

Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*

Christopher S. Gibson**

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* In his 1999 article, *Duty and Discretion in International Arbitration*, William Park writes that “national arbitration law can seek a reasonable counterpoise between arbitral autonomy and judicial control mechanisms.” 93 AM. J. INT’L L. 805, 822 (1999). As I discuss in this essay, seeking “counterpoise” between the transnational impulses of arbitration grounded in party autonomy and national restraint on those impulses vested in the public policy defense to enforcement of an arbitral award reflects a dynamic tension that can be present even when the system is in equilibrium.

** Associate Professor of Law, Suffolk University Law School. J.D., Boalt Hall School of Law, University of California, Berkeley; M.P.P., Kennedy School of Government, Harvard University; B.A., University of Chicago. I benefited from the assistance of research librarian Rick Buckingham and research assistant Otylia Babiak. Last, I want to thank my wonderful wife Skye for her continued support.

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There is an oft-quoted witticism to the effect that Gandhi, when asked what he thought of Western civilization, replied that he thought it would be a good idea.¹

I. INTRODUCTION

Below the surface of the sea there are strong currents, whose direction is uncertain and whose effect may turn and tack those who float above. And so it is with international arbitration, as we set out to address the theme of this symposium, “Building the Civilization of Arbitration.” International commercial arbitration has had a globalizing impact on the law. Through centrally legislated and decentralized reforms, it has achieved a new transnational legal framework and common vision that bring with them characteristics of civilization. Below the surface, however, currents flow in contradictory directions. One area of vigorous debate concerns the proper role and scope for mandatory public law, not only in arbitral proceedings, but as a factor to be considered (or ignored) at the point of judicial intervention, whether seeking to enforce an arbitration agreement, in annulment proceedings, or at the stage of recognition and enforcement of an award. My essay focuses on how these considerations of mandatory public law play into the concept of public policy as a defense to enforcement of international arbitral awards. My claim is that mandatory public law poses a challenge to transnational arbitration and, in response, a reformed concept of substantive² public policy is needed to sustain the balance and legitimacy of the international arbitral system. I do not argue in favor of lowering the standard to be applied—that is, in balancing between finality and justice, a reviewing court should continue to reflect a pro-enforcement

1. BRUCE MAZLISH, CIVILIZATION AND ITS CONTENTS 156 (Stan. U. Press 2004).

2. I do not address or argue for any change in relation to what has been classified as “procedural public policy” grounds that might be invoked against enforcement of an international award. *See e.g.*, Pierre Mayer & Audley Sheppard, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT’L 249, 253 (2003).

bias and refuse enforcement only in “exceptional circumstances.”³ In this respect, I agree with the detailed recommendations that are intended to guide an enforcement courts’ discretion, and which are contained in the International Law Association Committee on International Commercial Arbitration’s (“ILA”) 2002 *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (“Final Report”).⁴ However, I contend that the public policy standard should permit a supervising court to consider fundamental public policy not only of the enforcement forum, but also at the place with the closest connection to an underlying contract.⁵

A trend toward delocalization of arbitral law has been underway for the last 50 years, starting with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).⁶ This shift has increased the focus on *public policy* as a potential means of control by national courts over international arbitration.⁷ At the same time, however, many courts recognizing the merits of arbitration have continued to exercise significant deference

3. See Mayer & Sheppard, *supra* note 2, at 250 (2003) (recommending that “the finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances”); see also discussion *infra* note 151 and accompanying text.

4. Mayer & Sheppard, *supra* note 2; see also International Law Association Committee on International Commercial Arbitration, *Interim Report On Public Policy as A Bar To Enforcement of International Arbitral Awards*, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

5. A similar policy argument has been proposed by Homayoon Arfazadeh in *In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception*, 13 AM. REV. INT’L ARB. 43, 62 (2002) (“In my opinion, many of the above concerns could be adequately addressed if supervisory courts were prepared to broaden their conception of ‘international public policy’ in order to include a foreign public policy rule. That would allow supervisory courts to sanction, short of becoming intrusive, a deliberate or reckless disregard of a foreign public policy rule as ground for setting aside or refusing enforcement of an international arbitral award. The relevant foreign public policy rule could be that of the place of enforcement of a contract or that which is otherwise directly affected by the parties’ transaction.”).

6. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (hereafter the “New York Convention” or “Convention”). The New York Convention is in force in 143 countries at the time of this publication.

7. The public policy exception to the enforcement of arbitral awards is enshrined in the New York Convention, Article V.2(b), and in the 1985 UNCITRAL Model Law on International Commercial Arbitration (“Model Law”). See Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, UN Doc A/40/17. The Model Law includes “public policy” as a ground for setting aside an award by the courts at the seat of the arbitration (Article 34) and as a ground for refusing recognition and enforcement of a foreign award (Article 36), like Article V.2(b) of the New York Convention. The Model Law does not define “public policy,” but like Article V.2(b) of New York Convention, refers to the public policy of the State in which enforcement is sought.

toward arbitral awards.⁸ A modern and light-handed attitude by national courts is reflected not only at the enforcement stage, as evidenced by a narrow view of the public policy defense, but also in doctrinal developments such as the competence-competence principle and severability of the arbitration agreement, arbitral jurisdiction to deal with interim relief and other precautionary measures, and the expansion of arbitrable subject matter.⁹ The expanding scope of claims that may be submitted to arbitration, however, accentuates emerging concerns about issues of mandatory public law arising in arbitration. First, there is increased discussion over the authority and obligation of arbitral tribunals to consider issues of public law within the arbitration procedure itself.¹⁰ Further, there is a call for recognition that the liberalization of arbitrable subject matter “comes necessarily at the price of some increase in judicial *ex post* control of the compatibility of the arbitrators’ product with public policy.”¹¹

From time to time it is appropriate to revisit the question of public policy as a bar to enforcement of international arbitration awards.¹² Public policy, by nature, is a dynamic concept that evolves continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions.¹³ Although much has been written

8. See *infra* note 75 and accompanying text.

9. Bernardo M. Cremades & David J. A. Cairns, *The Brave New World of Global Arbitration*, 3 J. WORLD INV. & TRADE 173, 182 (2002).

10. Richard Buxbaum, *Public Law, Order Public and Arbitration: a Procedural Scenario and a Suggestion*, at 1 (draft on file with author, to be included in a festschrift tribute to Tibor Varady); see *infra* note 92 (citing authorities discussing mandatory rules of law in international arbitration).

11. Jan Kleinheisterkamp, *Reconciling Public Interests and Arbitration’s Efficiency: Coping with Internationally Mandatory Laws*, (unpublished, draft paper presented at the annual Institute for Transnational Arbitration Academic Council meeting, January 29-30, 2009) (on file with author).

12. As Gabrielle Kaufmann-Kohler suggests, the issue of enforcement of arbitral awards is hardly a new issue, but it is nonetheless one that is of constant and major concern that “needs to be revisited at regular intervals.” Gabrielle Kaufmann-Kohler, *Enforcement of Awards—A Few Introductory Thoughts*, in *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION CONGRESS SERIES NO. 12, 287, 287 (Albert Jan van den Berg ed., 2005).

13. See Loukas Mistelis, *‘Keeping the Unruly Horse in Control’ or Public Policy as a Bar to enforcement of (Foreign) Arbitral Awards*, 2 INT’L LAW FORUM DU DROIT INT’L 248, 252 (2000); JULIAN D. M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 723 (2003); Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION CONGRESS SERIES NO. 3, 295 (Pieter Sanders ed., 2005) (“[T]he concept of public policy . . . has a dynamic and evolutive character and must be considered *in concreto*, in light of all the circumstances of the case.”).

about the public policy defense,¹⁴ I take the opportunity provided by the topic of this symposium to reassess public policy as an appropriate “tool for external constraint” on the freedom of members of the international business community to determine their commercial relationships and to structure dispute resolution as they see fit.¹⁵

My aim is first to conceptualize the role of public policy in the civilization of arbitration. To set the context, in Part II, I inquire why public policy is relevant to the concept of building the civilization of arbitration. Moreover, what do we mean by the term “civilization” when we talk about building a civilization of arbitration? I take the view that we should understand the concept of public policy as an interface of exchange between the civilization of transnational arbitration and the societal interests of external (national) actors. In Part III, I review the enforcement framework for arbitral awards, the concept of public policy, and the deferential approach used by leading courts when considering the public policy defense. I turn in Part IV to review the challenges posed by mandatory rules of law and look at several cases from England and the United States. The cases show inconsistencies regarding how public law issues factor into the public policy analysis at the stage of enforcement, but also reflect a tendency to pay too little heed to mandatory rules of law at the place where the underlying contract is performed.

A number of commentators have suggested that a more detailed definition should be given to the concept of public policy. The ILA issued its Final Report in 2002 with the aim of doing just that. Others have expressed concerns that the public policy defense, if exercised improperly by State courts, may undermine fundamental arbitral principles such as party autonomy, predictability, finality, and the integrity of the international arbitration system.¹⁶ In Part V, I review the

14. See e.g., GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 815-32 (2d ed. 2001); LEW, ET AL., *supra* note 13, at 693; Arfazadeh, *supra* note 5, at 48; Mark Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 513 (1988); Lalive, *supra* note 13, at 295; Mayer & Sheppard, *supra* note 2; Mistelis, *supra* note 13, at 248; Hrvoje Sikiric, *Arbitration Proceedings and Public Policy*, 7 CROAT. ARB. Y.B. 85 (2000).

15. In an article written some 20 years ago, Mark Buchanan wrote that public policy provides States with a “tool for external constraint,” but suggested that it can also free international commercial transactions from the stringent requirements of domestic law of the forum state or foreign states through adoption of the concept of transnational public policy. Buchanan, *supra* note 14, at 513.

16. See e.g., Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 793 (2002) (“These enforcement rulings constitute unfortunate and poorly-disguised attempts to protect nationals or national entities from basic contract accountability. Pervasive protectionism could foil the entire transborder arbitral process.”); Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U.

recommendations of the ILA in its Final Report, recommendations that reflect a modern and comprehensive view for which considerable consensus exists among practitioners and academics. I inquire whether the ILA Report is sufficiently responsive to the mandatory public law question. In my view, the scope of public policy as defined in the Final Report is too narrow because it recommends that an enforcement court exclude consideration of the public policies that may be relevant at the place of the underlying performance of the contract.¹⁷ As noted above, my claim is that, in light of the challenges posed by mandatory public law, a reformed concept of public policy is needed that would permit the supervising court to consider important public policies at the place with the closest connection to a contract, which is where the transaction in question has its greatest societal impact. This approach provides proper incentives for the parties and arbitrators to consider relevant issues of mandatory public law during arbitral proceedings. It also enables courts to give due regard to the important public policies of another State, reflecting that State's sovereignty and societal values.¹⁸ In this way, public policy mediates between the interests of transnational business and those of the State with the closest connection to the contract. It is an interface of exchange between the civilization of transnational arbitration and the national interests of States.

II. ARBITRATION, CIVILIZATION, AND PUBLIC POLICY

A modern by-product of economic globalization is the occurrence of innumerable international disputes.¹⁹ Disputes of an international public law character surface between States—many involving trade and market concerns now channel themselves through the dispute settlement system of the World Trade Organization.²⁰ Disputes of a mixed public-private law character emerge between States and non-State actors, particularly when the non-State actor is an investor alleging harm to its

INT'L L. REV. 957, 1020 (2005) (“[T]he prospect of State interference poses a threat not simply to the ‘professional autonomy’ of international arbitrators, but to the health of the entire system.”).

17. See *infra* note 168 and accompanying text.

18. See *infra* notes 115-19 and 168-73 and accompanying text.

19. The related trends of globalization and privatization have generated an increasing number of international transactions among private parties, governments, and non-governmental entities, generating numerous and multifaceted disputes. See, e.g., *remarks of Robert Briner, Chairman, International Court of Arbitration of the International Chamber of Commerce, in U.N., ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS* at 9, U.N. Sales No. E.99.V.2 (1999).

20. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, Legal Instruments—Results of the Uruguay Round, vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU].

investment caused by action of a host State. An increasing number of these investors bring claims directly against the States through treaty-based dispute resolution procedures, in a framework commonly known as investor-State arbitration.²¹ And there are many international disputes primarily of a private law character between private commercial entities, which are resolved through international commercial arbitration. At each level, the dispute settlement system adopted to provide an international legal framework for adjudicating the parties' disagreement is modeled on arbitration procedures. And at each level, the role of public policy is relevant and pressing for many reasons, not the least of which is that there are simply many more disputes to test the limits of this concept and its relation to State interest and sovereignty.²² In the context of international commercial arbitration, the expansion of arbitral claims to include public law matters invites public policy considerations into the fray.

A. *Public Policy as an Interface of Exchange between Civilizations*

I believe it is useful to address generally the relationship between arbitration, civilization, and public policy. Why is public policy and the public policy defense to enforcement of international arbitral awards relevant to the concept of building the civilization of arbitration? Some might suggest that the answer to this question is self-evident. Public policy gives expression to certain fundamental principles underpinning a civilization and its legal system,²³ and it should be no different in the arbitration context. Public policy within arbitration should reflect the instrumental principles and values underlying the procedure, such as

21. Indeed, "[t]his widespread pattern of consent to arbitration of investment disputes is one of the more remarkable developments in international law in the past 40 years." R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 2* (2005).

22. Public policy is often directly implicated when the State is party to the dispute. *See Cremades & Cairns, supra* note 9, at 193 ("The mere fact that an investor-State arbitration involves a State party means that it raises public and not merely private issues."). Some have suggested that the public law nature of these cases demands a different approach than that called for in private commercial arbitrations. *See Barton Legum, Trends and Challenges in Investor-State Arbitration*, 19 *ARB. INT'L* 143, 147 (2003).

23. Outside the field of arbitration, public policy has been defined generally as manifesting

the common sense and common conscience of the citizens as a whole that extends throughout the state and is applied to matters of public health, safety, and welfare. It is general, well-settled public opinion relating to the duties of citizens to their fellow citizens. It imports something that fluctuates with the changing economic needs, social customs, and moral aspirations of the people.

8 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 173 (2d ed. 2005).

party autonomy,²⁴ neutrality, efficiency, predictability, finality, justice,²⁵ and the validity of the procedure in the eyes of the law, all of which may combine to weigh in favor of a pro-enforcement approach to international arbitral awards.

Yet despite emphasis on arbitration as a “predominantly . . . private affair,”²⁶ arbitration does not exist in a vacuum, and the work of arbitration has had an expansive impact on society at-large. In his introduction to this symposium, Thomas Carbonneau recognizes that “arbitration is a force in American society and global business” and that “arbitrators, by their number and the frequency of their decisions, have an enormous impact upon the character of society.”²⁷ Catherine Rogers suggests that, within arbitration, there is a fledgling “public realm . . . comprised of procedural and decisional commitments to honor mandatory law claims and public policy concerns, as well as a range of public goods that are produced not only for the international arbitration community, but beyond.”²⁸ Hence, a conception of public policy relevant to arbitration should address not only procedural issues pertinent to the integrity of arbitral proceedings, but also the interaction between the procedure and its results, on the one hand, and the interests of the larger society, on the other. In light of these considerations, it is useful to consider the concept of public policy in arbitration as not only reflecting principles fundamental to the dispute resolution method itself, but also as an “interface of exchange” with a larger civilization outside of arbitration. This exchange interface operates through the public policy defense to recognition and enforcement of international arbitration awards.²⁹

24. Thomas Carbonneau would suggest that “[t]he legal foundation for [international commercial arbitration] arises from a universal principle of private law: freedom of contract (party autonomy for civil law lawyers).” Carbonneau, *supra* note 16, at 806-07.

25. Catherine Rogers makes a convincing case that “the final end product of arbitration is justice as opposed simply to dispute resolution.” Rogers, *The Vocation of the International Arbitrator*, *supra* note 16, at 985.

26. Catherine Rogers refers to “private parties who create arbitral jurisdiction through private agreement,” but nonetheless suggests that there is an increasing public realm to arbitration. *Id.* at 993. I agree with Rogers’ assessment that in arbitration, as in other areas, the “public-private distinction tends to rely on rudimentary dissimilarities that preclude more nuanced appreciation of the true nature of either aspect, let alone their overlap, cross-referencing, and blurring at the margins.” *Id.* at 992-93.

27. Thomas Carbonneau, Introduction (Draft Dated Oct. 16, 2008).

28. Rogers, *The Vocation of the International Arbitrator*, *supra* note 16, at 963.

29. The public policy defense is a channel providing a view through to limits based on the norms of particular external (national) societies. Public policy mediates between the incentives of transnational business and national rules based on local values.

B. *Civilization*

Given the theme of this symposium, one cannot proceed further in this conceptual analysis without addressing the concept of “civilization” itself. The term is used frequently and in innumerable settings to serve many functions. It is a term that carries a great deal of baggage. It often brings with it a sense of history when used to refer to past societies such as the Romans or Aztecs who, much like an organism, were given to birth, growth, decline, and death.³⁰ Its meaning can be used to describe an “us” versus “them” dynamic, as in the demarcation of those who are “civilized” and those who are not (e.g., the “barbarians”).³¹ It has been used to describe everything that a Western society seeks to define as its special character, including “the level of its technology, the nature of its manners, [and] the development of its . . . knowledge.”³² Historian Bruce Mazlish, in his book *Civilization and Its Contents*, states that civilization remains a contentious term, much like globalization. “For some people, it represents the epitome of human achievement [and] the end result of modern progress,” while for others it is an “external threat, bringing with it a challenge to ‘traditional’ beliefs.”³³

All this may take us well beyond the intended meaning of civilization as part of the title for this symposium. However, Thomas Carbonneau raised the subject of civilization in his 2002 article, *The Ballad of Transborder Arbitration*,³⁴ observing that international commercial arbitration “has clear epic dimensions that warrant being recited as testimony to the exploits of the international business community.”³⁵ He suggested that the inaugural days of international arbitration are over and a “new era . . . is dawning” with arbitration’s attainment of a degree of civilization: “*The acquisition of civilization establishes a different reality, role, and expressive discourse for the [arbitral] process.*”³⁶

How, then, do we view the term when we refer to building the “civilization” of arbitration? I believe that a modern definition is appropriate, one which abstracts the term from a particular time and place and does not draw lines between those who have and those who

30. BRUCE MAZLISH, *CIVILIZATION AND ITS CONTENTS* xii, 1 (2004).

31. *Id.* at xii. This is use of the term in a political sense, similar to saying “God is on our side.” *Id.* at 160.

32. *Id.* at 141. This assertion of civilization can also imply a form of either benign or colonial superiority. *Id.* (citing NORBERT ELIAS, *THE CIVILIZING PROCESS: THE DEVELOPMENT OF MANNERS* 3-4 (1978)).

33. MAZLISH, *supra* note 30, at x.

34. Carbonneau, *supra* note 16, at 825.

35. *Id.*

36. *Id.* (emphasis added).

have not. There is no geographical center to this meaning of arbitral civilization, yet modern civilizations do need exchange and interaction with outside groups as a constituent element of their identity.³⁷ This concept of arbitral civilization is tied closely to the adjacent concept of culture, yet connotes an aspiration toward the best in human achievement.³⁸ Building a civilization of arbitration thus implies seeking high achievement, while maintaining cross-cultural encounters as a constituent (not peripheral) element.³⁹ Drawing on a concept of civilization which Bruce Mazlish attributes to an Iranian scholar, arbitral civilization may consist of the junction between two inseparable parts: a common world vision and a coherent legal system.⁴⁰ The civilization of international arbitration should thus have a unifying global vision and coherent legal system, yet maintain exchange with other external or national legal systems.⁴¹

37. Indeed, just as civilizations no longer have geographic centers, arbitration exists today in a highly networked society that does not have such a “center.” See MAZLISH, *supra* note 30, at xii, 136.

38. The Concise Oxford Dictionary defines civilization as “an advanced stage or system of human social development” or “the process of achieving this.” CONCISE OXFORD DICTIONARY 261 (10th ed. 1999).

39. MAZLISH, *supra* note 30, at xii. In his article, *The Impact of Culture on International Commercial Arbitration*, William Slate pointed to indicators of the “internationalization” of arbitration, but also recognized that cultural differences can have a serious and substantive impact on transnational arbitration. William K. Slate II, *The Impact of Culture on International Commercial Arbitration*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, *supra* note 12, at 11, 11-12. He suggested that not only do we need a better understanding of the impact of culture on international dispute resolution, but we also need to have an exchange with scholars and professionals from other fields and disciplines. *Id.* at 16-17.

40. I am drawing from a modern example of civilization, which Bruce Mazlish describes as having two inseparable parts: “The first part is an explicit world vision which can be a set of cultural systems, an ideology or a religion, most often the latter. The second part is represented by a coherent political, military, and economic system usually concretized as an empire or a historical system.” MAZLISH, *supra* note 30, at 17. Civilization is thus the junction between a world vision and a historical system. *Id.*

41. Catherine Rogers, in a series of articles, has sought to address a common vision for the international arbitration community, focusing in particular on professionalism and ethical standards among international arbitrators. In her article, *The Vocation of the International Arbitrator*, Rogers writes at some length about various dimensions of professionalization in arbitration and the international arbitrators’ “internal desire to operate and be recognized as a coherent group,” which may have “the unintended effect of creating certain expectations regarding the values the very term ‘profession’ emotes – quality control, transparency, ethical conduct, self-regulation, and the like.” Rogers, *The Vocation of the International Arbitrator*, *supra* note 16, at 983, 1008. In her article, *The Arrival of the “Have-Nots” in International Arbitration*, she writes about how the international arbitration system, even in relation to public policy issues,

has internalized a sense of its own regulatory function. International arbitrators do not simply decide individual cases for a fee. They were the original architects of the system and are self-consciously the modern day custodians of it. The system they have developed and maintain intentionally straddles the

Public policy informs the development of the civilization of arbitration, even as concepts of both public policy and civilization continue to evolve. As stated above, public policy may play an increasingly significant role within arbitral proceedings themselves, and thus contribute to the aspiration of a common vision and coherent legal system. The public policy defense also serves as an interface for the exchange between arbitral civilization and other external communities, where State interest and sovereignty (reflecting the values of a particular country) are given weight. Public policy can place limits on a delocalized notion of arbitral civilization, to the extent that the parties or members of the arbitration community would ignore fundamental public policies and, through the instrument of an award, seek to abridge rights fundamental to public policy—either rights of an individual or of the society at large. In this context, a worthy aim for the public policy defense is as a mechanism to maintain “counterpoise” between arbitral civilization and the society at large. As the next section highlights, the tendencies of globalization do not lessen these concerns. Instead, they increase the potential points of friction as arbitration plays a larger role, while States remain protective of their fundamental economic, political, cultural, and moral values.

C. Globalization

Every day we have new evidence that globalization has compressed the world.⁴² In their 2002 article, *The Brave New World of Global Arbitration*, Bernardo Cremades and David Cairns addressed globalization and arbitration.⁴³ As to globalization itself, they referred to the debate about its nature and impact: “[i]t has been called the herald of a new world order and has been damned for oppression, exploitation and injustice.”⁴⁴ Cremades and Cairns refer to the “philosophical foundations of globalization,” at least in the economic sector, as being

public-private divide. In it, arbitrators not only resolve disputes between parties, but produce law-bound decisions that often intentionally take into account mandatory law and public policy. Interestingly enough, international arbitrators have developed theories and criteria for enforcing mandatory national law that have not been selected by the parties, but are implicated by the dispute or the underlying contract.

Catherine Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, 8 NEV. L.J. 341, 370 (2007) (internal citations omitted).

