NLSIR

PUBLIC POLICY UNDER THE NEW YORK CONVENTION – BRIDGES BETWEEN DOMESTIC AND INTERNATIONAL COURTS AND PRIVATE AND PUBLIC INTERNATIONAL LAW

—Anthony E Cassimatis*

Abstract Controversy continues over the "public policy" exception set out in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Claims are still made regarding the sharpness of distinctions between national and international law and private international law and public international law. Populist assertions of sovereignty have given these supposed distinctions even greater salience. A closer assessment of national and international law suggests, however, that the distinctions are not as sharp as some have contended.

I. INTRODUCTION

The Final Act of the diplomatic conference at which the New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[1] ("New York Convention") was negotiated refers to the belief of the assembled State representatives that the treaty "… would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes".[2] Article III of the New York Convention sets out the general obligation of State parties

* BA LLB (Qld), LLM (Cantab), PhD (Qld). Professor, TC Beirne School of Law, and Director, Centre for Public, International and Comparative Law, University of Queensland. Research for this article was undertaken initially as a visiting scholar at the Lauterpacht Centre for International Law, University of Cambridge. Generous and valuable assistance was also provided by the anonymous reviewer of the article, Professor Leon E. Trakman, Dr Jonathan Ketcheson and Ms Sophie Ryan. I remain entirely responsible, however, for any remaining errors, omissions or infelicities.

1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, (1959) 330 UNTS 3.

2 Reproduced in United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), United Nations,

to "… recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the … articles … [of the treaty]". A comprehensive review published in 2017 of forty-one national jurisdictions[3] and their implementation of the New York Convention confirmed the reasonableness of the hopes of those who negotiated the treaty.[4] As of 27 December 2018, the New York Convention had 159 State parties and its provisions have also been incorporated into the laws of various non-State entities.[5]

Notwithstanding this support for the New York Convention, concerns remain regarding the treaty.[6] This article addresses one area of concern, namely the "public policy" exception to the recognition and enforcement of foreign arbitral awards. With the rise of assertions of sovereignty by politicians in various nations[7] and the increasing invocation of national security in trade and other relations,[8] it appears timely to re-examine some of the underlying issues raised by treaty exceptions such as the "public policy" exception in the New York Convention.

Article V(2)(b) of the New York Convention provides that:

> "[r]ecognition and enforcement of an arbitral award may … be refused if the competent authority in the country where recognition and enforcement is sought finds that: …

New York, 2015, at 6. The New York Convention sought to improve upon the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, (1928) 92 LNTS 301.

3 Recognition and Enforcement of Foreign Arbitral Awards - The Interpretation and Application of the New York Convention by National Courts (George A. Bermann ed., 2017). This book assesses a total of 44 jurisdictions (41 States and three non-State jurisdictions).

4 *See*, *e.g.*, *Id*., Introduction.

5 Hong Kong, Macau and Taiwan.

6 For example, Professor Bermann, in his introduction, observes that "[n]otwithstanding this largely positive assessment of the Convention, over half of the national reports cite difficulties in the Convention's application … and propose avenues of Convention or national law reform", Bermann, *supra* note 3, at 71.

7 A recent example being President Trump's speech in the UN General Assembly on September 25, 2018, *available at* https://gadebate.un.org/en/73/united-states-america (last visited January 6, 2019).

8 For example, in the context of international trade, Saudi Arabia and other States in the Middle East have invoked Article XXI of the General Agreement on Tariffs and Trade 1994 (annexed to the Agreement Establishing the World Trade Organization) in relation to trade measures targeting Qatar. The United States has invoked the same article in defence of restriction on imports of steel to the US. Russia has invoked Article XXI in a trade dispute with Ukraine.

See, *e.g.*, https://www.wto.org/english/news_e/news18_e/dsb_04dec18_e.htm (last visited January 6, 2019). For a discussion of conceptual linkages between national security and public policy considerations, *see*, *e.g.*, Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 Nebraska Law Review 685 (2016).

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

Trakman, in a recent comprehensive survey of the case law and literature on this public policy exception,[9] has noted that various competing approaches are apparent in relation to the exception:

> "Some argue that … [the public policy exception] ought to be construed restrictively, encompassing only the localized interests of … [State parties]. … Others contend that it should be construed expansively to include transnational public policy considerations as well. … Yet others worry that national courts invoking mono-localized interests to annul international arbitration awards may do so partially and in deference to the state's executive. … These different perspectives raise the question of whether the public policy defenses adopted by courts of state … [parties] to the N.Y. Convention include, or prevail over, transnational conceptions of public policy."[10]

Commentators, for example, in Australia,[11] have raised concerns regarding a Queensland Supreme Court decision[12] in which the public policy exception was invoked, *inter alia*, on the grounds that the foreign arbitral award in question included orders that "… would not be made in Queensland, particularly without undertakings as to damages and appropriate security."[13] Scholars, for

---

[9] Leon E. Trakman, *Aligning State Sovereignty with Transnational Public Policy*, 93 TULANE LAW REVIEW 207 (2018).

[10] *Id.* at 208-209. Public policy exceptions can be found in other treaties and instruments applicable to foreign arbitral awards. *See*, *e.g.*, the Committee on International Commercial Arbitration, "Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards" in International Law Association, Report, 69th Biennial Conference (London 2000), 340 at 347-350. The International Law Association Committee on International Commercial Arbitration, in its "Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", offered guidance on the scope of "international public policy" - International Law Association, Report, 70th Biennial Conference (New Delhi 2002), 352 at 359-361. For arguments against requiring consideration of "international public policy" in the context of the recognition and enforcement of foreign arbitral awards, *see*, *e.g.*, James D Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, 8 CHINESE JOURNAL OF INTERNATIONAL LAW 81 (2009). For a consideration of broader conceptions of public policy, *see*, *e.g.*, Sir Jack Beatson FBA, *International Arbitration, Public Policy Considerations, and Conflicts of Law: The Perspectives of Reviewing and Enforcing Courts*, 33 ARBITRATION INTERNATIONAL 175.

