“The moral order of the world has its rights just as the material order”

Louis Kossuth (Memories and Writings from the Time of Exile)

I. Introduction

1. In the whole field, in full expansion, of commercial international arbitration, few subjects are more vague, more difficult to seize and more controversial than that of the existence, contents and function of a public policy which would be “really” or “truly” international, and which it is better, if only for the sake of convenience, to call “transnational”.

2. The limits of the present Report do not of course allow a thorough examination of the subject and no “final” conclusion will be suggested (if there is such a thing as a “final” conclusion in scientific and in particular legal matters!). An attempt will however be made to clarify the terms of the problem with a view to the discussion which shall take place in New York.

3. A first task will be to attempt to clarify terminology. There is indeed little doubt that the subject, already difficult in itself, is made more obscure by the imprecisions, the diversity and sometimes the confusion in the vocabulary used, as shown for instance by the well-known ambiguity of the word “international”.

4. With regard to its structure, the present Report does not begin, on purpose, with a discussion of the substance of the subject, i.e., the analysis of the decisions (comparatively rare, for obvious reasons, for instance in cases of bribery) when the international arbitrator has resorted to the concept of a “really international” public policy. For a good understanding of the subject, it appeared indispensable to begin with an outline of certain basic elements or facts of private international law with regard to public policy, on the one hand and, on the other hand, to recall the particular position of the international arbitrator in private international law, a position which is totally different from that of a national judge.

5. The present Report will then discuss the possible contents of transnational public policy in judicial practice. Such a study appears interesting for three reasons: the judicial practice of States is quantitatively important (much more so than published arbitral awards), notwithstanding a clear and understandable reluctance of judges with regard to the concept under discussion. Second, a comparison between the practice of judges and the practice of arbitrators is in itself significant, whatever the subject concerned.
Third, it is interesting to observe how judicial practice, in its recent evolution, has gradually broadened its horizons, from the sole taking into consideration of the public policy of the forum to that of the public policy of a foreign State, then of the public policy common to several States, and finally of a public policy more and more international.

II. First Part: Public Policy in Private International Law

6. From an examination of arbitral practice, of judicial practice in international arbitration matters or of doctrinal writings on the subject, one can often perceive, not only a great diversity in the vocabulary and ambiguities, but also a definite ignorance of the fundamental principles and mechanisms of private international law. Such ambiguities and confusions are harmful in practice to the development of international arbitration, much more so than is commonly realized in arbitration circles. As an example, it should be sufficient to mention the “automatic” assimilation – which is often made, without much thought, by judges – between local “mandatory” rules and the international public policy of the forum, from which follows on occasions the annulment or refusal of recognition of arbitral awards, without any substantive reason.

1. The Concept of Public Policy in General

7. In municipal law, the concept of public policy is often used to designate “imperative” or mandatory rules, from which the parties cannot derogate.\(^1\) The concept of public policy in private international law is, of necessity, a different one – the functions and the purpose of these two parts (domestic law and private international law) of a given legal order not being the same. It follows that, in the case law of many countries, a mandatory rule of domestic law does not necessarily prevail in international matters; in other words the judge need not necessarily resort to its “international public policy” in case such a rule has been violated.\(^2\) Such distinction reflects the nature of things and in particular the very nature of private international law, a branch of the law which is based on a fundamental distinction between “domestic” situations and “international” situations (i.e., those which include one or more foreign elements sufficiently relevant to call for a particular treatment and the intervention of the private international law of the State). To take another example, in domestic private law, the so-called principle of “autonomy of the will” or contractual freedom is limited by the obligation to respect mandatory rules whereas, in private international law, it is well-known to have a totally different meaning (allowing the parties by their choice of law to dismiss the rules, mandatory or not, of the law which, in the absence of choice, would have been applicable).

8. To mention such truisms might seem to warrant an apology but, in practice, they are often neglected, in particular in arbitration. One of the reasons is likely to be the very ambiguity of such terms as “domestic law”, “public policy” or “ordre public”, and “international”. Private international law is (unless it is based on international conventions) a part of “domestic” law (although it must be distinguished from the substantive or “material” part of such domestic law). And the “domestic law” (in the broad sense) of a State, i.e., its legal order, includes both its domestic private law (with its “domestic public policy” and its mandatory rules) and its private international law with its “international public policy” (which is also,
but in a broad sense, “domestic” or “municipal”).