42. Sociologist Roland Robertson, in an oft-quoted piece, wrote that globalization “refers both to the compression of the world and the intensification of consciousness of the world as a whole.” ROLAND ROBERTSON, *GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE* 8 (1992).

43. Cremades & Cairns, *supra* note 9.

44. *Id.* at 173.

comprised of a series of freedoms: “freedom to trade, freedom to invest capital and freedom of establishment of business in other countries.”⁴⁵ There is widespread consensus that the development of these freedoms after World War II has led to an expansion of trade, economic growth, and greater prosperity across much of the world.⁴⁶ Today, however, the economic downturn has revealed some of the mixed blessings of globalization, as the financial crisis which started in the United States’ housing sector has spread around the world like a highly contagious avian flu.

It is not my intention to enter the vast and ongoing debate about the merits of globalization,⁴⁷ except to suggest that (i) international commercial arbitration represents a significant legal dimension to globalization (this should be an unsurprising assertion),⁴⁸ and (ii) the role of public policy as a bar to the enforcement of arbitral awards is but a particular example of a pivot point balancing national and transnational

45. *Id.* at 174.

46. With respect to arbitration, Thomas Carbonneau writes that “[d]espite the diversity of views within the family of nations, globalization has emerged and participation in international commerce is seen by most countries as a desirable objective. A system of transborder arbitration is essential to the pursuit of commerce across national boundaries.” Carbonneau, *supra* note 16, at 795.

47. My own view is that globalization is like science: both can have deeply positive or negative consequences, yet both are relentless forces in human development and social activity. Borrowing words from Joseph Stiglitz in the broader debate, “[t]he problem is not with globalization, but with how it has been managed.” JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 214 (2002). Those who would critique Stiglitz suggest that if his

main insight is generally correct—that the state cannot be ruled out (or, in his case, that it should be ruled in)—then he cannot continue to ignore the grand constitutional questions: How will the coercive institutions of the state be constrained? What is the relation between the state and civil society?

David L. Prychitko, *Whither Socialism?*, 16 *CATO J.* 280, 284 (1996) (reviewing JOSEPH E. STIGLITZ, *WHITHER SOCIALISM?* (1994)). In the field of arbitration, we find that the public policy nexus poses a similar question: how do we address the role of the State, how do we restrain it appropriately in the arbitration context, and what is the balance to be achieved between national interests and transnational private interests?

48. Cremades and Cairns peg the beginning of the “globalization of international arbitration” to the New York Convention in 1958, marking the Convention’s powerful and beneficial influence on the harmonization of arbitration law. *See* Cremades & Cairns, *supra* note 9, at 175. I would suggest that the emergent civilization of arbitration has become a globalizing force in and of itself. International commercial arbitration has become a key element in the “spread and compression” of legal methodologies and ideas across the world, achieved through various levels of activity as reflected in international instruments such as the New York Convention and UNCITRAL Model Law, investor-State arbitration, and the active practice of international commercial arbitration. At each level, various measures have been taken to further the establishment of arbitration as a universally accepted method for resolving disputes between different state and non-state actors in civilization at large. At each level, arbitration has facilitated legal and cultural exchange as important dimensions to globalization.

interests, which is itself reflective of the broader globalization debate. Tom Palmer, writing for the Cato Institute, has defined globalization along economic lines as “*the diminution or elimination of state-enforced restrictions on exchanges across borders and the increasingly integrated and complex global system of production and exchange that has emerged as a result.*”⁴⁹ Similarly, the framework of international arbitration has contributed in a positive manner to diminish State-enforced restrictions on the freedom of private actors to structure their international commercial relationships and related dispute resolution procedures.⁵⁰ International arbitration is but one example of a larger movement to promote reforms facilitating international commerce and cooperation, and the avoidance of parochial discrimination by the State.⁵¹ Arbitration has filled the void by providing a neutral and flexible dispute resolution process that enables businesses to trade and invest capital abroad, taking advantage of lower trade barriers and advances in communications, technology, and transportation systems, while having “confidence that they will not be forced to sue within a foreign judicial system.”⁵²

The current global financial and economic crisis triggers several questions concerning international arbitration and the pivot-point of the public policy defense. On the one hand, international commercial arbitration is a legal regime—a transnational dispute settlement framework—that facilitates certain globalizing tendencies by private commercial actors. It has enabled these actors to achieve a degree of

49. Tom G. Palmer, *Globalization Is Grrrreat!*, 1 CATO’S LETTER No. 2, Fall 2002, at 1 (emphasis added), available at http://www.cato.org/pubs/letters/palmer-cato_letters.pdf.

50. In the legal sphere, it has been suggested that “[i]ncreasingly, nation states are becoming less important in the creation of international commercial law with the growth of regional organizations, non-state actors, and international arbitration. This is spurred on by the march of globalization and the need for international commercial law.” Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J. L. & COMM. 117, 117 (2004).

51. See Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT’L L. 209, 224 (2002). In the United States, the desire to protect these international interests in arbitration is reflected in important court decisions, none more so than the Supreme Court’s decision in *Mitsubishi v. Soler*. See *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth Inc.*, 473 U.S. 614 (1985). In response to the issue of arbitrability of an antitrust claim in an arbitration to take place in Japan, the Court stated that “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreements, even assuming that a contrary result would be forthcoming in a domestic context.” *Id.* at 638-39.

52. William S. Fiske, *Should Small and Medium-Size American Businesses ‘Going Global’ Use International Commercial Arbitration?*, 18 TRANSNAT’L LAW. 455, 465, 470 (2005).

“liftoff” from the terrain of national regulation.⁵³ The public policy defense is thus useful and necessary because of its ability to place limitations on these globalizing tendencies to the extent private contracting parties overstep fundamental public policy limits. On the other hand, in light of the current economic crisis, we can also anticipate that many disputes may arise and that national interest, which has now become more integrally tied to the marketplace even in countries such as the United States, could be increasingly and more directly implicated. It is not too hard to imagine that States may face new temptations to impose national constraint—even through the concept of public policy—in order to achieve protectionist ends. As Richard Buxbaum has put it, the discussion on public law and public policy issues in arbitration “expectably will . . . intensify in light of the current financial and economic crisis and the anticipated search for its resolution in a new level of national and international regulatory activity.”⁵⁴

By focusing on the role of the public policy defense in arbitration as a pivot point, we can learn something about the broader globalization debate, pitting national or local interests—legitimate or not—against forceful transnational currents. Arbitration is an institution that, initially, did not have a need for this form of introspection. However, with the expansion of claims to embrace mandatory public law issues as arbitrable subject matter, we may have arrived at a new stage in the development of arbitral civilization. As noted above, the concept of public policy is dynamic, not static. Indeed, the “impact of globalization on the substance of public policy might prove to be substantial.”⁵⁵ The concept may morph to encompass new issues—such as environmental, labor, safety, consumer protection, and public health standards, human rights law, and effective regulation of economic actors (e.g., antitrust laws, securities laws, usury laws, and laws that prohibit bribery, corruption, money laundering, and tax evasion)—all of which may be increasingly implicated as the scope of arbitral claims expands and States play a more active role in their economies.⁵⁶

53. See Wai, *supra* note 51, at 218, 220-29 (arguing that the traditional regulatory function of private international law may be obscured by a misleading identification with parochialism).

54. Buxbaum, *supra* note 10, at 1.

55. Cremades & Cairns, *supra* note 9, at 205.

56. See *id.* at 205-06. The authors reason as follows:

A frequent criticism of trade liberalization and globalization has been that it involves a ‘race to the bottom’ in terms of environmental and labour standards and, given the profile of these concerns through the activities of NGOs and anti-globalization groups, a party to an arbitration who is guilty of exploitative practices in these areas might well face resistance to the enforcement of an award on public policy grounds. . . . Some nations may already, or may in the future, consider certain minimum environmental standards to be part of their

III. LEGAL BACKGROUND

A. *Enforcement of International Awards and Public Policy*

The New York Convention,⁵⁷ which has just passed its 50th anniversary, exerts a powerful and harmonizing influence on international arbitration through its focus on two vital arbitral elements: establishing the legal validity of agreements to arbitrate⁵⁸ and providing for the recognition and enforcement of arbitral awards.⁵⁹ Regarding the latter, the Convention raises a strong presumption of enforceability of international awards. In particular, Article III of the Convention requires that each contracting State “shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the

public policy. Similarly, the protection of public health or cultural sites forming part of the patrimony of humanity might in future achieve preference over *pacta sunt servanda* in the hierarchy of modern international public policy. . . . Further, it seems likely that human rights law will have a profound impact on the definition of public policy in the future. . . . The protection of children from economic exploitation would, in many nations, be considered part of their ‘basic notions of morality and justice’ and arguably forms part of transnational public policy. The fact that a successful party in an international arbitration was, or might be, guilty of the economic exploitation of children might raise a delicate factual question for the enforcement court of the degree of connection between the economic exploitation and the contract which was subject of the arbitration, but it seems undeniable that a human rights abuse could, in an appropriate case, justify a refusal of the enforcement of an award.

Id.

57. See New York Convention, *supra* note 6.

58. See *id.* Article II.1 of the Convention addresses the validity of arbitration agreements, providing in relevant part:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

59. After the Conference for the New York Convention ended in June 1958, the drafters issued a Mission Statement to indicate what they hoped to achieve through the Convention: “Worldwide simple enforcement of arbitral awards.” See Fali S. Nariman, President, International Council for Commercial Arbitration, *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*, at 10, United Nations No. E.99.V.2, ISBN 92-1-133609-0 (1998). Catherine Rogers writes that:

[t]o accommodate the need for neutrality, effectiveness, and party control, the international arbitration system delicately calibrates the allocation of power among national legal systems and courts, parties, arbitral institutions, and arbitral tribunals. What makes arbitration so effective is that nation-states provide support for the system in terms of enforcing party-drafted arbitral agreements and awards rendered pursuant to those agreements.

Catherine Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J INT’L L. 1, 15 (2003).

territory where the award is relied upon.”⁶⁰ Through Article III and the related Articles IV, V, VI, and VII, the Convention “constitutes the backbone of the international regime for the enforcement of foreign awards,”⁶¹ and establishes a “pro-enforcement bias.”⁶²

Judicial recognition and enforcement of an arbitral award is necessary when one of the parties to arbitration fails to comply voluntarily with the requirements of an award. At this stage, the parties leave the “private sphere” of arbitration and turn to the public courts, where one party may seek the court’s coercive power to enforce performance of the award, while the other (losing) party may request court assistance to resist enforcement.⁶³ It has been noted that by seeking State recognition and enforcement, “[a] private act is being empowered by a public act, a judgment of a state court.”⁶⁴

For the party seeking to resist enforcement, Article V of the Convention provides seven well-known grounds for which recognition and enforcement of the international award *may* be refused.⁶⁵ Among these grounds, Article V.2(b) provides that recognition and enforcement may be refused “if the competent authority in the country where

60. New York Convention, *supra* note 6. Article III provides in the same paragraph that “[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” *See id.*

61. JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 693 (2003). The authors highlight that the Convention has received praise for being the “most effective instance of international legislation in the history of commercial law.” *Id.* at 694 (quoting Lord Mustill, *Arbitration: History and Background*, J. INT’L ARB. 43, at 49 (1989)).

62. Albert Jan van den Berg, *An Overview of the New York Convention of 1958*, International Council for Commercial Arbitration, at 13 (June 6, 2008), *available at* www.arbitration-icca.org.

63. LEW, MISTELIS & KRÖLL, *supra* note 61, at 689. “Enforcement” is normally achieved through a judicial decision giving effect to the requirements of an award. It is more than mere recognition and can act as a “sword” to compel compliance by imposing legal sanctions—such as seizure of property or freezing bank accounts—should a party fail or refuse to comply voluntarily. *Id.* at 691.

64. *Id.* at 689.