[11] Bermann (ed.), *supra* note 3, 93 at 122, Luke Nottage and Chester Brown, *Interpretation and Application of the New York Convention in Australia*.

[12] Resort Condominiums International Inc v. Bolwell, (1993) 118 ALR 655; [1995] 1 QdR 406 (per Lee J).

[13] [1995] 1 QdR 406 at 431-432. On the current position in Australia, *see also* James Allsop, *The Authority of the Arbitrator*, 30 ARBITRATION INTERNATIONAL 639 (2014); Jaclyn Smith, *The Enforcement Of International Arbitral Awards In The Asia-Pacific Region – A Comparative Study Of Recent Cases*, 30 BUILDING AND CONSTRUCTION LAW 148 (2014); and Luke Villiers,

example, in India, while endorsing recent judicial development in India,[14] have questioned[15] whether the following statement by the Indian Supreme Court in *Renusagar Power Co. Ltd.* v. *General Electric Co.*[16] reflects the practical reality of the implementation of the New York Convention in India:

> "In view of the absence of a workable definition of 'international public policy' we find it difficult to construe the expression 'public policy' in Article V(2)(b) of the New York Convention to mean international public policy. In our opinion the said expression must be construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced. Consequently, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act[17] means the doctrine of public policy as applied by the courts in India."[18]

By contrast, scholars in Switzerland[19] have referred to:

> "…a constant line of decisions … [in which] the Swiss Federal Court exclusively refers to an 'international' or 'transnational' public policy. This means that not all fundamental-principles of the Swiss legal system belong to public policy, but only 'universal' principles, i.e. such principles, which – under Swiss understanding of law and sense of justice – should be considered as fundamental by all countries in the world."[20]

Breaking in the 'Unruly Horse': The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards, 18 Australian International Law Journal 155 (2011).

[14] Bermann (ed.), *supra* note 3, at 445, Ashutosh Kumar, Raina Upadhyay, Anusha Jegadeesh, and Yakshay Chheda, *Interpretation and Application of the New York Convention in India*.

[15] *Id.* at 469-470, where the learned authors set out the quoted passage from the decision in *Renusagar* and then observe, in light of the decision of the Indian Supreme Court in *Shri Lal Mahal Ltd* v. *Progetto Grano SpA* (2014) 2 SCC 433, that "… the existence of two different interpretations of 'public policy' [i.e., one for domestic arbitral awards and another for foreign arbitral awards] strongly suggests that the concept of international public policy has now received some degree of sanction under Indian law." For a discussion of the Indian jurisprudence prior to the decision in *Shri Lal Mahal Ltd. case*, *see also* Michael Pryles, *Recent Singapore Decisions on International Arbitration*, 24 National Law School of India Review 35.

[16] Renusagar Power Co Ltd v. General Electric Co 1994 Supp (1) SCR 644.

[17] The relevant provision is now Section 48(2)(b) of the *Arbitration and Conciliation Act*, 1996. [Footnote not in original.]

[18] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCR 644 at para 63.

[19] Bermann (ed.), *supra* note 3, at 911, Andrea Bonomi and Elza Reymond-Eniaeva, *Interpretation and Application of the New York Convention in Switzerland*.

[20] *Id.* at 935-936.

This article will explore potential linkages between these competing perspectives on the "public policy" exception of the New York Convention. These linkages, between domestic and international jurisprudence, and between public and private international law, provide bridges between the various competing positions and allow for a more nuanced assessment of the "public policy" exception. Rather than sharp distinctions, what is apparent is the potential for greater convergence amongst the competing perspectives. This convergence also appears to have relevance to broader issues of sovereignty and national security that are currently being adjudicated by international courts and tribunals in accordance with rules of international law.

II. BRIDGES BETWEEN DOMESTIC AND INTERNATIONAL COURTS

The above quoted passage from the Indian Supreme Court's decision in *Renusagar* is supported by the express language of article V(2)(b) of the New York Convention. The treaty provision does not direct domestic courts to consider "international public policy" but instead directs national authorities to consider and potentially apply the "public policy of *that country*"[21] when deciding whether or not to recognise or enforce a foreign arbitral award. Support for this position is also found in the work of scholars in the field of private international law.[22] It has been emphasised, for example, that

> "*Ordre public* as a concept of private international law, regarding either choice of law, i.e. the application of foreign law, or the … recognition and enforcement of foreign judgments or arbitral awards in the forum, … must be distinguished from another concept: the notion of … international public order [which] designates a set of commonly accepted rules belonging to public international law. It differs from the notions of *ordre public* or public policy, in that these notions do not belong or have in general any regard to public international law."[23]

These distinctions are said to be present not just in (generally dualist) common law systems but also in civil law systems:

---

[21] Emphasis added.

[22] For a comprehensive general introduction to *ordre public* under private international law, *see* Franco Mosconi, Exceptions to the operation of choice of law rules, 217 *Recueil des Cours* 9 at 23-128 (1989).

[23] Martin Gebauer, *Ordre public (Public Policy) ,in* 7 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1008, ¶ 2 (RüdigerWolfrum et. al., 2012).

> "Especially in countries belonging to the family of the French civil code, another distinction is commonly used: the '*ordre public interne*' designates the rules of domestic law which shall not be set aside by the will of the parties to a contract. …On the other hand, the '*ordre public international*' is the kind of public policy within the forum that may also control the application of foreign law."[24]

This distinction appears to echo the Indian Supreme Court's distinction in *Renusagar*.[25]

However, just as the supposed distinction between monist and dualist national legal systems can be misleading when viewed as a sharp distinction (i.e., the differences between national systems can be better viewed as different points on the same continuum),[26] so the differences between national and international conceptions of "public policy" do not appear to be as stark as sometimes supposed.[27] Consider, for example, common law conceptions of "public policy".[28] Historically, English Courts raised concerns regarding the invocation of public policy in a domestic context[29] and the dualism of English law and tendency to limit the influence of international law would superficially appear

---

[24] *Id*. ¶ 5.