9. It is worth noting in passing that when Article V of the New York Convention of 10 June 1958 allows the non-recognition of an arbitral award if it is against the “public policy” of the country where the award has been rendered or of the country in which recognition is requested, one should carefully avoid the automatic assimilation or the confusion between those two kinds of “public policy”. The confusion is particularly dangerous, and frequent, with regard to the procedural public policy of the State where the award has been rendered if such a State, or rather its legislation or case law, has not become fully conscious yet of the specificity of international arbitration by contrast to domestic arbitration and therefore applies to international arbitration, without adaptation nor exception, mandatory rules enacted and conceived for domestic arbitration.

10. Unless there are specific indications to the contrary, reference will hereinafter be made to public policy in the traditional sense of private international law, i.e., to the “international public policy” of a given State, such terms being taken as equivalent to those of ordre public (notwithstanding the difference drawn, at least until recent times, in English practice for example, between “public policy” and ordre public as observed in the Böckstiegel Report, note 2).

11. This traditional expression is used, first of all, in its “negative” sense, as a “reserve” or exception (ordre public d’éviction or Vorbehaltsklausel), i.e., as a general clause enabling the judge to reject the application of the foreign law normally applicable according to the conflict rule of the forum, as well as to refuse the recognition of foreign acts whenever such application of foreign law or such recognition acts would be incompatible with fundamental principles of the forum. Public policy exercises therefore a negative function (depriving the foreign law of its normal title of application or the foreign act of its faculty to be recognized). And it constitutes a limit to the functioning of the rules of private international law when the latter command either the application of foreign law or the recognition of a foreign act.

12. Thus defined, public policy constitutes a general principle of private international law which exists in all legal systems, even in the absence of specific rules or judicial precedents to that effect and a principle which may be opposed to the application of foreign law even though the latter would be applicable by virtue of a conflict rule contained in an international convention, whether or not such convention has expressly formulated this reserve of public policy.

a. Conditions and functioning of the exception of public policy

13. It is generally admitted that such exception only comes into play when certain conditions are fulfilled, which (in spite of a variety of formulations or technical expressions) express a very simple idea: the community concerned (here a national community, a State) must feel sufficiently concerned to impose the respect of its fundamental rules.

14. An observation is not devoid of interest for an understanding of our subject: such conditions of application of public policy can be summed up by the formula of the “relativity” of public policy, from three points of view: it must be appreciated in concreto, in relation to
the circumstances of the concrete case and not (unless in extreme and particularly shocking cases) in relation to the abstract contents of a foreign rule; public policy is also relative in space (in the absence of a sufficient connection with the legal order of the forum, it will not come into play or will only have an indirect effect (effect atténué)). Finally, public policy is relative in time (the exception will only intervene against a present attack against the fundamental rules of the forum).

15. This analysis, which is traditional at least in Continental Europe, is not unknown in English private international law (although the concept appears to have a more limited role, since English conflict rules seem to designate a foreign law less often). In the United States, the concept of relativity of public policy appears to be recognized notwithstanding terminological differences and the fact that, according to the so-called “new methods” based on “interest analysis”, considerations of public policy appear to be integrated as a principal element of the conflictual reasoning.

b. “Positive” public policy

16. Apart from the cases of its exceptional “derogation” to the normal functioning of the conflict rule, the same idea (of protection of fundamental principles of the legal order) intervenes in a different manner, in order to ensure the application of certain rules, having priority, of the lex fori. This is the “positive function” of public policy, a function which aims at imposing the application of the law of the forum, by means of unilateral conflict rules, or of “special reservations” of public policy or, according to a terminology which has become somewhat fashionable in Europe, of laws of “necessary” or immediate application.

17. To sum up, the concept of international public policy of a given community, here of a State, is made up of a series of rules or principles concerning a variety of domains, having a varying strength of intensity, which form or express a kind of “hard core” of legal or moral values, whether in its negative or in its positive function.

2. Concepts Akin to Public Policy

18. A brief mention of other techniques is also called for, techniques which are revealed by an examination of comparative private international law and which also result in imposing (indirectly or directly) the respect of certain fundamental principles or essential values, as an exception to the normal functioning of rules of conflict of laws. Such a mention will prove useful, if only by way of comparison and contrast, in our later examination of transnational public policy in arbitration.

a. Inapplication of foreign public law, in particular of penal or fiscal laws

19. According to a theory still existing, although of declining popularity, the domain of private international law is supposed to be limited to conflicts between State rules of private law; the application of foreign law would therefore be possible only in domains belonging to “private law”. Such a restrictive conception may well have important practical consequences (varying from one country to the
other). A number of decisions have thus decided that foreign public law would be inapplicable per se, or that it is not applicable in the same way as private law, but may sometimes, be “taken into consideration” by the forum, or that it cannot be enforced (coercive application) to the benefit of a foreign State; such affirmations have also been expressed as particular sub-rules in the field of criminal law or tax law, in English or American private international law.