65. van den Berg, *supra* note 62, art. V. Albert Jan van den Berg observes that there are three key features concerning the grounds under Article V for refusal of enforcement of an award. First, the grounds of refusal mentioned in article V are exhaustive. Second, the court before which enforcement of a Convention award is sought may not review the merits of the award, because mistake of fact or law is not included among the grounds enumerated in Article V. Third, the party against whom enforcement of the award is sought has the burden of proving the grounds for enforcement. Indeed, van den Berg states that it is “arguable that in a case where a ground for refusal of enforcement is present, the enforcement court nevertheless has a residual discretionary power to grant enforcement in those cases in which the violation is *de minimis*.” *See* van den Berg, *supra* note 62, at 13-14.

recognition and enforcement is sought” finds that “the recognition or enforcement of the award would be contrary to the public policy of that country.” This article refers, in particular, to the public policy of the forum of enforcement: “the public policy of *that country*.”⁶⁶ The drafters of the Convention thus did not seek to harmonize public policy or establish a common international standard. 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,”⁶⁷ thus endorsing a narrow concept for public policy.

B. Public Policy under Article V.2(b)

As recently as April 2002, the ILA Final Report observed that “[f]ifty years on, public policy remains the most significant aspect of the Convention in respect of which . . . discrepancies might still exist.”⁶⁸ Another prominent author has written, similarly, that the public policy exception is “[o]ne of the most significant, and most controversial, bases for refusing to enforce an international arbitral award.”⁶⁹ As noted above,⁷⁰ public policy, by nature, is a dynamic and evolving concept—this characteristic therefore limits, to a degree, predictability in its application.⁷¹ In addition, the public policy defense of Article V.2(b) constitutes an acknowledgement of the ultimate right of State courts to determine what constitutes public policy within their jurisdictions.⁷² However, despite lack of definition to the concept and the diversity of State courts that may consider its application, the ILA Final Report suggests that Article V.2(b) “has not given rise to any serious mischief and attempts to resist enforcement on grounds of public policy have been rarely successful.”⁷³

66. New York Convention, *supra* note 6, art. V.2(b). As discussed below (*see infra* Part V.B), I argue that the fundamental public policy—not only of the enforcement forum, but also at the place with the closest connection to the underlying contract—should be considered by the reviewing court.

67. *Report of the Committee on the Enforcement of International Arbitral Awards*, U.N. Doc. E/2704 and E/AC.42/4/Rev.1 (Mar. 28, 1955). For comments from governments in response, see U.N. Doc. E/2822 (Jan. 31, 1956).

68. Mayer & Sheppard, *supra* note 2, at 254.

69. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 815 (2d ed. 2001).

70. *See supra* note 14 and accompanying text.

71. *See* Mistelis, *supra* note 13, at 252.

72. Mayer & Sheppard, *supra* note 2, at 255.

73. *Id.*

Courts have refrained from imposing idiosyncratic legal conceptions or parochial national interests when reviewing the merits of an award.⁷⁴ Indeed, a deferential approach for review has been adopted by the courts in many countries, informed in large part by the public policies of party autonomy, efficiency, predictability, and finality.⁷⁵ Many courts set a high bar, such as the well-known standard expressed by the Second Circuit Court of Appeals in *Parsons & Whittemore Overseas v. RAKTA*, to the effect that a foreign award should be denied “only where enforcement would violate the forum state’s most basic notions of morality and justice.”⁷⁶ Similarly, in England, another leading jurisdiction for arbitration, the courts require that “enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of [the] public on whose behalf the powers of the state are exercised.”⁷⁷ So too, the ILA Report, discussed below, provides a detailed articulation of “international public policy” grounds, grouping them as procedural or substantive and further classifying each, but nevertheless maintains that an enforcement court may upset the finality of an international award only “in exceptional circumstances.”⁷⁸ Thus, although at first glance, public policy “appears to open an exception broad enough to swallow the Convention itself,” in practice it has been interpreted “exceedingly narrowly.”⁷⁹ Arbitration has prospered under

74. See Arfazadeh, *supra* note 5, at 48.

75. Albert Jan van den Berg, *Why are Some Awards Not Enforceable?*, in *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND*, *supra* note 12, at 291, 291, 309 (regarding the public policy bar, van den Berg writes that “[t]he public policy defence rarely leads to a refusal of enforcement”); Arfazadeh, *supra* note 5, at 48 (noting that “the past several decades have witnessed a coordinated international effort aimed at reducing the available grounds for challenging an international arbitral award to a set [of] uniform standards, applicable in both setting aside and enforcement proceedings”); Rogers, *The Vocation of the International Arbitrator*, *supra* note 16, at 996 n.135 and accompanying text. While anecdotal evidence suggests that the great majority of international awards are complied with, recently there has been more searching empirical investigation into this question in relation to voluntary compliance and court-ordered enforcement, an investigation which bears on the debate concerning the role of public policy and mandatory public law rules that might arise at a stage of court intervention. See Quentin Tannock, *Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards*, 21 *ARB. INT’L* 71, 82-87 (2005); Christopher R. Drahozal, *Of Rabbits and Rhinosceri: A Survey of Empirical Research on International Commercial Arbitration*, 20 *J. INT’L ARB.* 23 (2003).

76. *Parsons & Whittemore Overseas v. RAKTA and Bank of America*, 508 F.2d 969, 974 (2d Cir. 1974).

77. See *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co.*, 2 Lloyd’s Rep. 246, 254 (1987).

78. Mayer & Sheppard, *supra* note 2, at 250.

79. Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, *supra* note 41, at 129.

public policy's protective shadow, which casts the latent threat of court supervision and constraint.⁸⁰

While a deferential standard prevails for the public policy defense, it should be recalled that the New York Convention was drafted well before the expansion in the scope of arbitrable claims.⁸¹ Traditional restrictions on arbitrability, which excluded sensitive public law matters from arbitration, served as justification for a narrow interpretation under the Convention's Article V(2)(b).⁸² However, with the expansion in arbitral claims, the public policy defense has attracted attention as a potential counterbalance to arbitrability:⁸³ that is, conditioning the court's intervention at an early stage to uphold an arbitration agreement on the prospect of eventual court review under public policy arising at the later stage of enforcement. Thus, when the U.S. Supreme Court in *Mitsubishi* permitted arbitration of antitrust claims, "it hedged its decision by announcing the so-called Second Look doctrine, which postulates that courts would still be able to protect U.S. regulatory interests through the public policy exception."⁸⁴ One leading commentator has gone so far as to state that "the availability of the public policy exception is what justifies allowing claims that involve public policy to be arbitrable in the first instance."⁸⁵ Several commentators now question whether—with the tearing down of the *ex ante* filter of arbitrable subject matter under Articles II.1 and V.2(a)—a more nuanced approach is needed under the public policy defense, one

80. See Arfazadeh, *supra* note 5, at 45 ("As it turns out, however, the development of international arbitration has not been hampered by the public policy exception. If anything, international arbitration has largely prospered under its protective shadow.")

81. Kleinheisterkamp, *supra* note 11, at 22.

82. See New York Convention, *supra* note 6. Article II.1 provides that New York Convention members shall recognize arbitration agreements concerning "a subject matter capable of settlement by arbitration." Correspondingly, Article V.2(a) provides, at the enforcement stage, that recognition and enforcement may be refused if a competent court finds that "[t]he subject matter of the difference is not capable of settlement by arbitration under the law" of the country where enforcement is sought.

83. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, *supra* note 41, at 366.

84. *Id.* The Court stated that "[w]hile the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985). However, the Court added in the well-known footnote 19 that, "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19.

85. See Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, *supra* note 41, at 366 n.150 (citing GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (forthcoming 2009) (manuscript at 330)).

which might permit a level of review that is appropriate to the nature of the claim and that does not “disparage the legislative value judgments inherent in [a] forum’s catalogue of laws of mandatory application.”⁸⁶ Following this line of reasoning, the focus shifts from the question of arbitrability when considering whether to enforce an arbitration agreement, to subsequent stages for tribunals and courts: (i) how mandatory public law should be dealt with during the arbitration proceedings, and (ii) not only whether mandatory law should be regarded as within the scope of the public policy defense at enforcement, but also which State’s rules may be considered. The next section reviews the existing debate on the first point, as well as several contradictory court decisions with respect to the second.

IV. THE CHALLENGE OF MANDATORY PUBLIC LAW

With the expansion in the scope of arbitrable subject matter, mandatory public law issues pose new challenges for international commercial arbitration.⁸⁷ Indeed, these issues arise with increasing frequency in arbitral proceedings.⁸⁸ While public policy, according to the well-worn metaphor, has been referred to as an “unruly horse,”⁸⁹

86. Buxbaum, *supra* note 10, at 27. See Arfazadeh, *supra* note 5, at 52 (noting that “the proper implementation of public policy rules necessitates an elaborate scheme of mutual support and coordination among arbitrators and (foreign) judges in a complex decision-making process on the extraterritorial scope of application of public policy rules”); see also Kleinheisterkamp, *supra* note 11, at 22-23.

87. Most public law claims are now capable of being arbitrated and “[n]ational court decisions expanding the arbitrability of public law claims leave open a cluster of complex issues that are only now beginning to be addressed in international arbitration.” GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 283-84 (2001); see also Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 *DUKE L.J.* 1279, 1281-82 (2000) (“The expanded role of arbitration . . . has challenged the legal system’s efforts to ensure that certain legal rules apply even when parties seek to contract around them.”); Arfazadeh, *supra* note 5, at 51 (“The impact of mandatory rules of law must be seen as one of the most burning issues in international commerce and trade, as it is in daily international arbitration practice.”).

88. BORN, *supra* note 87, at 559, 565 (“Issues of public policy have arisen with increasing frequency in international arbitration in recent years. That is in part due to expanding notions of arbitrability.” Born suggests that “it takes a pedestrian lawyer to fail to find some basis for invoking ‘public policy’ or statutory claims in most moderately complex commercial disputes. Contemporary legislative protections in many countries are sufficiently open-textured that competent lawyers can often legitimately (and effectively) introduce them into a contractual dispute.”). See also Marc Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 *J. INT’L ARB.* 23, 23 (1997) (stating that “a substantial growing percentage of cases are affected by the interference of mandatory rules of law,” raising “one of the most difficult questions with which an arbitrator may be confronted in more than 50 percent of cases”).

89. In *Richardson v. Melish*, (1824) 130 Eng. Rep. 294, the court referred to public policy as “a very unruly horse, and once you get astride it you never know where it will

public law issues now add a new segment to that testing ride—the arbitration proceedings themselves. As one commentator puts it

quite ironically, the widening scope of subject matter arbitrability has placed arbitrators in the saddle of the “unruly horse,” entrusting them with the primary task of deciding when and if a particular mandatory or public policy rule should be allowed to interfere with an international dispute or transaction, and determining the legal consequences of any such interference.⁹⁰

In section A below, I define mandatory public law and review relevant dimensions of the debate concerning the role of mandatory public law in arbitration, while in section B, I look at several English and U.S. court decisions that have taken somewhat inconsistent positions on whether to consider the public policy (and embedded mandatory rules) of a foreign state where the contract was performed.

A. *Debate About the Role of Mandatory Public Law in Arbitration*

There are at least four areas of active debate with respect to the role of mandatory public law in arbitration: (i) should such claims be arbitrable at all; (ii) what is the authority of an arbitral tribunal to entertain public law claims, particularly if the law implicated is not the law of the contract as chosen by the parties; (iii) will the tribunal properly apply the mandatory law and have proper incentive to do so; and (iv) what should a supervising court do in terms of the scope of public policy review for these issues either at the stage of annulment⁹¹ or enforcement? Much of the debate has been addressed elsewhere and my

carry you. It may lead you from sound law. It is never argued at all, but where other points fail.”