[25] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCR 644, ¶ 71.

[26] Judge Crawford, writing extra-judicially, has observed that "[t]he misleading terms 'monism' and 'dualism' are more appropriately framed as the ends of a continuum of domestic legal structuring, with much variation in between. Classifying a State's constitutional design as either monist or dualist is not so much an exercise in absolutes as a matter of degree. Countries with constitutional arrangements reflecting degrees of monism include the civil law States of France, Germany, the Netherlands, Russia and Switzerland. Those that reflect dualist tendencies include States within the common law tradition such as the United Kingdom, United States, South Africa and Australia. But no two States treat foreign relations law or international law in exactly the same way" – Crawford, *Chance, Order, Change: The Course of International Law*, 365 Recueil des Cours 9 164 (2013). In relation to India's position on this continuum, *see* Nihal Jayawickrama, *India*, *in* The Role of Domestic Courts in Treaty Enforcement - A Comparative Study 243 (David Sloss ed., 2009).

[27] *Compare*, for example, Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 Journal of Private International Law 201, 213: "Sometimes a distinction is drawn between three types of public policy: internal public policy, or *ordre public interne* (applying purely to domestic cases for example, to invalidate a contract governed by English law), international public policy, or *ordre public international* (applying in the context of private international law) and "truly international" public policy, or *ordre public veritablement international* (public policy derived from international law …). These categories do not, however, indicate clearly distinct types of norms, but merely positions on a continuum."

[28] Judge Lauterpacht, in his separate opinion in the Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands* v. *Sweden*), Judgment of November 28th, 1958, 1958 ICJ Reports 55, observed that "probably the [French] conception of *ordre public* is somewhat wider … [than the notion of public policy in common law countries such as the United Kingdom or the United States of America]" – at 90-91.

[29] Famously in 1824, Burrough, J. referred to English public policy as "… a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law" - Richardson v. Mellish, (1824) 2 Bing 229, 252 : 130 ER 294, 303.

to sharpen the distinction between English (domestic) public policy and international public policy.

This view, however, becomes more difficult to sustain once it is recognised that English common law is not as impervious to the influences of international law as is sometimes supposed. There has, for example, been renewed interest in Blackstone[30] and the so-called "incorporation" theory on the relationship between English (and Australian, New Zealand and Canadian etc.) common law and customary international law.[31]

A less obvious link between the common law conception of public policy and international law, however, exists which is distinct from the more dramatic and contested "incorporation" theory of Blackstone. This less obvious link is apparent, for example, in the way Sir Gerard Brennan, in the decision of the High Court of Australia in *Mabo* v. *Queensland (No. 2)*,[32] held that the common law of Australia was influenced by developments in international law. The doctrine of *terra nullius*, which was criticised in the International Court of Justice in the *Western Sahara case*[33] on account of its role in European colonial dispossession of indigenous peoples,[34] was similarly attacked by Brennan J as a common law principle in the *Mabo* decision:

> "The common law does not necessarily conform with international law. But international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."[35]

In a similar way, the common law conception of "public policy" is not impervious to conceptions of "public policy" under international law. The United States Supreme Court, for example, explicitly recognised the relevance of international law to public policy in *Hurd v Hodge*,[36] where the

---

[30] 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67: "[T]he law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land".

[31] Lord Denning invoked Blackstone's incorporation theory in Trendtex Trading Corporation v. The Central Bank of Nigeria, 1977 QB 529 : (1977) 2 WLR 356. The House of Lords conditionally endorsed it in R v. (Margaret) Jones, [2007] 1 AC 136 : (2007) 2 WLR 772. In Australia, see Nulyarimma v. Thompson, (1999) 165 ALR 621.

[32] Mabo v. Queensland (No. 2), (1992) 175 CLR 1.

[33] Western Sahara, Advisory Opinion, 1975 ICJ Reports 12.

[34] Western Sahara, Advisory Opinion, 1975 ICJ Reports 12, at 85-86 (Separate Opinion of Vice-President Ammoun).

[35] Mabo v. Queensland (No. 2), (1992) 175 CLR 1 at 42 (per Brennan, J.).

[36] Hurd v. Hodge, 1948 SCC OnLine US SC 60 : 92 L Ed 1187 : 68 S Ct 847 : 334 US 24 (1948).

court refused to allow the enforcement of a racially discriminatory restrictive covenant:

> "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, … and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from …such exertions of judicial power."[37]

This statement of the US Supreme Court echoes the language of Article VI of the US Constitution.[38] A similar approach has been adopted in relation to the common law of public policy in the United Kingdom. In *Oppenheimer v Cattermole*[39] Lord Cross of Chelsea observed that:

> "… it is part of the public policy of this country that our courts should give effect to clearly established rules of international law. Of course on some points it may be by no means clear what the rule of international law is. Whether, for example, legislation of a particular type is contrary to international law because it is 'confiscatory' is a question upon which there may well be wide differences of opinion between communist and capitalist countries. But what we are concerned with here is [Nazi nationality] legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all."[40]

---

[37] Hurd v. Hodge, 1948 SCC OnLine US SC 60 : 92 L Ed 1187 : 68 S Ct 847, 853 : 334 US 24 (1948) (Vinson, C.J. delivering the opinion of the court).

[38] Article VI of the United States constitution provides that:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the US, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

[39] Oppenheimer v. Cattermole, 1976 AC 249 : (1975) 2 WLR 347.