20. In 1975, the Institute of International Law adopted, after a thorough study of the problem, a Resolution which categorically condemns the so-called “principle of inapplicability of foreign public law”. The main grounds of such a position can be summed up as follows: the concept of international public policy is sufficient to guarantee the respect of the fundamental principles of the forum, and the alleged principle of inapplicability of foreign public law does not add anything to this traditional concept, and is not based on any valid reason. The Resolution further recalls the requirements of international collaboration or solidarity, which impose a more cooperative attitude towards foreign States and therefore also towards their public law. This idea should be kept in mind when examining the position of the international arbitrator.

b. Fraus legis

21. In the sense of the private international law of some countries (a sense which is quite precise and distinct from that of domestic law), there is fraus legis when parties manage to change or displace, in an artificial although formally legal manner, the localization from the connecting factor used in the conflict rule (of conflict of laws or conflict of jurisdictions), e.g., through a change of domicile or nationality: this in order to bring about the application of a definite law, or to create the jurisdiction of a particular tribunal, thereby obtaining a practical result which the normal functioning of the conflict rule would not have made possible.

22. The so-called exception of fraus legis is therefore distinct, according to prevailing doctrine, from that of international public policy, by its subjective or psychological element, i.e., the “fraudulent” intention. In those legal systems which only sanction a fraud upon the lex fori, it is, nevertheless, very near the notion of public policy, whereas in those countries where the concept is used also to sanction a fraud upon foreign law, it appears rather as an independent correction to the ordinary functioning of the conflict rules.

23. Be that as it may, the concept appears to have a particular position in the field of contracts, by reason of the existence of the so-called principle of “autonomy of the will”, a universally-recognized principle although with different modalities or interpretations. If the rule itself (which allows the parties to choose the applicable law) has as one of its underlying motives the idea of restricting the possibilities of fraud, then the choice of the lex contractus is restricted in its scope by the requirement of a territorial connection or that of a legitimate interest in the choice. If, on the other hand, the rule allows, as is frequently the case, a totally free choice of law, then the relevant system of private international law may well recognize other corrective elements (such as the taking into consideration of foreign “public” or “police” laws), so that it is
permitted to consider that the exception of *fraus legis* has lost its purpose.\(^{(17)}\)

24. It is in French private international law, in particular, that this theory appears to have been favourably received,\(^{(18)}\) while its importance seems to be rather small in comparative private international law.\(^{(19)}\) Here, too, we are faced with a concept which appears *prima facie* able to play some role in international commercial arbitration. Let us think, for example, of the possible use by the parties both of the choice of arbitration and of a choice of applicable law in order to avoid the effect of a foreign mandatory law, of "international public policy" or "necessary application".

c. *Conformity of the normally applicable rule with the Constitution of the forum*

25. In some cases, the forum may take into account its Constitution in the conflictual reasoning, either through the formulation of special unilateral conflict rules for the Constitution,\(^{(20)}\) or through the requirement that the application of the normally applicable foreign law be in conformity with the Constitution of the forum. There is no need to elaborate on such a hypothesis, which appears to be easily absorbed within the general theory of public policy,\(^{(21)}\) a concept which, as page "266" we have seen, is sufficiently general and flexible to allow judicial practice to solve as they arise the various questions which may be involved in a concrete case.

d. *Conformity of the normally applicable law with public international law*

26. Some general observations appear to be called for here, which will help later to situate better the problem of a "transnational public policy" in arbitration. They refer mainly to the relations between the traditional notion of "international public policy" (in a national system of private international law) on the one hand and, on the other hand, general or conventional public international law.