90. See Arfazadeh, *supra* note 5, at 45.

91. There is also a long-standing debate about whether public policy (procedural or substantive) should be considered at all in court proceedings to annul an award at the seat of arbitration, and what impact such an annulment should have on a subsequent attempt to enforce an international award. See, e.g., Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT’L ARB. 451 (2000); Park, *supra* note 1, at 821; Jan Paulsson, *The Case for Disregarding LSAS (Local Standard Annulments) Under the New York Convention*, 7 AM. REV. INT’L ARB. 99 (1996). Article V.1(e) of the New York Convention provides that a court may refuse to enforce a foreign award if it “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” Unlike the UNCITRAL Model Law, however, the Convention provides no standards for annulment and this provision has been criticized for allowing local standards of enforcement. UNCITRAL MODEL LAW ON INT’L COMM. ARB. § 34 (1985). See Paulsson, *supra*. These issues are beyond the scope of my essay, although my view favors (i) eliminating any ground for substantive public policy review by an annulment court, and (ii) permitting an enforcement court a greater degree of discretion when considering whether to give effect to a prior judgment setting aside an award.

purpose is not to enter into a lengthy discussion of the first three issues.⁹² I review them only as considerations to be weighed when assessing the fourth point, the appropriate scope of review for public policy at the stage of enforcement.

Before proceeding further, it is useful to define “mandatory public law.” The term often refers to those rules of law that cannot be derogated from by private parties in the exercise of their party autonomy.⁹³ Donald Donovan has explained that mandatory rules are those that “arise outside the contract, apply regardless of what the parties agree to, and are typically designed to protect public interests that the state will not allow the parties to waive.”⁹⁴ With respect to one category of mandatory rules increasingly implicated by international trade and commerce—mandatory economic regulation—another author states that “the very purpose of most mandatory economic regulatory legislation is to constrain private commercial activity in ways believed essential to the greater public good.”⁹⁵ For our purposes, the task in the arbitration context is, in the first instance, for the arbitral tribunal to determine whether such rules can and should be applied to the issues in dispute and subsequently, at the stage of enforcement, for the supervisory court to

92. See generally George A. Bermann, *Introduction: Mandatory Rules of Law in International Arbitration*, 18 AM. REV. INT'L ARB. 1 (2007) (introducing a special issue of the American Review of International Arbitration, which addressed the role of mandatory rules of law in international arbitration and contains articles from leading academics and practitioners who took part in a 2007 workshop organized by Columbia University Law School and Queen Mary University of London); Blessing, *supra* note 88; Alexander K.A. Greenawalt, *Does International Arbitration Need a Mandatory Rules Method?*, 18 AM. REV. INT'L ARB. 103 (2007); Guzman, *supra* note 87; Catherine Kessedjian, *Mandatory Rules of Law in International Arbitration: What are Mandatory Rules?*, 18 AM. REV. INT'L ARB. 147 (2007); Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NW. U. L. REV. 453 (1999); William Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOK. J. INT'L L. 629 (1986); Alan Scott Rau, *The Arbitrator and ‘Mandatory Rules of Law,’* 18 AM. REV. INT'L ARB. 51 (2007); Audley Sheppard, *Mandatory Rules in International Commercial Arbitration: An English Law Perspective*, 18 AM. REV. INT'L ARB. 121 (2007); Hans Smit, *Mandatory Law in Arbitration*, 18 AM. REV. INT'L ARB. 155 (2007).

93. See Bermann, *supra* note 92, at 1; Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELB. J. INT'L L. 205 (2005); Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L 274, 275 (1986).

94. Donald F. Donovan & Alexander K.A. Greenawalt, *Mitsubishi after Twenty Years: Mandatory Rules before Courts and International Arbitrators*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 1, 13 (Loukas Mistelis & Julian Lew eds., 2006).

95. McConnaughay, *supra* note 92, at 495. As Andrew Guzman states, “[c]oncern for the externalization of costs or the protection of those who cannot protect themselves . . . can justify the use of mandatory legal rules.” Guzman, *supra* note 87, at 1284.

determine whether they merit inclusion in the public policy defense because of their fundamental and imperative nature. The exercise involves “gaug[ing] the strength and depth of the attachment of the legal system in question to the values that the rule of law is thought to embody.”⁹⁶ Under this understanding of the term, one can question whether there is sound basis for a court at the place of enforcement to look to its own national conception of public policy, yet categorically turn a blind eye should enforcement of the award violate mandatory rules of law that are a constituent part of public policy in the foreign state where the contract was actually performed and has its greatest impact. As we develop a truly international civilization of arbitration and face new challenges generated by globalization, reviewing only the local norms of public policy (at the place of enforcement) would appear myopic.

Of course, the first point of debate on these issues reflects a view that mandatory public law questions should not be arbitrable in the first place. Hans Smit writes nostalgically that “[i]n the good old days, arbitrators did not adjudicate issues of mandatory law. These were within the exclusive jurisdiction of the competent public authorities.”⁹⁷ He argues that there has been insufficient consideration of the fundamental differences between judicial and arbitral adjudication, and a more nuanced approach is necessary under which certain material issues of mandatory law should be ruled inarbitrable and referred to the courts.⁹⁸ Others likewise would appear to prefer excluding these issues from international arbitration, or at least voice concern that their inclusion will challenge the system.⁹⁹ In my view, the current state of economic globalization, and the close interplay between private international transactions and regulation, does not realistically permit siphoning off relevant public law issues to the courts.¹⁰⁰ Such an

96. Bermann, *supra* note 92, at 5.

97. Smit, *supra* note 92, at 155.

98. *Id.* at 157.

99. Thomas E. Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 VAND. J. TRANSNAT'L. L. 263, 297-98 (1986) (“If such fundamental issues as antitrust matters (and RICO claims) can be submitted to arbitration, what possible limits could there be to the reach of arbitrability in the international . . . context? The confusing and potentially dangerous shift of domestic public law concerns to the enforcement stage is likely to be ineffectual, destined to act as the shadow of a safeguard rather than a genuine means of protection. . . . The court’s rush to eradicate all national legal constraints not only compromises legitimate national concerns, but also threatens the integrity of international arbitral adjudication itself. . . .”); McConnaughay, *supra* note 92, at 523 (“Unfortunately, the best solution to this problem—the complete restoration of international commercial arbitration to the scope of private contractual prerogative—also is the least likely.”).

100. See Arfazadeh, *supra* note 5, at 52.

approach, similar to questions of fraud in the inducement that, in years past (before the severability doctrine), might have called into question the validity of an arbitration agreement, would cause significant cost, delay, and confusion, thereby bringing arbitration to its knees. Instead, the modern trend favoring an open approach to the arbitrability of public law issues is warranted, enabling the parties to obtain access to neutral and efficient dispute resolution procedures. Moreover, as discussed below in relation to the second point of debate, permitting these public law issues to be resolved in arbitration is in accord with the principle of party autonomy: that is, the parties have chosen the arbitral forum and should have the opportunity for these questions to be adjudicated there.

When an arbitral tribunal entertains mandatory public law claims or defenses, questions can arise as to the tribunal's authority to deviate from the parties' agreement, particularly if the law implicated is not the law of the contract as chosen by the parties.¹⁰¹ As the argument goes, because arbitration is consensual, arbitral authority must derive from the contractual relationship between the parties and thus the tribunal has no basis to consider a foreign mandatory rule. The modern trend of analysis, however, focuses on the language of the arbitration clause to determine whether such mandatory rules can be considered, even when they originate from a jurisdiction other than that of the choice-of-law.¹⁰² These clauses often sweep more broadly than the choice-of-law clauses contained in the same contracts, to encompass disputes that the governing law clause does not encompass.¹⁰³ For example, an arbitration clause providing that the parties agree to arbitrate all disputes "arising out of or in connection with" the contract is broad enough to encompass non-contractual public law claims,¹⁰⁴ even those of a nation other than the jurisdiction of the chosen law.¹⁰⁵ One can interpret the parties' intent

101. BORN, *supra* note 14, at 560; Bermann, *supra* note 92, at 8.

102. *See, e.g.*, BORN, *supra* note 14, at 566; Greenawalt, *supra* note 92, at 103-04.

103. Bermann, *supra* note 92, at 12, 20.

104. This language is taken from the International Chamber of Commerce's suggested arbitral referral clauses. International Chamber of Commerce, *ICC Standard and Suggested Clauses for Dispute Resolution Services*, <http://www.iccwbo.org/court/arbitration/id4114/index.html> (follow "English" hyperlink) (last visited Mar. 14, 2009).

105. Greenawalt, *supra* note 92, at 115 ("The critical point is that arbitrators facing this standard pairing of broad arbitration provision and narrow choice-of-law clause need not limit their consideration of mandatory rules to those arising under the parties' chosen contractual law. . . . This logic applies most clearly to non-contractual claims. . . . A true conflict between the parties' agreement and consideration of mandatory law may not arise, in other words, unless an arbitrator faces a rare instance in which the contract expressly excludes consideration of mandatory law."). Indeed, the Supreme Court in *Mitsubishi* expected the arbitral tribunal in Japan to address United States antitrust claims, despite the parties' choice of Swiss law. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

as a desire to have all such claims adjudicated in the arbitration. In addition, some arguments in favor of applying public mandatory law grow out of a conception of the arbitral tribunal as having a more public role, which must recognize the values underlying truly mandatory rules of law, whatever their source.¹⁰⁶

The third area of debate presents issues as to which there is the greatest divergence of opinion, and presents credible justification for a degree of properly grounded court supervision. The concern here is not only whether the tribunal will apply the mandatory law correctly, but whether it will have adequate incentive to do so. Catherine Rogers makes the case that disputes involving mandatory rules may be addressed effectively in the arbitral forum,¹⁰⁷ that arbitrators do have incentive to address such rules,¹⁰⁸ and that addressing these rules in arbitration will improve the effectiveness of their enforcement.¹⁰⁹ However, a number of commentators raise concerns in relation to each of these grounds, particularly where parties actively seek to contract around mandatory rules.¹¹⁰ Aside from the complexity introduced by such rules, there is concern that international arbitrators will not have the proper perspective,

106. Bermann, *supra* note 92, at 58.

107. Rogers, *The Vocation of the International Arbitrator*, *supra* note 16, at 995-96 (“Not only does international arbitration incidentally encounter these socially important claims, it adjudicates claims involving transnational applications of mandatory law more often, and arguably more effectively, than domestic national courts.”).

108. Stating a reason that reinforces my concern for the incentives provided by judicial review that considers relevant public policy, Rogers indicates that “to protect the integrity of their own work product, arbitrators can, and often do, apply foreign mandatory law if failure to acknowledge it could interfere with the enforceability of the final award.” *Id.* at 998; *see also* Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 VA. J. INT’L L. 647, 668 (1999) (“The evidence suggests that international arbitrators are deeply concerned about their reputation for respecting mandatory rules.”).

109. Rogers, *The Vocation of the International Arbitrator*, *supra* note 16, at 996 (“[A]necdotal evidence suggests that international arbitration is doing a reasonably robust job of enforcement in individual cases. Far from completely undermining the public concerns embodied in mandatory rules, international arbitration is capable of ensuring, and at least to some discernable extent does ensure, their vitality.”); *see also* Rogers, *Context and Institutional Structure in Attorney Regulation*, *supra* note 59, at 17-18 (“[O]ne nation’s assertion that particular law is mandatory does not necessarily make it inescapable if another nation adjudicates the case. There are . . . inherent limitations in applying and enforcing mandatory law regarding extraterritorial and international conduct. By contrast, arbitral awards enjoy a much higher degree of international enforceability than U.S. judgments, particularly judgments involving mandatory law claims. Permitting arbitrators to apply mandatory law is important not just to ensure the functioning of the international arbitration system, but also to ensure the effective enforcement of national mandatory laws in the international context.”).