[40] Oppenheimer v. Cattermole, 1976 AC 249 at 278 : (1975) 2 WLR 347. In Canada, the High Court of Justice of Ontario held that a religiously discriminatory restrictive covenant was void on the grounds of public policy. According to Mackay, J., the factors supporting this conclusion included the United Nations Charter, which the court considered to be of "… profound significance" - *Drummond Wren* (1945) 4 Ontario Reports 778, 781. For more recent consideration of the on-going relevance of this decision in Canada, *see* Tamar Witelson,

While it is acknowledged that the House of Lords in *Oppenheimer* v. *Cattermole* was considering public policy in the context of English conflict of law rules applicable to foreign decrees, the common law basis of the House of Lords' decision ensures that it has broader relevance. This English common law conception of public policy has been applied in other contexts such as in relation to the act of State doctrine[41] and its potential relevance to English Courts considering the New York Convention has also been recognised.[42]

Furthermore, the common law principle of the supremacy of Parliament does not alter the position as dramatically as might be imagined. For example, legislation, in common law systems, is interpreted according to the common law "principle of legality".[43] This principle creates a presumption that Parliament does not intend to remove fundamental common law rights and therefore,clear statutory language is required for legislation to remove such rights. Increasingly, the principle of legality is itself being influenced by international law.[44] The "fundamental common law rights" which the principle of legality is designed to protect are themselves influenced by developments in international law.

In addition, the capacity for legislation to itself contribute to the development of the common law, provided certain strict conditions are met,[45] creates a further *feedback loop* by which international law can influence common law principles.[46] Legislation enacted to incorporate international legal obligations can itself assist in the migration of international legal norms into the

---

Retort: Revisiting Bhadauria and the Supreme Court's Rejection of a Tort of Discrimination, 10 National Journal of Constitutional Law 149, 154-156 (1999); and Anne Warner La Forest, *Canada and International Human Rights Law at 150: A Journey in Three Parts*, 69 University of New Brunswick Law Journal 233, 244 (2018). Mills, *supra* note 27, at 22 223, offers an extended list of cases in which public policy under English law has been linked to international law.

41 *See, e.g.*, Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5), (2002) 2 AC 883 at 1081, [28]-[29] : (2002) 2 WLR 1353, per Lord Nicholls of Birkenhead.

42 Yukos Capital Sarl v. OJSC Rosneft Oil Co. (No. 2*)*, 2014 QB 458 at 506 : (2013) 3 WLR 1329, per Rix, LJ.

43 *See*, *e.g.*, David Dyzenhaus, Murray Hunt and Michael Taggart, *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation*, 1 Oxford University Commonwealth Law Journal 5 (2001).

44 *Id*.; Wendy Lacey, *Confluence or Divergence? The Principle of Legality and the Presumption of Consistency with International Law*, *in* The Principle of Legality in Australia and New Zealand 237 (Dan Meagher and Matthew Groves eds., 2017); and Dan Meagher, *The Common Law Principle of Legality in the Age of Human Rights*, 35 Melbourne University Law Review 449 (2011).

45 *See*, *e.g.*, Harlan, J. delivering the opinion of the US Supreme Court in Moragne v. States Marine Lines Inc., 1970 SCC OnLine US SC 137 : 26 L Ed 2d 339 : 398 US 375 at 388-392 (1970); and Lord Diplock in Erven Warnink Besloten Vennootschap v. J. Townend & Sons (Hull) Ltd., 1979 AC 731, 742-743 : (1979) 3 WLR 68. The High Court of Australia has yet to rule conclusively on the relationship. *See*, *e.g.*, Adam Pomerenke, Statute and Common Law, Current Legal Issues Seminar Series, Brisbane, August 17, 2017, 16-18 (on file with author).

46 *See*, *e.g.*, Dyzenhaus, Hunt and Taggart , *supra* note 35; and Lacey, *supra* note 36.

interpretation of national legislation and the development of the common law. Thus in common law systems it appears that there are a number of potential linkages between the common law conception of "public policy" (and statutory expressions of that "public policy") and an international legal conception of public policy located in treaties, customary international law or general principles of law.[47]

A related but more specific common law bridge between common law systems and an international conception of "public policy" is also apparent in the substantive common law rules of private international law. The English House of Lords effectively acknowledged a role for international law in its decision *Siskina (Owners of Cargo Lately Laden on Board)* v. *Distos Compania Naviera SA*.[48] Members of the High Court of Australia, for example, in *CPCF* v. *Minister for Immigration and Border Protection*,[49] relied Lord Diplock's dictum in this case to justify a reading down of Australian legislation that conferred powers on Australian government officials to detain foreign nationals and to take them to any place outside of Australia. According to Hayne and Bell JJ, applying Lord Diplock's dictum in the *Siskina*:

> "Those are powers [of detention and removal] properly seen as exorbitant powers which 'run counter to the normal rules of comity among civilised nations'.[50] … The exorbitant nature of the powers is further reason to construe[51] the provisions strictly."[52]

---

[47] Sir Hersch Lauterpacht, in his separate opinion in the Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of 28 November 1958, 1958 ICJ Reports 55, 91, observed that "… the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law. If that is so, then it may not improperly be considered to be a general principle of law in the sense of Article 38 of the Statute of the Court." In 1950, Lauterpacht gave two examples of national courts relying on *treaties* to develop common law principles of "public policy" – Lauterpacht, *International Law and Human Rights*, Steven and Sons Ltd., London, 1950, 411. The examples given were: the US Supreme Court's decision in Hurd v. Hodge, 1948 SCC OnLine US SC 60 : 92 L Ed 1187 : 68 S Ct 847, 853 : 334 US 24 (1948); and decision of the High Court of Justice in Ontario in Drummond Wren, In re, (1945) 4 Ontario Reports 778, 781.

[48] Siskina (Owners of Cargo Lately Laden on Board) v. Distos Compania Naviera, SA 1979 AC 210 : (1977) 3 WLR 818 : (1977) 3 All ER 803.

[49] CPCF v. Minister for Immigration and Border Protection, (2015) 255 CLR 514.

[50] Siskina (Owners of Cargo Lately Laden on Board) v. Distos Compania Naviera SA 1979 AC 210, 254 : (1977) 3 WLR 818 : (1977) 3 All ER 803 at 823 (Siskina) per Lord Diplock. [Footnote in original.]

[51] Siskina at 1979 AC 210, 254–55; (1977) 3 All ER 803, 823 per Lord Diplock. [Footnote in original.]