27. According to the "Act of State" doctrine, known in particular to American law, the courts of the forum have no jurisdiction or, rather, no power to scrutinize the validity of acts which a foreign State has carried out within its own territory or, more precisely, within its sphere of territorial competence. This rule thus creates a kind of immunity *ratione materiae* for certain foreign acts. It constitutes, therefore, rather than a concept neighbouring that of international public policy, a limit imposed on the domain of the public policy of the forum: since the forum refuses to examine the validity of a foreign act of government, its international public policy should, so to speak by definition, have no possibility to intervene. The Act of State doctrine and the principle of international public policy thus appear to be opposed rather than close to each other.\(^{(22)}\)

28. What are the relationships between the "exception" of public policy of the State and public international law? Doctrinal writings on this subject seem inclined to include such question within the general theory of public policy and to consider that the *only* pertinent question is whether, how and to what extent the rules of the law of nations do contribute to the formation of the concept (shown above to be relative in space and in time) of the international public policy.
of a given State. (23) According to various writers, the role of the international public policy of a State depends neither on the question whether the State in question has accepted the "monist" or "dualist" doctrine, nor on the recognition by the State of the supremacy of public international law over the domestic legal order. The precise subject here under examination is said to bear only on the relations between the domestic law of the State (lex fori, including its private international law) with the law of nations; it does not relate to the relations between the normally applicable foreign law (according to the private international law of the forum), on the one hand, and the law of nations, on the other. (24)

29. For the purpose of the present Report, there is no need to discuss such page "267" questions, for which it is, in any case, difficult to suggest general and absolute solutions. It should be enough to outline them briefly, on the basis of the traditional distinction between the general rules (custom and general principles) and the particular rules (conventional) of public international law.

30. What are the relations between the concept of the international public policy of the forum and international treaties?

31. If the forum is a party to a treaty, the international public policy of the forum would, of course, prevent the application of a foreign law which is contrary to the treaty. (29) It may also be said that the question does not arise in such a manner, inasmuch as the provisions of the treaty have a direct application in the State of the forum by reason of the priority of international law. (26)

32. When an international treaty has not been ratified by the State of the forum, can it be stated that the latter's "international public policy" is not concerned? Such an absolute answer would appear excessive, at least for multilateral treaties. The existence cannot be denied of treaties which either codify a pre-existing custom or express or imply principles having general application; in such cases the fact that the treaty concerned has not been ratified by the State of a forum would not suffice, per se, to justify a refusal to take such custom or general principles into consideration. In several countries, courts have not hesitated, and rightly, to take into consideration principles contained in international conventions which had not (or not yet) been ratified by the State. (27)

33. Such phenomenon is illustrated by two recent and significant examples, taken from European case law in the field of protection of cultural property, in connection with the UNESCO Convention of 1970 relating to measures aimed at prohibiting the illicit import, export and transfer of ownership of cultural goods. In both cases, one German, the other Italian, the UNESCO Convention was taken into consideration although it was not in force in the State of the forum:

In the case decided by the German Federal Court, on 22 June 1982, an insurance contract relating to artifacts illegally exported from Nigeria was considered as null and void as against bonos mores in the sense of the German Civil Code. (28) page "268"

In the judgment of 25 March 1982 of the Tribunal of Torino, the Republic of Ecuador won the case although the Convention was not applicable as such, since it had come into force in Italy after the
facts giving rise to litigation; but the judges underlined the fact that the Italian international public order was in any case based upon and inspired by essential values recognized by the Convention.\(^{(29)}\)

34. There are, of course, other examples of international conventions which contain, expressly or implicitly, general principles capable of “nourishing” the international public order of States which had not ratified them (or had no intention of doing so). Several international conventions relating to the\(^{(29)}\) traffic of armaments and a decision of the Court of Paris of 9 February 1966 may be quoted in this respect.\(^{(30)}\) Another example which comes to mind is that of the International Agreements on the High Sea relating to measures preventing sea pollution by all products or by radioactive waste, or measures aimed at preventing damage to international cables.\(^{(31)}\)

35. Without discussing here the question, which attracted much attention in recent doctrinal writings, of \textit{ius cogens}, one should also mention here, in passing, general public international law, i.e., international custom (as well as general principles\(^{(32)}\)). By definition, international custom and the other general rules of the law of nations must be complied with by all members of the international community; and State organs, in particular courts, have many occasions to apply them (for instance, with regard to the international delimitation of jurisdictions for acts \textit{iure imperii}, immunities, recognition of States, nationality, nationalizations, etc.). It may be said that the international public policy of the forum has no reason to intervene, properly speaking, whenever public international law applies by reason of its priority, and the legal situation for the State of the forum is here like that, mentioned above, where the rules of a ratified treaty are applicable. But it may also be thought that the international public policy of the forum does come into play, in its positive functions, in order to impose the respect, not of a “mandatory” rule (of the forum or of a foreign State) but of the rules of the law of nations.\(^{page "269"}\)

\textbf{III. Second Part: The Position of The Arbitrator in Private International Law}

36. The above-mentioned general considerations on the concept of public policy in private international law, useful as they may be, do not suffice to allow a complete understanding of the subject under discussion. They must be supplemented by a brief outline of the unique position of the arbitrator of international commerce, a position which is fundamentally different from that of a State judge.

