case, decided that a closed shop agreement had not been an unfair labour practice prior to 1988, and then in 1988 amended the *Labour Relations Act* to having the closed shop agreement being classified as an unfair labour practice, before again changing it to its original status that a closed shop agreement was not an unfair labour practice in 1991. The court ruled that public policy as opposed to legislative policy, is far less changeable.<sup>243</sup>

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239 *Ibid.*

240 *Ibid.*

241 *Amalgated Clothing & Textile Workers Union of SA and Another v Veldspun (Pty) Ltd* 1994 1 All SA 453 (A) at page 455.

242 *Amalgated Clothing & Textile Workers Union of SA and Another v Veldspun (Pty) Ltd* 1994 1 All SA 453 (A) at page 460.

243 *Ibid.*

The court quoted with approval the judgment in *Sasfin (Pty) Ltd v Beukes*<sup>244</sup> where Smalberger JA said:

The power to declare contracts contrary to public policy...be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of power.

The same approach would apply in respect of the court's power to declare an arbitration award contrary to public policy. Therefore the court held that it would be difficult for the court to declare that particular closed shop arrangements would be contrary to public policy and rejected that argument by the company.<sup>245</sup>

While the *Veldspun*-case was decided in the context of labour arbitration, the principles derived thereof have a clear impact on the public policy defence in the enforcement of foreign awards. Even if an award may be contrary to legislative policy or state policy it is not necessarily contrary to public policy. The *Foreign Awards Act* only provides for awards that are contrary to public policy and this case provides room to enforce foreign awards, even though it may contrast South African legislation.

#### 5.4.4 *Protection of Businesses Act 99 of 1978*

The *Business Protection Act* was originally enacted to protect South African businesses from the far-reaching tentacles of American anti-trust legislation.<sup>246</sup>

Section 1(a) of the *Business Protection Act* reads:

(1) Notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs-  
(a) no judgment, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request delivered, given or issued or emanating from outside the Republic in connection with any civil proceeding and arising from any act or transaction contemplated in subsection (3), shall be enforced in the republic;

Section 1(3) stipulates:

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244 1989 (1) SA 1 (A) at 9A-B, hereafter referred to as *Sasfin*.

245 *Amalgated Clothing & Textile Workers Union of SA and Another v Veldspun (Pty) Ltd* 1994 1 All SA 453 (A) at page 460.

246 Forsyth *Private Law* 435.

(3) In application of subsection 1(a) an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.

The ambit of section 1(3) of the *Business Protection Act* is very wide and it would seem that, on a literal reading of the Act, a foreign award will only rarely be capable of enforcement without the permission of the Minister,<sup>247</sup> since it embraces almost all ranges of human activity.<sup>248</sup> The link between the public policy defence and the protection provided for in the *Business Protection Act* is self-evident. Enforcement of an award without having complied with the provisions of the *Business Protection Act* may be contrary to public policy, since a statute can be regarded as an expression of public policy.<sup>249</sup>

Fortunately, South African courts should be commended for consistently adopting a restrictive approach to the interpretation of the *Business Protection Act* and there is no reported judgment where the defence provided for the *Business Protection Act* has been upheld to successfully refuse enforcement.<sup>250</sup> Even though the courts have held through interpretation that the *Business Protection Act* does not apply to certain cases where it arose,<sup>251</sup> it is the opinion of legal scholars that this legislation should be repealed<sup>252</sup> or reassessed.<sup>253</sup> There is doubt whether the *Business Protection Act* is needed at all and while it exists, it undermines confidence in international commerce.<sup>254</sup>

The Law Commission also recommended that the *Business Protection Act* be at the very least reassessed. Pending the reassessment, it was proposed that reference to

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247 Forsyth *Private Law* 435-436.

248 Schulze *Foreign Money Judgments* 31.

249 Law Commission's Report 153.

250 Forsyth *Private Law* 436.

251 See *Tradex Ocean Transportation SA v MV Silvergate* 1994 (4) SA 121 (C), *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C) and *Jones v Krok* 1996 (1) SA 504 (T).

252 Forsyth *Private Law* 436; Schulze *Foreign Money Judgments* 32.

253 Law Commission's Report 154.

254 Forsyth *Private Law* 436.

arbitral awards should be omitted.<sup>255</sup> The *Law Commission's Report* also came to the conclusion that the wording of the *Business Protection Act* is unnecessarily wide, but that it may be regarded as a statutory expression of public policy aimed at the preventing of awards providing for the punitive or multiple damages against South African businesses.<sup>256</sup> The *Law Commission's Report* however stated that it felt that the courts were capable of dealing with the defence of public policy, if raised against the enforcement of arbitral awards, without the need for statutory shields.<sup>257</sup>

Whereas the courts have found ways to circumvent the applicability of the *Business Protection Act*, the fact remains that on a plain reading of the *Business Protection Act* it is impossible for a foreign party to enforce a foreign award without the Minister's consent. The Minister has not been generous in the granting of permission.<sup>258</sup> As is correctly pointed out by *Forsyth*,<sup>259</sup> litigants should not be put to the trouble and delay of having to extract permission from the Minister.