110. Guzman, *supra* note 87, at 1282-85; *see also* LEW, MISTELIS & KRÖLL, *supra* note 61, at 732 (“However, it would be clearly wrong if by carefully drafting an arbitration clause and choosing its governing law parties could by-pass fundamental and mandatory laws of an otherwise relevant foreign country.”).

training, or motivation to enable their diligent and proper application.¹¹¹ International arbitrators may have no particular interest in or incentive to apply mandatory laws foreign to their own traditions, or they may be reluctant to apply mandatory laws that disfavor the party appointing them.¹¹² Their unfamiliarity with, and potential dislike of, applicable mandatory law may move them to find a reason to avoid applying it, such as exclusion of mandatory law due to choice-of-law rules.¹¹³ Minimal judicial oversight of arbitral awards, or oversight that necessarily precludes consideration of the policies of the State where the contract was performed, may increase tendencies of arbitrators to ignore such mandatory rules.¹¹⁴ All of these factors may contribute to arbitral misapplication or non-application of relevant mandatory law that rises to the level of public policy for purposes of the New York Convention's Article V.2(b).

I do not doubt the capacity and commitment of many international arbitrators to address mandatory public law issues diligently. Given the professionalism and coherent vision permeating the nascent civilization of international arbitration, the modern international arbitrator, as Catherine Rogers has put it, "is not simply an instrumentality of the parties' collective will expressed through the arbitration agreement, but instead an integral part of a larger system that depends, in part, on them performing their role as responsible custodians of that system."¹¹⁵ Nonetheless, the arbitrator faces inherent limits and cannot transform to attain the perspective, grounding, and comprehension of the judge working within the State system. Nor can the arbitrator match the state court for legitimacy in regulating transnational business in view of

111. See Arfazadeh, *supra* note 5, at 60 ("[U]nlike state judges, international arbitrators may lack the 'frame of reference'—the comprehensive legal system usually afforded by a domestic legal order—for judging the 'application worthiness' or the legitimacy of extraterritorial application of public policy rules."); Buxbaum, *supra* note 10, at 9-10.

112. Smit, *supra* note 92, at 158-61.

113. See BORN, *supra* note 87, at 561 ("In general, arbitrators are more cautious than national courts in relying on public policy notions to override a bargained-for choice-of-law agreement.").

114. See Guzman, *supra* note 87, at 1290, 1312. Guzman writes that the "existing rules governing judicial review of arbitral decisions are not only inadequate to ensure that mandatory rules are applied, but they actually encourage arbitrators to ignore such rules." *Id.* at 1281. Guzman would place the focus on the arbitrator by creating an approach he styles "arbitrator liability," in which the losing party in an arbitration could sue the arbitrator on the ground that a mandatory rule was ignored. *Id.* at 1316. While I disagree with this approach, Guzman's analysis generally serves to bring further emphasis to the importance of the public policy defense in international arbitration.

115. Rogers, *The Vocation of the International Arbitrator*, *supra* note 16, at 963; see also Blessing, *supra* note 88, at 39 (the international arbitrator is not simply the obedient servant of the parties; instead, his responsibility goes far beyond).

important societal interests. Further, the arbitrator faces the immediate pressures of the case before him or her, including the parties' stipulation of the governing law to be applied. As discussed above, the civilization of arbitration needs exchange with external (national) groups in order to develop and grow stronger. This can be achieved through supervision from courts as they periodically consider the New York Convention's public policy defense, which should be extended to encompass those fundamental policies at the place of performance of the parties' agreement.

At the same time, economic globalization generates certainty that enforcement of arbitral awards will often be sought in states that are foreign to the place where the contract was performed. While some may call for reconsideration of the deferential standard of review for awards implicating public law issues,¹¹⁶ my proposal steers a different course. Even if refusal to enforce an award is reserved for a court's decision on "exceptional circumstances" in accordance with the ILA Final Report's recommendations,¹¹⁷ there is little justification for refusing to consider the public policy of the state where the transaction has had its greatest societal impact—at the place of performance.¹¹⁸ If the public policy of that nation would extend to embrace certain mandatory public law rules implicated in a particular dispute, they should be considered by the enforcement court. In this way, the proper implementation of public policy can contribute to arbitral civilization through a system of "mutual

116. See Buxbaum, *supra* note 10, at 13-14. If the degree of judicial scrutiny to be applied by a United States court on review of an arbitral award is similar to that discussed by Richard Buxbaum in *Baxter International, Inc. v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003), then I might agree that something more is required, even if refusal to enforce is reserved for "exceptional circumstances." The federal court of appeals in *Baxter*, in relation to an antitrust issue that apparently arose only after the arbitral tribunal had rendered an award finding that respondent had infringed the plaintiff's patent and must cease its relevant U.S. activities, cited *Mitsubishi* to rule that "[t]he arbitral tribunal in this case 'took cognizance of the antitrust claims and actually decided them.' Ensuring this is as far as our review legitimately goes." *Id.* at 832. Of course in this case, the federal court had the opportunity to consider the public policy of the relevant country concerned, the United States, which is the position for which I argue. While no foreign mandatory rules of law were implicated, the court recognizes that "arbitrators are not allowed to command the parties to violate rules of positive law." *Id.* See also McConnaughay, *supra* note 92, at 523 (raising the prospect of "variable judicial review" of international awards, which would involve more searching court scrutiny for public law issues than those arising under private law).

117. See Mayer & Sheppard, *supra* note 2, at Recommendation 1(a); see also *infra* Part V.

118. Of course, one factor to be weighed by an enforcement court is, in the first instance, whether the arbitral tribunal has actually considered and made a decision with respect to the relevant public policy of the place where the contract was performed. The importance of assessing whether the tribunal addressed these issues was explicitly recognized by the U.S. Supreme Court in *Mitsubishi*, 473 U.S. 614, 637-638 (1985).

support and coordination among arbitrators and (foreign) judges in a complex decision-making process on the extraterritorial scope of application of public policy rules.”¹¹⁹

B. Foreign Public Policy and Mandatory Law Considered in the Courts

England and the United States are leading jurisdictions for international arbitration, influencing arbitral law around the world. Yet the courts in these jurisdictions have yet to achieve consistent practice concerning recognition of foreign mandatory public law and the consequences for the public policy defense at the stage of enforcement. The following review shows that courts have taken somewhat inconsistent positions on whether to consider the public policy (and embedded mandatory rules) of a foreign state where the contract was performed. It would appear, however, that the trend is to consider such foreign mandatory rules as insufficient to trigger public policy grounds for refusing to enforce international arbitral awards.

1. England

Three prominent English court decisions, when considering arbitral award enforcement, address public policy concerns stemming from the asserted unlawfulness of the relevant contracts under foreign mandatory law. The case of *Soleimany v. Soleimany*¹²⁰ was the first case in which an English court refused enforcement of an award because of public policy considerations derived from violation of foreign law.¹²¹ A father and son had entered into an agreement to export Persian carpets from Iran.¹²² However, export of the carpets violated Iranian revenue and export controls.¹²³ Once a dispute emerged, arbitration was held before the Beth Din (Court of Chief Rabbi) in London.¹²⁴ The court rendered an award in favor of the son, but the award recited openly that the carpets had been exported out of Iran illegally.¹²⁵ Once it became necessary to seek enforcement of the award, the English Court of Appeal ruled:

An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a

119. See Arfazadeh, *supra* note 5, at 52.

120. *Soleimany v. Soleimany*, [1999] Q.B. 785.

121. See LEW, MISTELIS & KRÖLL, *supra* note 61, at 724.

122. *Soleimany*, [1999] Q.B. at 789.

123. *Id.*

124. *Id.*

125. *Id.* at 790.

foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country. . . . The rule applies as much to the enforcement of an arbitration award as to the direct enforcement of a contract in legal proceedings.¹²⁶

Thus, when illegality comes into play, even under the laws of a foreign country, it would appear that English courts may refuse to recognize an arbitral award. However, shortly after the decision in *Soleimany*, the English Court of Appeal in *Westacre Investment, Inc. v. Jugoimport-SP-DR Holdings*¹²⁷ ruled on similar issues, yet in a different direction. In the face of a challenge that enforcement of the award would violate English public policy because the underlying contract involved paying bribes to Kuwaiti officials for personal influence and would have been contrary to the public policy of Kuwait, the English court nonetheless enforced the award. The fact that the issue of illegality had been considered and rejected by the arbitral tribunal (and then by the Swiss Federal Court) was enough to persuade the English court.¹²⁸ Moreover, the relevant agreement was governed by Swiss law, the arbitration had been located in Switzerland, and enforcement of the award did not violate Swiss public policy.¹²⁹ This decision signals a shift back toward greater deference to the arbitral award (and the parties' choice of governing law), even in view of potential violation of foreign mandatory rules.

In the third case, *Omnium de Traitement et de Valorisation S.A. v. Hilmarton*,¹³⁰ the English Court of Appeal again enforced an award although, on its face, the award indicated that the underlying consultancy contract violated Algerian law at the place of performance.¹³¹ In this case, too, the governing law chosen by the parties was Swiss law and the arbitrator determined that, as a matter of Swiss law, the contract in issue was not unlawful.¹³² The English court indicated that "[i]t may well be that an English arbitral tribunal, chosen by the parties, and applying English law as chosen by the parties, would have reached a different

126. *Id.* at 803-04.

127. *Westacre Investment, Inc. v. Jugoimport-SP-DR Holdings*, [2000] Q.B. 288.

128. *Id.* at 316.

129. *Id.* at 316-17.

130. *Omnium de Traitement et de Valorisation S.A. v. Hilmarton*, [1999] 2 Lloyd's Rep. 222 (Q.B.) (U.K.).

131. *Id.* at 223. Specifically, the law that prohibited intervention by middlemen in connection with any public contract or foreign trade agreement. *Id.*

132. *Id.* at 224. The award sought to be enforced in the English courts was actually the second award made in the arbitration. The first award was challenged and reversed by the Swiss Supreme Court. Following reversal, a newly appointed arbitrator considered himself bound by the decision of the Swiss Supreme Court.

result.”¹³³ However, the court stopped short of further inquiry, stating that it was “not adjudicating upon the underlying contract,” but instead deciding only whether

an arbitration award should be enforced in England. In this context it seems to me that (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point. Indeed, the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration.¹³⁴

Thus, the English court enforced an award that was not contrary to the public policy of the governing law (Swiss) or the law at the place of the arbitration (also Swiss), even though the underlying contract was unlawful in the country of performance (Algeria).

2. United States

Several cases in the United States demonstrate a similar approach to issues of foreign mandatory law and public policy. Even if the foreign public policy is in conflict with an arbitral award, and even if the foreign jurisdiction has a close relationship to the parties’ transaction, U.S. courts are reluctant to refuse enforcement of an arbitral award.

In *Northrop Corporation. v. Triad International Marketing S.A.*,¹³⁵ the Ninth Circuit Court of Appeals refused to consider the law of a foreign jurisdiction in determining whether there had been a violation of public policy.¹³⁶ The court of appeals ruled that, despite a Saudi Arabian regulation which rendered illegal in that country an existing military contract for payment of commissions to an agent, the marketing agreement remained enforceable under governing California law as chosen by the parties.¹³⁷ The court noted that the party resisting enforcement had raised the public policy defense. However, the court focused exclusively on the law of California to analyze the circumstances.¹³⁸ In other words, the court gave complete deference to the parties’ choice of law, without inquiring whether the Saudi regulation should be regarded as fundamental “public policy” of that country.¹³⁹

133. *Id.*

134. *Id.*

135. 811 F.2d 1265 (9th Cir. 1987).

136. *Id.* at 1271.

137. *Id.*

138. *Id.* at 1270.

139. In response to the appellant Northrop’s argument that the relevant agreement violated Saudi public policy, the court found that such an argument “flies in the face of the parties’ agreement that the law of California, not Saudi Arabia, would determine the

Northrop was decided more than 20 years ago and the court apparently viewed the public policy question as inextricably related to an issue of arbitrability. Specifically, with respect to principles of California law that prohibited enforcement of a contract where performance would be illegal under the law of a foreign country, the court stated that if “the statutory codification of such rules of contract law were regarded as *converting them into principles of public policy cognizable only in the courts*, the capacity of arbitrators to resolve contract disputes would be seriously diminished.”¹⁴⁰

In another well-known case, *Laminions-Trefileries-Cableries de Lens, S.A. v. Southwire Company*,¹⁴¹ the federal district court considered the public policy of the relevant enforcement state, the United States. The court ruled that the imposition of excess interest rates, even though in accordance with French foreign law, violated applicable United States public policy against the imposition of penal interest rates.¹⁴² The domestic public policy thus prevailed over the French foreign law.