37. A clear understanding of such particular position (which is one of the aspects of the specificity of international arbitration, the functions and main features of which are to a large extent different from those of domestic arbitration) is a pre-condition to any attempt at answering the question whether there does exist a “truly international” public policy or, rather, a “transnational public policy”. Any observation of arbitration practice and any reading of doctrinal writings suffice to show, on this question as on many others in the domain of international arbitration, the danger of terminological confusions or of ambiguities on basic concepts and the premises of legal reasoning.

38. It would be futile to reopen the old theoretical or doctrinal discussions (such as those, inherited from certain municipal laws, on
the “legal nature”, jurisdictional or contractual, or mixed) of international arbitration. But it may be useful, in order to clarify the discussion, to state precisely the main parameters of the problem. In order to do so, it is necessary to recall what is the position of the arbitrator in private international law. The other Rapporteurs had also to deal with this problem, of course, although in different contexts, whether on the question of arbitrability of the dispute, of arbitral procedure or of the law applicable to the merits, and reference will have to be made to their reports on several occasions.

39. In particular, the reader should keep in mind the excellent analysis (with which we are to a large extent in agreement) of Mr. Yves Derains in his Report on “Public Policy and the Law Applicable to the Merits of the Dispute in International Arbitration”.

40. At the beginning of the enquiry, two facts should be realized: (a) any judge is “sitting” at a “forum”: he has a lex fori, both in the usual sense of a domestic legal system, of substantive rules, which his function is to “state” or apply, as well as a national system of private international law which he has to follow. Any international question put to the judge must be decided by him on the basis of this system of private international law (which includes rules of conflict of jurisdictions and rules of conflict of laws) and which necessarily includes also a concept of “international public policy”, the meaning of which has been outlined above. Similarly, the national judge may be called upon, also on the basis of his national system of private international law, to “take into consideration” or even to “apply” foreign public policy (as he is authorized to do, for example, by Article 7 of the Rome Convention of the EEC on the law governing contractual obligations).

41. The position of the international arbitrator, as rightly observed by Mr. Yves Derains, “is fundamentally different from that of a national judge when called upon to solve a problem of conflict of laws” (no. 8). He has no “forum” properly speaking (nor has he any “seat”, which is a common but dangerously ambiguous word to use).

42. The international arbitrator, therefore, has no lex fori within the usual sense of the term in private international law, and there is hardly any advantage in the use of a terminology which is borrowed from the totally different context of judicial activities within a particular State. Such an absence of lex fori also means, as stated above, the absence of a (national) system of private international law.

43. It is, however, doubtful that such absence of lex fori within the meaning of private international law is, as submitted by Mr. Derains, a consequence of the freedom of the arbitrator (which regard to the designation of the law applicable to the merits), a freedom which is clearly recognized by many national laws, by recent international conventions as well as by the most important arbitration rules. It would seem to appear, on the contrary, that he enjoys such freedom because he has no lex fori! The international arbitrator is not the organ of a State; he is not bound by any national system of private international law, while being obliged to follow, or so it would seem, the general principles of private international law, which recognize both the autonomy of the will of the parties and the freedom, for the international arbitrator, to disregard on occasions the “conflictual method” in order to choose the “direct way” and apply, for example,
general principles of law or the *lex mercatoria*.\(^{(34)}\)

44. While he is clearly not an organ of the State, the international arbitrator is not acting in a legal vacuum and is not called upon to decide, so to speak, as if he did not belong to this world! The question may be raised here, in passing (and it appears to be connected with that of the existence of a transnational public policy) whether the arbitrator is not, perhaps, the organ of the international community, be it the community of States\(^{(35)}\) or the “international community of *page 271* businessmen” (in which more and more States and State organs appear to be active) or both international communities. It might be contended that, since States have refrained from creating, except in very rare cases, really international private law jurisdictions (such as the Iran–US Claims Tribunal in The Hague), the extraordinary expansion of commercial international arbitration is due to the need to fill in this “gap” in international organization. It stands to reason that any answer given to such questions is bound to have to some extent a “political-philosophical” character and is likely to have a bearing on the analysis of our subject.