[52] CPCF v. Minister for Immigration and Border Protection, (2015) 255 CLR 514 at [82]-[83]. For a comparable rule of statutory interpretation in India, *see Gramophone Co. of India Ltd.* v. *Birendra Bahadur Pandey* (1984) 2 SCC 534 : (1984) 2 SCR 664, discussed in Jayawickrama, *supra* note 26 at 253-255.

Though Hayne and Bell JJ were in dissent in the outcome of this case, the principle of interpretation that they invoked was not questioned by other members of the court. Exorbitant assertions of national "public policy", that "run counter to the normal rules of comity among civilised nations", can potentially be avoided through the application of traditional common law principles of statutory interpretation.

It is clear that in dualist national systems, parliaments are able to enact laws requiring courts to depart from international standards. This theoretical possibility, however, should not blind us from recognising this is almost invariably only a theoretical possibility and not the reality. The reality, even in dualist common law national legal systems, is that national courts have various tools at their disposal to mould national law in a manner that conforms to a nation's international legal obligations.[53] National conceptions of "public policy"are as much able to be moulded using these tools as other parts of national law.

III. BRIDGES BETWEEN PRIVATE AND PUBLIC INTERNATIONAL LAW

In *Renusagar* the Indian Supreme Court emphasised the link between the "public policy" exception in the New York Convention and private international law:

> "Since the *Foreign Awards Act* is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression 'public policy' in Section 7(1) (b) (ii) of the *Foreign Awards Act* must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law."[54]

The express inclusion of "public policy" in a treaty (albeit in a treaty on private international law and with express reference to national conceptions of "public policy") also creates a bridge between public and private international

---

[53] It must also be recognised that the willingness of national judges to use these tools is an important factor – *see*, *e.g.*, Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW 159 (1993); Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 241 (2008); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 57 (2011); and Pierre-HuguesVerdier and Mila Versteeg, I*nternational Law in National Legal Systems: An Empirical Investigation*, 109 AMERICAN JOURNAL OF INTERNATIONAL LAW 514, 522-531 (2015).

[54] Renusagar Power Co. Ltd. v. General Electric Co. 1994 Supp (1) SCR 644 [66].

law. This bridge has the potential to influence the approach to "public policy" under the New York Convention.

The International Court of Justice and its predecessor (the Permanent Court of International Justice) have only addressed the relationship between public and private international law in a handful of cases.[55] One such case is the *Guardianship of Infants* case.[56] The case involved a dispute between Sweden and the Netherlands over whether orders made by Swedish authorities in respect of a child born in Sweden of Dutch nationality were in breach of the Hague Convention of 1902 governing the Guardianship of Infants ("the 1902 Convention"). The parties to this dispute devoted much of their submissions before the International Court of Justice to arguments over whether and how the principle of "public policy" might be implied into the 1902 Convention even though the treaty had no express "public policy" exception. A majority of the court approached the resolution of the case in a manner that avoided the need to decide these "public policy"questions.

A number of the judges who formed part of the majority, however, while agreeing with the outcome in the case, did not accept the court's avoidance of the "public policy" issues and addressed these issues under the relevant treaty in their separate opinions.[57] Judge Lauterpacht's separate opinion contains much that is relevant to a consideration of "public policy" under the New York Convention, offering a succinct account of the important role that public policy plays in private international law and reflecting on the consequences of a treaty on private international law and the role of the International Court of Justice:

> "Within the State, the judicial use of public policy - of *ordre public* - has often been exposed to criticism. But it is seldom, if ever, suggested that it is not an indispensable instrument of the interpretation, application and development of the law. If that is so in relation to the national law of the State which may be changed by ordinary legislative processes, it is particularly so in relation to foreign law over which the State has no control and which, in certain circumstances, its courts may find it inconceivable to apply. History - modern history - has occasionally produced examples of legislation manifesting eruptions of malevolent injustice, or worse,[58] to which

---

[55] *See*, *e.g.*, Stéphanie De Dycker, *Private International Law Disputes before the International Court of Justice*, 1 Journal of International Dispute Settlement 475 (2011).

[56] Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands* v. *Sweden*), Judgment of November 28th, 1958, 1958 ICJ Reports 55.

[57] *See* the declaration of Judge Spiropoulos and the separate Opinions of Judge Badawi, Judge Lauterpacht and Judge Moreno Quintana. These separate opinions are discussed by Mosconi, *supra* note 22, at 52-55; and Mills, *supra* note 27, at 212.

[58] On the next page of his separate opinion Judge Lauterpacht observed that "… practically all parties to … [the 1902 Hague Convention on the Conclusion of Marriage] refused

> courts of foreign countries may find it utterly impossible to give effect and with regard to which the right to denounce the treaty may not provide a timely or practicable remedy.
>
> It is that residuum of discretion, it is that safety valve, which has made private international law possible at all, and which, if kept within proper limits, is one of the principal guarantees of its continued existence and development. … *Ordre public* is, and ought increasingly to be, subject to reasonable limitations in accordance with the main purpose of private international law. …
>
> If a State takes action which, on the face of it, departs from the language of the Convention, then it cannot confine itself to proving generally that the Law under which it acted falls within the permissible exception; it must show that that exception was applied reasonably and in good faith. … [W]hen …[a] State is bound by a treaty in relation to a particular subject-matter, it can invoke public order only if, in case its action is challenged, it is prepared to submit the legality of its action to impartial decision. It is that jurisdiction which removes the notion of and recourse to *ordre public* from the orbit of uncertainty, pure discretion and arbitrariness and which endows the treaty with the character of an effective legal obligation."[59]

Sir Percy Spender, in his separate opinion, offered an opposing view:

> "A reservation or exception of 'public policy' would, in my judgment, set the Convention at large. What is given by one hand may be taken away by the other. Obligations clearly enough intended thereunder to be imposed upon all contracting States would have no consistent — if, indeed, any predictable — meaning. Such obligations could never be defined or ascertainable in terms reciprocally understood and binding on the parties."[60]

---

to recognize, prior to the Second World War, the impediments established by the German Nuremberg Laws" - Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands* v. *Sweden*), Judgment of November 28th, 1958, 1958 ICJ Reports 55, at 96. [Footnote not in original.]