Perhaps the case that comes closest to refusing enforcement of an arbitral award due to foreign mandatory rules is *Victrix S.S. Company, S.A. v. Salen Dry Cargo A.B.*¹⁴³ The federal court of appeals refused to enforce both a London arbitration award (attaching assets) and a related English court judgment due to connected Swedish bankruptcy proceedings. Upon examining the Swedish bankruptcy law and satisfying itself that the law was similar to United States bankruptcy law, the federal court determined that enforcement of the London arbitration award and British court judgment would conflict with the public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt company.¹⁴⁴ In the end, the court considered that the public

validity and construction of the contract.” *Id.* at 1271. The Saudi law had been enacted in an attempt to root out corruption and bribery in military contracts.

140. *Id.* (emphasis added). It is significant to note that in court litigation involving some of the same parties and similar arms dealings in Saudi Arabia, a federal district court in New York, in the face of the parties’ forum selection clause stating that the relevant marketing agreement would be governed by New York State law, nonetheless ruled that effect must be given to the Saudi law prohibiting payments of any agent’s fees in connection with the sale of armaments. *Triad Fin. Establishment v. Tumpene Co.*, 611 F. Supp. 157 (D.C.N.Y. 1985). The district court reasoned that “[i]n view of the significant connection to Saudi Arabia, the fundamental Saudi policy against agent’s fees in military contracts, and the negligible relation between this case and New York, the court finds that Saudi Arabian law should apply.” *Id.* at 164.

141. 484 F. Supp. 1063 (N.D. Ga. 1980). One can ask why an enforcement court should, when reviewing an arbitral award, reach a contrary conclusion by deferring completely to the parties’ choice-of-law instead of recognizing “fundamental Saudi policy.”

142. *Id.* at 1069.

143. 825 F.2d 709 (2d Cir. 1987).

144. *Id.* at 714.

policy of the United States would be best served by recognizing the Swedish proceedings (and Swedish rules of bankruptcy) and thereby facilitating the orderly and systematic distribution of the assets.

Finally, in a more recent case, *Telenor Mobile Communications v. Storm LLC*,¹⁴⁵ the federal district court analyzed whether, in response to a public policy challenge against enforcement of an award, it was required to consider relevant foreign (Ukrainian) law as expressed through the judgment of the Ukrainian courts.¹⁴⁶ The court observed that, in New York State, “while the existence of a public policy against enforcement of arbitral awards that compel a violation of [foreign] law is unclear,” the award should nonetheless be enforced because of the well established federal public policy in favor of arbitration and evidence that the Ukrainian court judgments in question were obtained through collusion.¹⁴⁷

These decisions of the English and United States courts reveal a strong policy in favor of enforcing international arbitration awards, as well as a reluctance to uphold public policy challenges based on violation of foreign mandatory rules of law. The courts have exercised deference in two ways. First, in relation to the arbitral tribunals’ decisions on these issues and, second, in relation to the parties’ choice of governing law, which guides the discretion of the arbitral tribunals in the first place. In several cases it is clear that the arbitral tribunal was aware of the conflict between choice-of-law and mandatory law,¹⁴⁸ yet was guided by the parties’ choice-of-law. Favoring the parties’ choice-of-law over certain mandatory rules may permit the parties to circumvent such rules, even while the contractual activities have impact within the relevant State. To the extent that parties’ choice-of-law limits consideration during the arbitration of mandatory rules at the place of performance, a court’s review of public policy grounds should be more searching. There is obviously tension between giving due regard to an arbitral award and considering such mandatory rules. As discussed above, the court is, however, in a unique position to contribute in this way to the civilization of arbitration. The courts can support international arbitration by tempering its insular impulses that, in the long run, could become self-defeating when too little heed is paid to the legitimate concerns of the states that use the system.

145. 524 F. Supp. 2d 332 (S.D.N.Y. 2007).

146. *Id.* at 356-58.

147. *Id.* at 358.

148. Value judgments, such as that the mandatory rules in question are of a “protectionist nature,” and may not be helpful. *See, e.g.,* *Omnium de Traitement et de Valorisation S.A. v. Hilmarton*, [1999] 2 Lloyd’s Rep. 222, 224 (Q.B.) (U.K.).

V. THE ILA REPORT, MANDATORY PUBLIC LAW, AND (FOREIGN) PUBLIC POLICY

In this section, I inquire whether the Final Report of the ILA Committee on International Commercial Arbitration is sufficiently responsive to the mandatory public law question and its relation to the concept of public policy, particularly when the law is foreign to the forum of enforcement. As discussed above, there has been active debate and inconsistent court decisions concerning the role of mandatory public law in arbitration proceedings, and these issues can have an impact on the scope of public policy review at the stage of enforcement.

Prior to issuing its Final Report, the ILA Committee conducted a six-year study into the application of public policy by enforcement courts.¹⁴⁹ The ILA Report represents a thorough and modern view of the public policy defense, containing detailed recommendations for which considerable consensus exists among practitioners and academics.¹⁵⁰ The Report reflects professionalism, as well as a coherent international vision and legal system in continuous development by members of the arbitration community. The Report provides an excellent source of guidance for parties, arbitrators, and supervisory courts as they grapple with the concept of the public policy defense. In this manner, the Report is a positive manifestation of the civilization of arbitration. The Report intends to be a reflection of existing practice and explicitly recognizes that tribunals will be faced with issues of public law and public policy during arbitral proceedings. However, the Report does not adequately concern itself with the question of providing proper incentives to the parties and arbitrators to consider public law issues. Such incentives could be provided through the weight of supervisory court review of international awards.

A. *Guiding the Enforcement Court's Discretion by Defining and Cataloging Public Policy*

The ILA Final Report recommendations are intended to guide the exercise of discretion of the enforcement¹⁵¹ court. The Report does this

149. See Mayer & Sheppard, *supra* note 2, at 249; see also Audley Sheppard, *Public Policy and the Enforcement of Arbitral Awards: Should There be a Global Standard?*, 1 TRANSNAT'L DISP. MGMT. 1 (Feb. 2004), available at http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htm. Audley Sheppard served as rapporteur for the ILA Committee on International Commercial Arbitration.

150. The ILA Committee made a number of recommendations, which were adopted at the ILA's 70th Conference in New Delhi, in April 2002. See Sheppard, *Public Policy and the Enforcement of Arbitral Awards*, *supra* note 149, at 1.

151. When I refer to "enforcement" in this section I am also referring to the necessary step of "recognition" that accompanies any court enforcement.

in three ways: first, by emphasizing the exceptional nature of the public policy defense while stressing that the particular public policy principle in any given case must be sufficiently fundamental; second, by cataloging the various elements that fall within the concept of public policy; and third, by specifying the source of law (while excluding other sources) that may be considered when assessing a potential public policy violation.

Recommendation 1(a) of the Final Report provides that the finality of an award should be respected except in “exceptional circumstances.”¹⁵² Recommendation 1(b) adds that “exceptional circumstances” may be found to exist where enforcement of the award would be against “international public policy.”¹⁵³ In recommendation 2(b), the Report states that in order to determine whether a principle forming part of its legal system must be considered sufficiently fundamental to justify refusal to recognize or enforce an award, a court should take into account, on the one hand, the international nature of the case and its connection with the legal system of the forum and, on the other hand, the existence of a consensus within the international community as regards the principle under consideration.¹⁵⁴ An enforcement court should also look to the practice of other courts, the writings of commentators, and other sources to determine the extent to which a principle that is submitted to be fundamental is regarded as fundamental by the international community.¹⁵⁵ The ILA Report thus helpfully encourages grounding the concept of public policy in the developing civilization of arbitration, while courts through their supervision of awards play an important role in defining the concept and regulating exchange with national interests.¹⁵⁶ However, the ILA Report stops short of and, in fact, specifically excludes recommending that enforcement courts look also to the public law and policy at the place with the closest connection to the underlying contract, which as stated above, is the location where the international transaction will have its greatest societal impact.¹⁵⁷

With respect to “international public policy,” the Final Report observes that the legislatures and courts of a number of countries have

152. See Mayer & Sheppard, *supra* note 2, at 250.

153. *Id.*

154. *Id.* at 259.

155. *Id.*

156. Recommendation 1(g) helpfully provides that if a court refuses enforcement, it should set out in detail the method of its reasoning and the grounds for refusing enforcement, which will help promote a more coherent practice and the development of a consensus on principles and rules which may be deemed to belong to international public policy. *Id.* at 257.

157. See *infra* Part V.B.

sought to qualify and restrict the scope of public policy by applying this test.¹⁵⁸ While “no precise definition is possible,” international public policy is considered to be narrower in scope than domestic public policy.¹⁵⁹ International public policy is to be understood in the sense given to it in the field of private international law—that is, that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law, foreign judgment, or foreign award.¹⁶⁰ The ILA Committee considered that this concept was “now sufficiently well-established to be used as the test of enforceability to be used by State courts,”¹⁶¹ and its limiting scope is reflected in the pro-enforcement bias of many national courts. Here again, the ILA Report gives expression to the developing civilization of arbitration. In cataloging the concept, Recommendation 1(d) provides that the international public policy of any State includes:

- (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;¹⁶²
- (ii) rules designed to serve the essential political, social, or economic interests of the State, these being known as “*lois de police*” or “public policy rules”;¹⁶³ and

158. See, e.g., Mayer & Sheppard, *supra* note 2, at 251 (in Algeria, France, Lebanon and Portugal, legislation provides that their public policy is “international public policy,” and a similar approach has been taken by the courts of Italy, Switzerland, Germany and Sweden); see also ILA Committee on International Commercial Arbitration’s, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000), at Part III (Approach of the Courts).

159. See Mayer & Sheppard, *supra* note 2, at 252.

160. *Id.* at 251.

161. *Id.* at 252 n.17.

162. In relation to this point, one can question why a reviewing court’s consideration of public policy should exclude the State that *is* directly concerned with the international business transaction.

The Report states that an example of a substantive fundamental principle is the principle of good faith and the prohibition of abuse of rights. *Id.* at 256. Other examples cited by courts and commentators include: *pacta sunt servanda*; prohibition against uncompensated expropriation; and prohibition against discrimination. *Id.* The category of fundamental principles also includes the proscription of activities that are *contra bonos mores*, such as: piracy; terrorism; genocide; slavery; smuggling; drug trafficking; and paedophilia. *Id.* There is an ongoing debate whether and to what extent the award of unlawful relief (e.g. punitive or exemplary damages) constitutes a violation of international public policy. See Sheppard, *Public Policy and the Enforcement of Arbitral Awards*, *supra* note 149.

163. An example of a public policy rule is an antitrust law. Some ILA committee members disagreed with this part of the recommendation. See Sheppard, *Public Policy and the Enforcement of Arbitral Awards*, *supra* note 149. However, the Committee concluded that there were a number of examples of courts considering antitrust law to be part of public policy. *Id.* Other examples that are often cited are: currency controls; price

(iii) the duty of the State to respect its obligations towards other States or international organizations (e.g., through international treaties).¹⁶⁴

In addition, international public policy can be classified into “substantive” or “procedural” principles.¹⁶⁵ Substantive public policy goes to the recognition of rights and obligations by an enforcement court in connection with the subject matter of the award, as opposed to procedural public policy, which goes to the process by which the dispute was adjudicated.¹⁶⁶

The area in which mandatory public laws or rules have the closest connection to the public policy defense is in respect to (iii) above, *lois de police* or public policy rules. The ILA Report seeks to distinguish a “mere mandatory rule” from a rule that forms part of a State’s international public policy.¹⁶⁷ A mandatory rule is an “imperative rule of law that cannot be excluded by agreement of the parties,” yet inconsistency with such a rule should not, *per se*, be a ground for refusing enforcement of an arbitral award.¹⁶⁸ The Report states that only those mandatory rules which are at the same time *lois de police* may be grounds for refusing enforcement.¹⁶⁹ Recommendation 3(b) is of some help in further elaborating the distinction, providing that

a court should only refuse . . . enforcement of an award giving effect to a solution prohibited by a rule of public policy forming part of its own legal system when: (i) the scope of said rule is intended to encompass the situation under consideration; and (ii) recognition or enforcement of the award would manifestly disrupt the essential political, social or economic interests protected by the rule.¹⁷⁰

By thus giving further definition to the concept of public policy and emphasizing that the State interests must be “essential,” the Final Report delimits the discretion to be exercised by supervising courts.¹⁷¹ My

fixing rules; environmental protection laws; measures on embargo, blockade, or boycott; tax laws; and laws to protect parties presumed to be in an inferior bargaining position (i.e. consumer protection laws. See Mayer & Sheppard, *supra* note 2, at 256.