As highlighted above, at present, parties seeking enforcement of a foreign award in South African courts, should first acquire consent from the Minister should it fall within the ambit of the *Business Protection Act* or alternatively construct an argument why the *Business Protection Act* would not be applicable to the case at hand. It then will follow that a party resisting enforcement can rely on a defence of public policy as set out in the *Foreign Awards Act* if there was non-compliance with the provisions of the *Business Protection Act*, since legislation can be seen as a manifestation of domestic public policy and the *Foreign Awards Act* does not specifically make provision for awards that is contrary to the enforcing state's statutes.

## 5.5. Conclusion

South African legislation dealing with international commercial arbitration is adequate in dealing with a defence of public policy in the enforcement of foreign awards.

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255 *Law Commission's Report* 154.

256 *Law Commission's Report* 153.

257 *Ibid.*

258 Forsyth *Private Law* 436 and Schulze *Foreign Money Judgments* 31; In fact the only reported case where the Minister has granted such permission was in *Seton Co v Silveroak Industries Ltd* 2000 (2) SA 215 (T).

259 Forsyth *Private Law* 437.

Although these statutes have their weaknesses,<sup>260</sup> South African courts have been able to use these statutes effectively in order to show that our courts are quite capable of dealing with the public policy defence.<sup>261</sup>

The *Foreign Awards Act* makes it possible for the refusal of the awards on public policy grounds.<sup>262</sup> South African law by implication endorsed the concept of international public policy in the *Jones*-case in terms of foreign arbitral awards.<sup>263</sup> The mere fact that an award of damages is made on a basis not recognised in South Africa does not necessarily make the award contrary to our public policy.<sup>264</sup> The public policy referred to in the *Jones*-case can be a referral to South African international public policy.

However, South African courts have not expressly dealt with the issue of what types of foreign awards constitute foreign awards that are against our international public policy. South African courts will therefore have to refer to previous court decisions which dealt with domestic public policy,<sup>265</sup> in respect of domestic arbitration awards, and enforcement of foreign judgments for guidance.

In addition, South African courts will also have to rely on foreign decisions regarding international public policy in order to decide what type of foreign awards constitutes awards that are against South African international public policy. South African courts will refuse to recognise or enforce an award where, on the face of the arbitration agreement or the award, it is clear that the arbitral award is contrary to public policy.<sup>266</sup> Where there are allegations of fraud in obtaining the foreign award, South African courts will refuse to enforce the award only if no extraneous evidence is necessary to prove the fraud.<sup>267</sup> If extraneous evidence is necessary, the party must seek to set the foreign award aside in the country where the award was made.

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260 *Becker Recognition and Enforcement* 12-17.

261 *Law Commission's Report* 153.

262 See Chapter 5.3.2.

263 See Chapter 5.3.2.1.

264 *Ibid.*

265 Such as the *Veldspun*-case and the *Easigas*-case. International public policy is a narrower concept than domestic policy, so these decisions are of limited value depending on the circumstances.

266 *Seton Co v Silveroak Industries* 2000(2) SA 215 (T) at page 230.

267 *Ibid.*

South Africa can therefore draw upon English law to assist in developing this division of the law both statutorily and judicially.

## **6 Comparison between South African law and English law**

### **6.1 General**

When reference is made to public policy, scholars often refer to the comment of the English judge who said in 1824 that “it is never argued at all but where other points fail.”<sup>268</sup> Public policy is at its best vaguely defined through case law, and legislation rarely, if ever, provides a clear definition of public policy in certain circumstances. Therefore, parties will surely rely on more concrete defences and only in the alternative rely on public policy. Courts have, however, dealt with the concept in enough detail to lay down principles to define it in the context of the enforcement of foreign arbitral awards. Public policy is nevertheless a very important issue, which is why courts can raise the issue of public policy on its own motion even if the parties do not consider it to be at issue.<sup>269</sup>

From the case law discussed above it is clear that in both South Africa and England, and in most other countries, the pro-enforcement bias of the *New York Convention* have been faithfully observed.<sup>270</sup> In fact, the pro-enforcement bias has become public policy itself, as is evident in *Westacre*, *OTV* and *R v V*.<sup>271</sup>

It is also clear from the *New York Convention* and the English case law that the public policy referred to is the public policy of the enforcement state or the *lex fori*. The question is whether that public policy differentiates between international award and purely domestic awards.<sup>272</sup>

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268 Redfern and Hunter *Arbitration* 456 and per Burrough J in *Richardson v Mellish* (1824) 2 Bing 229 at 252.