[59] Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands* v. *Sweden*), Judgment of November 28th, 1958, 1958 ICJ Reports 55, at 95-100 (Separate Opinion of Judge Lauterpacht).

[60] Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (*Netherlands* v. *Sweden*), Judgment of November 28th, 1958, 1958 ICJ Reports 55, at 131 (Separate Opinion of Judge Spender).

Similar claims by States that certain obligations under international law were incapable of third party judicial settlement, once relatively common in the 19th Century, have been met by increasing scepticism from an overwhelming majority of States and from international courts and tribunals.[61] When States make international commitments in treaties they intend to assume international legal obligations.[62] If international legal obligations are not intended then States avoid treaties and soft law instruments are used instead.[63] Vagueness of language used in treaties remains an issue,[64] but broad terms such as "public policy" are *not* non-justiciable under international law, notwithstanding the views of Sir Percy Spender. Uses of armed force (including in self-defence)[65] and national security exceptions in treaties[66] have been the subject of judicial settlement despite such topics having once been considered by certain States to be self-judging and outside the scope of international legal scrutiny.

As Sir Hersch Lauterpacht observed, the inclusion, even impliedly,[67] of public policy in a treaty brings with it the potential for international adjudication and international judicial scrutiny of domestic invocations of public policy.[68]

---

[61] For a discussion of the history of such claims and Sir Hersch Lauterpacht's scholarship on the topic, *see* Martti Koskenniemi, The Gentle Civilizer of Nations - The Rise and Fall of International Law 1870–1960 361-369 (2001).

[62] The principle of *pacta sunt servanda* is codified in Art. 26 of the Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969, (1980) 1155 UNTS 331.

[63] States are sometimes sensitive to the potential normative impact of soft law instruments, as was vividly illustrated in 2018 with State opposition to the soft law "Global Compact for Safe, Orderly and Regular Migration".

[64] Oil Platforms (*Islamic Republic of* Iran v. *United States of America*), Preliminary Objection, Judgment, 1996 ICJ Reports, 803 at 820.

[65] *E.g.*, Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo* v. *Uganda*), Judgment, 2005 ICJ Reports 168.

[66] *E.g.*, Oil Platforms (*Islamic Republic of Iran* v. *United States of America*), Judgment, 2003 ICJ Reports 161.

[67] Sir Gerald Fitzmaurice, as the International Law Commission's Special Rapporteur of the Law of Treaties, supported the separate opinions in the *Guardianship of Infants case* with the inclusion of the following in his fourth report:

> "Treaties dealing with undertakings relating to topics of private international law are to be read as subject to the implied condition or the exception of '*ordre public*' i.e., that the parties are not obliged to implement the treaty in any case where to do so would be contrary to the juridical conceptions of '*ordre public*' as applied by their courts" – International Law Commission, Fourth report by Sir Gerald Fitzmaurice, Special Rapporteur, (1959) 2 *Yearbook of the International Law Commission*, 37, 47 and 61.

[68] It cannot reasonably be argued that because the New York Convention does not include any compromissory clause conferring jurisdiction on the International Court of Justice, invocations of the "public policy" defence are therefore non-justiciable under international law. Such an argument would confuse the issue of consent to jurisdiction with the issue of the relevant applicable law. The International Court of Justice would, for example, have jurisdiction over a dispute related to the New York Convention amongst State parties that have made declarations under Art. 36(2) of the Statute of the International Court of Justice. In those circumstances, a dispute regarding the "public policy" exception in the New York Convention would justiciable before the International Court of Justice. On the issue of State responsibility in the context of international arbitrations generally (with a focus on investor-State arbitrations), *see* Bernardo

The express inclusion of "public policy" in the New York Convention has this consequence.

It appears important here to distinguish between two discrete and separate issues, namely the standards that a treaty recognises that a State party may apply, and the consequences of failure of a State party to apply those standards. There is, for example, no contradiction in accepting the Indian Supreme Court's view in *Renusagar* that the New York Convention permits Indian courts to apply Indian public policy when deciding whether to recognise or enforce foreign arbitral awards, on the one hand, and in accepting that the invocation of "public policy" by a State party to the New York Convention is not entirely subjective or incapable of third party scrutiny or adjudication, on the other. These are separate issues. The Indian Supreme Court and other national courts effectively recognise the separateness of these issues when they apply different approaches to public policy when dealing with domestic arbitral awards compared to those that they apply when they deal with foreign arbitral awards.

Judge Lauterpacht's reference to the effect of a treaty as being to "… remove recourse to *ordre public* from the orbit of … pure discretion and arbitrariness" also highlights the potential application of the abuse of rights principle in international law. When a State becomes party to a treaty, such as the New York Convention, that includes a broad discretionary "right" such as the entitlement to invoke the State's "public policy" to avoid the recognition or enforcement of foreign arbitral awards, it submits itself to international legal scrutiny under the abuse of rights principle. It is precisely in the field of broadly conferred discretions under treaties that the abuse of rights principle is said to have a role. In the words of the International Law Commission's special rapporteur on State responsibility in 1960, F.V. García Amador:

> "… it is necessarily true that the doctrine of the abuse of rights finds its widest application in the context of 'unregulated matters', that is, matters which 'are essentially within the domestic jurisdiction' of States."[69]

The abuse of rights principle has been articulated in various ways[70] but the formulation of the principle by Sir Robert Jennings and Sir Arthur Watts in 1992 appears both representative and well-adapted to apply to arbitrary invocations of the "public policy" exception in the New York Convention:

Sepúlveda-Amor and Merryl Lawry-White, *State Responsibility and the Enforcement of Arbitral Awards*, 33 Arbitration International 35 (2017).