164. Mayer & Sheppard, *supra* note 2, at 255.

165. *Id.* at 253 (Recommendation 1(c)).

166. See Sheppard, *Public Policy and the Enforcement of Arbitral Awards*, *supra* note 149. As noted above, I do not address or argue for any change in respect of procedural public policy. See *supra* note 2.

167. See Mayer & Sheppard, *supra* note 2, at 261 (Recommendation 3(a)).

168. *Id.*

169. *Id.*

170. *Id.* (Recommendation 3(b)).

171. *Id.* Further guiding the court’s discretion, the Final Report states that when the violation of the relevant rule “cannot be established by a mere review of the award and

difference with respect to this recommendation is that the enforcement court should be permitted to take into account not only rules “forming part of its own legal system,” but also those at the place of performance of the contract.

B. Recognizing Foreign Mandatory Rules as Public Policy

The Final Report provides direction as to the source of law for the fundamental principles that will inform an enforcement court’s concept of substantive or procedural public policy. While the Report recognizes that the State is ultimately entitled to refuse to enforce an award,¹⁷² it recommends that an enforcing court refer only to those “*principles considered fundamental within its own legal system,*” while excluding (i) the law governing the contract, (ii) the law of the place of performance of the contract, or (iii) the law of the seat of the arbitration.¹⁷³ This is the key area in which I disagree with the Final Report, but only in respect to the exclusion of point (ii) above in relation to substantive public policy.

Suggestions were made to the ILA Committee that an enforcing court should consider the public policy of the State where the award was rendered, the governing law of the agreement, or the place of performance of the underlying obligation.¹⁷⁴ However, the “prevailing view [was] that only the public policy of the State where enforcement is sought should be applied.”¹⁷⁵ The Report states that the law governing the contract, the law of the place of performance of the contract, and the law of the seat of arbitration are normally all matters “for the arbitral tribunal to consider.”¹⁷⁶ As discussed above, the arbitral tribunal may be inclined to act in accordance with the parties’ directive and give effect to the choice-of-law in the contract, which itself serves to authorize the tribunal’s jurisdiction. Similarly, the law of the seat of arbitration may be more likely considered during the arbitration, due to questions of arbitrability at the seat, as well as the proximity (and threat) of local court intervention. However, the mandatory law of the place of

can only become apparent upon scrutiny of the facts of the case, the court should be allowed to undertake such a reassessment of the facts.” *Id.* at 262 (Recommendation 3(c)).

172. *Id.* at 253.

173. *Id.* at 258.

174. *Id.* at 254.

175. *Id.* The ILA Report states that the body of principles and rules comprising international public policy should be those of the enforcement State, with the Report referring to the UNCITRAL Model Law and Article V.2(b) of the New York Convention in support of this point. *Id.* at 254. One interpretation is that the Final Report is simply following the mandate of the Convention, which restricts an enforcing court to consider only the public policy of its own State. *See supra* note 6.

176. *Id.* at 259.

performance of the contract, as discussed above in Part III, is in many cases not given adequate weight within arbitration proceedings. Thus, while I agree that it *should* be the duty of the arbitral tribunal to consider all of these matters and, in addition, that an enforcement court should assess the degree of engagement of the arbitral tribunal with the public law in question,¹⁷⁷ the assumption in the Final Report that all such issues will be addressed before the arbitral tribunal is nevertheless problematic. I would depart from the ILA recommendations on this point and suggest that supervising courts, in addition to determining international public policy by reference to their own legal system, should consider the law of the place with the closest connection to performance of the contract, thereby providing additional incentive for this same source of law to be considered within the arbitral proceedings themselves.¹⁷⁸

The desire for harmonization in application of the public policy defense is clearly a driving impetus behind the ILA's Final Report. The Committee concluded that although there is notable consistency of decisions among courts of different countries and legal traditions, and public policy is rarely successful in preventing enforcement of international awards, greater harmonization of approach will nevertheless lead to greater consistency and predictability, which would dissuade unmeritorious challenges to awards.¹⁷⁹ In my view, reference to the public policy rules of the place of performance of the underlying obligation will not work against the objective of harmonization. Rather, parties and arbitrators will have incentive to address these issues adequately during the arbitral proceedings, resulting in international awards that are sounder and more likely to be enforced. At the same time, given the dynamic and evolving nature of public policy, a blanket international standard for the concept is unrealistic and unwise.¹⁸⁰

177. See Buxbaum, *supra* note 10, at 14.

178. For example, Eric Posner argues forcefully that the very fact the Supreme Court's decision in *Mitsubishi* raised the prospect (and therefore created uncertainty) that a reviewing court may refuse to enforce an award based on violation of mandatory rules of law, helps provide proper incentives for parties and arbitrators to consider such rules during the arbitration. See generally Posner, *supra* note 108. Arbitrators will do a better job in weighing these concerns when they know that they may be relevant to the eventual enforceability of the final award.

179. See Sheppard, *Public Policy and the Enforcement of Arbitral Awards*, *supra* note 149, at 1; see also Mayer & Sheppard, *supra* note 2, at 253-55.

180. The ILA Final Report states that some commentators proposed that State courts should apply only "transnational" or "truly international" public policy. See Mayer & Sheppard, *supra* note 2, at 260. It was suggested that this concept should be of universal application, although of very restricted scope, comprising: fundamental rules of natural law; principles of universal justice; *jus cogens* in public international law; and the general principles of morality accepted by what are referred to as civilized nations. *Id.* However, there is little support among State courts for the application of this concept. *Id.* Again,

Instead, enforcing courts, over time, should continue to gauge the strength and depth of attachment of the national legal systems in question (including the legal system at the place of performance) to the values that the pertinent mandatory rules are thought to embody.

The ILA recommendations are intended to provide an appropriate balance between the interests of the various stakeholders—namely, the parties to a specific arbitration, members of the arbitration community generally, and the interests of the State. Indeed, these are the key stakeholders in the civilization of arbitration. The parties should receive the dispute settlement procedure they bargained for, which includes a final and binding award, unless it operates to violate fundamental public policy. Moreover, there are rules which act to protect the parties during arbitration proceedings, which can be enforced through procedural public policy.¹⁸¹ The arbitration community generally, of which the ILA Committee is a representative, has concerns for the effectiveness and legitimacy of the international arbitral system. The members of the community are the cross-cultural custodians that give arbitration its coherent vision and globalizing force. Indeed, the ILA Final Report is a reflection of the arbitration system seeking to internalize its own regulatory function. Finally, society at large has a significant stake both in the international arbitration system and in the public policy defense to enforcement, which serves to give effect to important underlying societal values. Thus, to build a civilization of arbitration, public policy works for all of the stakeholders and must be given expression both within the arbitral procedure itself and, if necessary, by supervising courts at the stage of recognition and enforcement.

VI. CONCLUSION: BUILDING LEGITIMACY IN ARBITRATION

As we build the civilization of arbitration, there needs to be an awareness of those currents below the surface that flow in contradictory directions. One area of vigorous and continuing debate concerns the proper role and scope for mandatory public law not only in arbitral proceedings, but as a factor to be considered at the point of judicial intervention. The expanding scope of claims that may be submitted to arbitration accentuates concerns about issues of mandatory public law, which often protect against certain externalities (e.g., harm to important societal values) to private transactions between parties. Moreover, there

given the evolving nature of public policy, an international standard would be difficult to attain and of time-limited value.

181. Examples of procedural public policy include the requirement that tribunals are impartial and that the making of the award not be induced or affected by fraud or corruption. See Mayer & Sheppard, *supra* note 2, at 256.

is tension between the paramount importance of the finality of arbitral awards, on the one hand, and the concerns generated by the increasing frequency of public law claims in arbitration, which can result in awards that are inconsistent with fundamental laws of a relevant foreign State, on the other hand.¹⁸² My essay has focused on how these considerations of public law play into the concept of public policy as a defense to enforcement of international arbitral awards. I have not argued in favor of the application of a lower standard when supervising courts consider public policy challenges. Instead, I consider that the recommendations of the ILA's Final Report provide a sound guide for an enforcement court's discretion by emphasizing that refusal to enforce an award should occur only in "exceptional circumstances," and that consideration should be given to whether a relevant mandatory rule reflects the "essential" political, social, cultural, moral, or economic interests of the States concerned. The Final Report is an excellent example of the arbitration system internalizing its own regulatory function and signifies a major contribution to the civilization of arbitration. Nonetheless, I contend that a reformed concept of public policy is needed that would permit supervising courts to consider fundamental principles not only of the enforcement forum, but also those at the place with the closest connection to the underlying contract. They should always be part of an enforcement court's considerations. The enforcing court, often removed from the place of performance, is an appropriate disinterested actor to consider whether relevant foreign mandatory rules are sufficiently fundamental, and will not face the immediate pressures imposed on arbitrators to follow the parties' choice of law.¹⁸³

Such an approach ultimately provides incentives for the parties and arbitrators to consider relevant issues of mandatory public law during arbitral proceedings. It also enables enforcement courts to give due regard not only to their own legal system's interests, but also to the important public policies of another State, reflecting that State's sovereignty and societal values. This is a needed and realistic approach in an age of pervasive economic globalization. Public policy mediates between the interests of those with the greatest stake at the stage of enforcement, including the parties and the states most directly

182. LEW, MISTELIS & KRÖLL, *supra* note 61, at 731-32; BORN, *supra* note 87, at 817 ("As public law claims become more common in arbitration, however, national courts will increasingly be required to consider whether to enforce an award permitting or not penalizing conduct occurring in a foreign state that is inconsistent with fundamental public policies and laws of that state."); William Park, *Judicial Controls in the Arbitral Process*, 5 ARB. INT'L 230, 251 (1989).

183. Indeed, in contrast to concerns that supervisory courts may sometimes be influenced by parochial tendencies, when considering the fundamental public policies of a foreign State the enforcement court should have a relatively dispassionate view.

implicated. In this way, the concept of public policy serves as an interface of exchange between the civilization of transnational arbitration and the societal interests of relevant external national actors.

Finally, I would hope that this approach builds legitimacy in the international arbitration system. By not seeking to do too much—that is, attempting to insulate itself from proper court supervision grounded on the substantive public policy of the relevant States—international arbitration is strengthened. Indeed, as has been noted elsewhere, not all refusals of enforcement by supervisory courts erode confidence in the system and, in fact, a refusal to enforce an award that is unsound should improve stakeholders' trust.¹⁸⁴ While building legitimacy and trust can be complicated and may require balancing paramount interests of arbitral finality against fundamental State principles, the public policy defense is the appropriate mechanism to achieve this counterpoise.

184. Tannock, *supra* note 75, at 72 (“It is noted that not all refusals of enforcement applications by domestic courts erode confidence in the system of international commercial arbitration. Indeed, the fact that enforcement applications are regularly refused where awards are unsound should improve party trust in the system of arbitration.”); *see also* Arfazadeh, *supra* note 5, at 62 (“[S]ystematic violation of public policy rules by international operators would in the long run produce a corrosive effect on the domestic policies concerned.”).