269 Redfern and Hunter *Arbitration* 445 and *New York Convention* Art V.2.

270 Collier and Lowe *Settlement of Disputes* 269 and Redfern and Hunter *Arbitration* 457.

271 See Chapter 4 above.

272 Redfern and Hunter *Arbitration* 458.

## 6.2 Legislative Comparison

South African legislation regarding the refusal of foreign awards is much more fragmented than English legislation. The *English Arbitration Act* is modelled on the *Model Law* and is not subject to as much criticism as the South African legislation governing the recognition and enforcement of international commercial arbitration awards.<sup>273</sup> In fact, the *English Arbitration Act* seems to have no clear shortcomings regarding the enforcement or refusal of international commercial arbitration awards. However, it seems to be clear that South African courts will not be persuaded to refuse enforcement on shortcomings in legislation<sup>274</sup> or by legislation aimed at preventing enforcement of foreign awards.<sup>275</sup>

A new international arbitration regime for South Africa is long overdue. But the courts have shown a willingness to use the current legislation in order to implement the concept of international public policy<sup>276</sup> and embrace the concept of pro-enforcement bias of foreign awards.<sup>277</sup> In addition South African courts have refused to use current legislation to protect local interest. It can therefore be concluded, as is proven by South African case law, that the current legislation is, although not without criticism, adequate in addressing issues presented to the courts concerning refusal of enforcement of foreign awards based on the public policy exception.

## 6.3 Judicial Comparison

Both South Africa and England are signatories to the *New York Convention* and, as a result have the same foundation regarding the interpretation, the enforcement and the refusal to enforce international commercial arbitration awards.

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273 Becker *Recognition and Enforcement* 12-17.

274 S 2(1) of the *Foreign Awards Act* uses the word "may," whereas art III of the New York Convention uses the word "shall". See also *Law Commission's Report* 145.

275 *Protection of Businesses Act*.

276 As in *Jones v Krok* 1996 (1) SA 504 (T) and in *Seton Co v Silveroak Industries* 2000 2 SA 215 (T) at page 229, where the court noted the need to interpret the *Foreign Awards Act* in a way which is consistent with the *New York Convention* and trends in other countries.

277 As in the case of *Seton Co v Silveroak Industries* 2000(2) SA 215 (T).

Both countries accept the notion of a country's international public policy as opposed to domestic public policy as the public policy that is to be considered when enforcing or refusing foreign awards. This is apparent from both the *Jones* and *Westacre* cases. In *Jones* the court stated that it found nothing wrong with allowing the principle of punitive damages, which is against South African domestic public policy, but not against international public policy. In *Westacre*, even though performance of the contract might have been contrary to the public policy at the place of performance, the governing law chosen by the parties did allow for the performance of the contract and enforcement of the contract.<sup>278</sup>

This brings forward two further aspects that need consideration, namely illegality and performance of the contract. These issues has not been considered by South African courts within the context of foreign arbitral awards but has been considered in other contexts. In *Phillips v Botha*<sup>279</sup> the court held that the court is not at all concerned with rights based directly or indirectly upon an illegal contract.<sup>280</sup> In *Exel Industrial (Pty) Ltd and another v Crown Mills (Pty) Ltd*,<sup>281</sup> the court held that an agreement involving bribery is void *ab initio* and cannot be enforced. The English standpoint on the issues is however very clear. If a contract is illegal at the place of performance, but is subject to another law, for example Swiss law,<sup>282</sup> and the governing law dictates that the contract is enforceable despite it being illegal at the place of performance, the English court will also enforce it despite the fact that English courts would not have enforced the contract had it been subject to English law. If, however, the contract is illegal at the place of performance and the contract is subject to English law, the English court will most likely not enforce the award due to the fact that it considers its obligation to other countries to weigh more heavily than the pro-enforcement bias attached to foreign arbitral awards.<sup>283</sup>

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278 *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* 1999 2 Lloyd's Rep 65 at 75 where Lord Justice Waller states that: "It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different views."

279 [1995] 3 All SA 141 (W).

280 *Phillips v Botha* [1995] 3 All SA 141 (W) at page 155.

281 [1998] 4 All SA 465 (A) at page 475.

282 See *Westacre*, *OVT* and *R v V*.

283 See *OVT*.

When allegations of illegality, corruption or bribery are raised, English courts will make use of the guidelines set out in *Soleimany* as to what extent it should enquire with regard to illegality and corruption. If, on the face of the award and the agreement, it is clear that there is evidence of illegality, corruption or bribery, the English courts will not enforce the contract. If, however, it is not clear on the face of the award or the agreement, it will be highly unlikely that the English courts will oppose a decision of the arbitral tribunal that no fraud was involved. In most instances the arbitral award would have been contested in the courts of the seat of arbitration and if they also find that there had been no corruption, it is even more unlikely that English courts will refuse to enforce the award. If it has not been contested in the courts of the seat of arbitration, English courts will refer it back to that court.