[69] F.V. García Amador, International Responsibility, Fifth Report by F.V. García Amador, Special Rapporteur, in (1960) 2 *Yearbook of the International Law Commission* 41, 60.

[70] *See generally*, Alexandre Kiss, *Abuse of Rights*, *in* 1 The Max Planck Encyclopedia of Public International Law 20 (RüdigerWolfrum et. al., 2012)

> "A … restraint on the freedom of action which a state in general enjoys by virtue of its independence, and territorial and personal supremacy, is to be found in the prohibition of the abuse by a state of a right enjoyed by it by virtue of international law. ... Such an abuse of rights occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage."[71]

The abuse of rights principle was, for example, applied in the context of alleged violations (by courts in Bangladesh) of the New York Convention in *Saipem SpA* v. *People's Republic of Bangladesh*.[72]

The influence of international law on domestic conceptions of public policy has been increasingly recognised by scholars in the field of private international law.[73] The use of treaties to enshrine principles of private international law establishes a bridge between public and private international law. Again, the relationship between public and private international law, which initially appeared starkly divided, appears, upon closer inspection, to be far more nuanced.

IV. SOME PRACTICAL ILLUSTRATIONS

There have been hundreds of decisions from around the world that have invoked the public policy exception in Article V(2)(b) of the New York Convention.[74] It is beyond the intended scope of this article to undertake a systematic review of this jurisprudence.[75] Instead, a number of cases will be considered that illustrate the *utility* or *application* of the more nuanced approach contended for in this article.

The Australian decision in *Resort Condominiums International Inc.* v. *Ray Bolwell*[76] was noted in the introduction. This case involved an application to enforce in Australia an interim arbitral award issued in the United States. An application had been made to the Supreme Court of Queensland under

---

[71] Jennings and Watts, Oppenheim's International Law 407 (9th edn., 1992).

[72] Saipem SpA v. People's Republic of Bangladesh, *infra* note 81, at ¶ 149-161. This aspect of the arbitral decision under the relevant bilateral investment treaty is considered by Sepúlveda-Amor and Lawry-White , *supra* note 68, at 46-47.

[73] *See*, *e.g.*, Jan Oster, *Public policy and human rights*, 11 Journal of Private International Law 542 (2015).

[74] Many of these judgments are accessible via the New York Convention website, http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=12&menu=657&opac_view=-1 (last visited on June 29, 2019).

[75] For comprehensive reviews *see*, *e.g.*, Trakman, *supra* note 9, and Bermann, *supra* note3.

[76] *Resort Condominiums International Inc* v. *Ray Bolwell* (1993) 118 ALR 655 : (1995) 1 Qd R 406 (per Lee, J.) (referred to in note 12 above).

the relevant Australian legislation. There were various grounds on which the application was resisted but one of the grounds raised against enforcement of the arbitral award was based on Article V(2)(b) of the New York Convention (Australia and the United States both being parties to the treaty). Submissions against enforcement made by counsel for the respondents included claims that "… many of the orders [in the interim arbitral award] were so vague and sweeping as to make enforcement impossible; that they are not orders a court in Queensland would make in their current form and should be remitted to the arbitrator [in the United States] to be redrafted pursuant [to the relevant Queensland legislation]."[77] Lee J refused to enforce the interim award, observing that:

> "[m]any of the orders …[in the award] are contrary to the public policy of Queensland not only in the sense that many of them as drafted would not be made in Queensland, particularly without undertakings as to damages and appropriate security and in certain other respects, but also because of possible double vexation and practical difficulties in interpretation and enforcement …".[78]

It is contended that it was not appropriate for the Queensland Supreme Court to frame the issue as one involving "the public policy of Queensland". It is *Australian* public policy, forming part of *Australian* common law that ought to have been applied.[79] Consistent with the approach advocated in Section II above, this Australian common law conception of public policy should also have been informed by Australia's international legal obligations. Had this approach been adopted by the Supreme Court of Queensland, the decision might have avoided the criticism that it has subsequently received.[80]

The application of the more nuanced approach contended for in Section III above is apparent in the decisions in a number of bilateral investment treaty (BIT) arbitrations. The New York Convention has arisen indirectly in the context of BIT arbitrations as alleged failures to recognise or enforce foreign arbitral awards have formed the foundation for claims under bilateral investment treaties. For present purposes, it is relevant to note that it has been accepted in a number of cases that an arbitral body constituted under a BIT could assess

---

77 (1993) 118 ALR 655 : (1995) 1 Qd R 406 at 427.

78 (1993) 118 ALR 655 : (1995) 1 Qd R 406 at 431-432.

79 Lange v. Australian Broadcasting Corpn., (1997) 189 CLR 520 ruled that:

> "There is but one common law in Australia which is declared by this Court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations" – at 563, per Brennan C.J. and Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby, JJ.

80 *See* Nottage and Brown, *supra* note 11, at 122.

whether, for example, the courts of a State had complied with that State's obligations under the New York Convention.[81]

Specifically, in the context of Article V(2)(b) of the New York Convention, an arbitral body established under a BIT between Canada and the Czech Republic in *Frontier Petroleum Services Ltd.* v. *Czech Republic*[82] was prepared to consider a claim by a Canadian corporation that Czech courts had impermissibly invoked the "public policy" exception.[83] Though this claim was ultimately rejected, the arbitral tribunal's reasoning is consistent with the approach contended for in this article:

> "525. … [T]he Tribunal rejects … [Czech Republic's] argument that this Tribunal does not have the power to review the decision of a national court's conception of the public policy exception under the New York Convention. The Tribunal's role under this claim is to determine whether the refusal of the Czech courts to recognise and enforce the Final Award in full violates … the BIT. In order to answer this question, the Tribunal must ask whether the Czech courts' refusal amounts to an abuse of rights contrary to the international principle of good faith, i.e. was the interpretation given by the Czech courts to the public policy exception in Article V(2)(b) of the New York Convention made in an arbitrary or discriminatory manner or did it otherwise amount to a breach of the fair and equitable treatment standard.
>
> 526. Article V(2)(b) of the New York Convention gives a competent authority in the country where recognition and enforcement is sought the discretion to refuse the recognition and enforcement of an arbitral award if the competent authority finds that the recognition or enforcement of the award would be 'contrary to the public policy of that country'. In the present case, this refers to the public policy of the Czech Republic. It is widely accepted that while the reference to 'public policy' in Article V(2)(b) of the New York Convention refers to international public policy, it is nonetheless a reference to the particular national conception of international public policy that is relevant rather than to a conception of

---

[81] See, e.g., Saipem SpA v. People's Republic of Bangladesh, ICSID Case No ARB/05/7 (Award, June 20, 2009), [163]-[173]. For a general discussion of this and similar cases, *see* Sepúlveda-Amor and Lawry-White, *supra* note 68, at 44-49.