The *International Law Association interim report on public policy as a bar to enforcement of international arbitral awards*<sup>284</sup> set out other public policy considerations that may have an effect on the public policy defence and that have not as yet been considered by English or South African courts. Examples of such considerations are: a fraudulent or corrupt arbitrator,<sup>285</sup> breach of due process,<sup>286</sup> lack of impartiality,<sup>287</sup> lack of reasons,<sup>288</sup> manifest disregard of the law or fact<sup>289</sup> and *res judicata*.<sup>290</sup> English courts have, in fact, ruled that *res judicata* is a rule of public policy.<sup>291</sup>

It is therefore clear that South African and English judgments have followed the same approach on this point. English courts have decided matters that have yet to be considered by South African courts. The English decisions could be of assistance to South African courts in deciding matters, as the decision appear to be

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284 London 2000, hereafter referred to as the *ILA's interim report*.

285 *ILA's interim report* 24-25.

286 *ILA's interim report* 25-26.

287 *ILA's interim report* 26-27.

288 *ILA's interim report* 27.

289 *ILA's interim report* 27-29.

290 *ILA's interim report* 29.

291 *Ibid.* In *Vervaeke v Smith* [1983] 1 AC 145, where the English court held that it would be contrary to public policy to enforce an award that was contrary to, and inconsistent with a prior judgment of a local court on the same subject matter.

sound and in accordance with global acceptance of the defence of public policy to the enforcement of foreign arbitral awards.

## 7. Conclusion

South African law allows for the public policy exemption to be applied in South Africa, although it has not been the specific focus of any specific case. Case law does however, indicate that our courts are in agreement with international application of the defence of public policy. South Africa does in fact acknowledge the fact that not domestic public policy, but international public policy is the concept that must be taken into account when determining whether a foreign award is against public policy as envisaged in the *New York Convention* and the *Foreign Awards Act*.<sup>292</sup>

The Bill of Rights contained in the Constitution ensures that an arbitration award can only be enforced in South Africa if the arbitration process was conducted fairly. South African law admits that in certain cases awards must be refused to be enforced on account of our international public policy. Recognition and enforcement of a foreign legal rule unknown to our law do not necessarily constitute a reason for refusing a foreign arbitral award. Cases involving fraud should be appealed by the party resisting enforcement at the place where the award was made, unless the fraud appears *ex facie* the award of the agreement. In a matter where it is alleged, the contract is illegal in South Africa, but not the place of performance. The South African courts would then have to draw on the decisions of the English courts since such matters have not yet been decided by South African courts.

South Africa urgently needs to introduce new arbitration legislation based on the *Law Commission's Report*, not only to develop our arbitration law and to bring it in line with *Model Law*, but most important to instil confidence in South Africa as a venue for the conduct of international commercial arbitration, with South African law as the law of the arbitration. This will have the effect of bringing disputes that centre on international commercial arbitration more readily before our courts and in turn develop our case law on arbitration law. South African legal principles with regard to

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292 As applied impliedly in the *Jones*-case and by applying the dictum from *Westacre* in the *Seton Co*-case.

public policy are thus to a large extent in accordance with international arbitration law and South African courts are well capable of dealing with any issue of enforcement of a foreign arbitral award, although our legislation is inadequate and our case law limited. In this regard English law can be of the most important assistance, not only because of the shared heritage but also because that law is one of the most developed regimes of arbitration law.

The English decisions may provide South African courts with useful guidance. Foreign awards or the underlying agreements that appear on their face to be illegal, are against international public policy.<sup>293</sup> Lobbying contracts however depend on many factors before it will be regarded as contrary to the international public policy of a country. Domestic public policy of the *lex fori*, illegality of the contract at the place of performance, and the proper law of the contract are all factors that play a role in determining whether the contract or foreign award is against the international public policy of England. Fortunately a fair amount of English and other countries' case law exist to assist in such disputes.

South Africa needs to enact a new arbitration act for especially international commercial arbitration. Such an action would ensure that any concern which may exist due to criticism regarding our current international commercial arbitration legislative framework will be quenched. That will hopefully lead to more international commercial arbitration disputes to be arbitrated in South Africa, which will in turn lead to more cases being determined by our capable judiciary and the development of our law in respect of the enforcement of foreign awards.

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293 As in the case of *Soleimany v Soleimany* [1999] Q.B.785 and endorsed by our courts in *Seton Co v Silveroak Industries Ltd* 2000 (2) SA 215 (T) at page 230.

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