[82] Frontier Petroleum Services Ltd. v. Czech Republic, (UNCITRAL Final Award, 12 November 2010).

[83] Frontier Petroleum Services Ltd. v. Czech Republic, (UNCITRAL Final Award, 12 November 2010), ¶ 469-530; discussed by Sepúlveda-Amor and Lawry-White, *supra* note 68, at 48.

> public policy that is in some way detached from the legal system at the place where recognition and enforcement is sought. …
>
> 527. The Czech courts concluded that the full recognition and enforcement of the Final Award would have been contrary to Czech public policy. In regard to this decision, it is not necessary for this Tribunal to determine whether the findings of the Czech courts meet the applicable standard of international public policy, or to determine the precise contents of that standard. States enjoy a certain margin of appreciation in determining what their own conception of international public policy is. … This Tribunal determines that it is sufficient to examine whether the conclusion reached by the Czech courts applied a plausible interpretation of the public policy ground in Article V(2)(b) of the New York Convention. Put another way, was the decision by the Czech courts reasonably tenable and made in good faith?"

It is contended that this approach was warranted not just by the BIT, but also by the terms of the New York Convention itself. If a party to the New York Convention was, for example, to complain to the International Court of Justice in relation to another party's purported reliance on the public policy exception in Article V(2)(b), the International Court of Justice would adopt a similar approach.[84]

V. CONCLUDING OBSERVATIONS

In the introduction to this article reference was made to doubts expressed by Indian scholars regarding the Supreme Court of India's statement in *Renusagar* regarding the existence of "a workable definition of 'international public policy'".[85] On deeper reflection, it appears that these doubts were unwarranted. We have seen that the Supreme Court's statement is supported by principles of private international law recognised by scholars and applied by States. The Indian Supreme Court currently recognises two conceptions of Indian "public policy": a broader conception that has been applied in relation to domestic arbitration in India; and a narrower conception applicable to the recognition and enforcement of foreign arbitral awards.[86] These differing conceptions potentially reflect two distinct issues: the degree of discretion accorded to national courts in relation

---

[84] On the role of the International Court of Justice in relation to arbitral awards, *see* Sepúlveda-Amor and Lawry-White, *supra* note 68, at 54-61.

[85] Kumar *et al.*, *supra* note 14, 469-470.

[86] Shri Lal Mahal Ltd. v. Progetto Grano SpA (2014) 2 SCC 433 ¶ 27-28.

to the recognition and enforcement of foreign arbitral awards; and the assumption of obligations under treaty regarding that discretion.

There exist in international law multiple examples of broad language capable of being applied in different ways in different circumstances. One illustration is the reference to "morals" in limitation clauses in human rights treaties.[87] Another is the reference to "public morals" in international trade treaties.[88] The European Court of Human Rights has, for example, held on numerous occasions that the morality exceptions in the European Convention on Human Rights do not require the Court to apply a uniform conception of morals across the States parties to the European Convention.[89] But the Court has also been clear that the absence of a uniform conception of morals in Europe does not mean that limitations on the enjoyment of human rights on the grounds of public morality escape international judicial scrutiny. There may be a margin of appreciation (a concept also invoked in *Frontier Petroleum Services Ltd.* v. *Czech Republic* in relation to the "public policy" exception in the New York

---

[87] *E.g.*, Art. 10 of the European Convention on Human Rights provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (Art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or ***morals***, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." [Emphasis added.]

[88] *E.g.*, Art. XX(a) of the General Agreement on Tariffs and Trade 1994 provides:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect ***public morals***; …". [Emphasis added.]

[89] *See*, *e.g.*, the decision in Handyside v. United Kingdom (1976) 1 EHRR 737:

> "*48.* … [I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. … Consequently, Article 10 para 2 … leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force".

Convention) but this margin can subsist with international judicial scrutiny.[90] Judge Lauterpacht makes a similar point in his separate opinion in the *Guardianship of Infants case*.[91] The same appears true for the "public policy" exception in the New York Convention.

Populist politicians are increasingly invoking national sovereignty but those invocations do not make global interconnectedness any less complex. If anything, they increase that complexity. The unprecedented rise in connectedness between States since the Second World Warcreated the social need for the negotiation of treaties such as the New York Convention. As cross-border economic and social relations have deepened, international legal arrangements have been negotiated that have become increasingly sophisticated. Sharp distinctions between national and international law and between public and private international law were already being questioned by Judges of the International Court of Justice in the *Guardianship of Infants case* in 1950s. Legal developments over the following decades have consolidated the bridges and linkages that have been established by States, traders and peoples in order to support and guide their increasing interconnectedness.

---

[90] Handyside v. United Kingdom (1976) 1 EHRR 737:

"*49*. … Nevertheless, Article 10 para 2 (Art. 10-2) does not give the Contracting States an unlimited power of appreciation. … The domestic margin of appreciation thus goes hand in hand with a European supervision."

For a discussion of margins of appreciation in the context of public order exceptions in private international law, *see* Mills, *supra* note 27, at 216.

[91] Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands* v. *Sweden*), Judgment of November 28th, 1958, 1958 ICJ Reports 55, at 100 (Separate Opinion of Judge Lauterpacht).