45. It may also be observed in passing that such international jurisdictions (inter-States, like the International Court of Justice, or “private” like the Mixed Arbitral Tribunals after World War I\(^{(36)}\) or certain international commissions after World War II) have no *lex fori* either, and, therefore, no particular systems of private international law; they have, thus, no conflict rules of their own nor any particular concept of “public policy”. But they have on occasions resorted to general principles of private international law or to a national “international public policy”.\(^{(37)}\)

46. To sum up, since he has no *lex fori* and, therefore, no particular conflict rules (with the exception of general principles such as the universally-recognized principle of “autonomy of the will”), the international arbitrator has no (national) law which is a priori applicable and, as shown by Y. Derains following B. Goldman, is not confronted with any “foreign” law properly speaking. For him, “all State laws have the same value and none has a privileged position, a fact which has a variety of important consequences, for instance, with regard to public policy” (own translation).\(^{(38)}\)

47. If one considers the concept of public policy as a necessary element of any (national) system of private international law and as a compulsory counterpart in the conflictual mechanism, one is tempted to conclude that, since he has no *lex fori* within the meaning previously indicated, the international arbitrator does not, likewise, have at his disposal a concept of “international public policy” or, perhaps (which is not the same thing) that for him this concept has no function.

48. Such a conclusion would obviously be erroneous, as clearly shown for *page 272* instance by the three Reports submitted by our colleagues Böckstiegel, Derains and Schwebel-Lahne respectively on arbitrability, the law applicable to the merits and procedure. There is indeed no doubt, as observed by Yves Derains in the Introduction to his Report that public policy, negative as well as positive, “can affect the solutions given by an international arbitrator”, be it on the subject of arbitrability, procedure or the merits of the dispute. In those various domains, international public policy...
(of a State – but of which State or States?) cannot possibly be ignored by the international arbitrator on the ground, or under the pretext, that the arbitrator is not an organ of the State. One reason among others is that he must strive to render a valid award capable of being recognized and enforced; the international arbitrator is legally and morally bound to take into consideration to an adequate extent the international public policy of one or of several States, in order to meet the expectations of the parties and, more precisely, their “legitimate” expectations: the parties cannot legitimately expect the arbitrator to establish or sanction a violation of public policy.

49. Assuming there does exist a transnational public policy (a question to be examined later), the question arises whether the international arbitrator has the power and the duty to take it into consideration either together with, or as a priority or even against one or the other relevant State public policies (of the forum, or of a foreign law such as the lex contractus, the law of the place of performance or possibly the law of a “third” interested State). Before answering such questions, it is useful and indeed indispensable first to examine the judicial practice of States.

IV. Third Part: Transnational Public Policy in Judicial Practice

50. It has been shown that, in private international law, the classic notion of (State) international public policy is marked by its evolutive and relative character and the difficulty, not to say the impossibility, of any precise definition. The same is true, so to speak a fortiori, for the notion of transnational public policy.

51. Even a cursory analysis of case law shows three factors which help to grasp the contents of the notion under examination. First, traditional public policy in private international law may contribute to the formation of specific rules (of substantive private international law) adapted to international situations, thus taking into account the needs of international trade. Second, its intervention in a given case does not always result in imposing the application of a particular and mandatory rule of the lex fori. Third, the public policy of the forum may also intervene in order to protect the (foreign) public policy of one or several States and lastly, that of the international community.

52. Undoubtedly, these various kinds of public policies are not distinct or independent enough to fall into clear-cut categories; this should in fact be a matter for satisfaction since it shows that, notwithstanding the “particularism” of legal systems, national laws often reveal a common core. Any attempt at classification and at an orderly presentation of the subject is thereby made more difficult, all the more so since judicial decisions on the subject are often motivated, or capable of being motivated, by a plurality and variety of grounds and reasonings.

53. Keeping in mind these explanations and reservations, we now propose to review a number of situations and judicial decisions which may be considered or interpreted as revealing, to some extent, the recognition of a transnational public policy.

1. The Formation of Specific Rules for International Relations

54. A classical example is found in the case of “Messageries
The case concerned a loan in Canadian gold dollars by the French company of “Messageries maritimes”, which attempted to repay its bond holders in paper dollars, in keeping with a Canadian statute enacted after the date of the loan; this statute had devalued the dollar and forbidden gold clauses without distinguishing between internal and international payments. The Court of Cassation disregarded the Canadian statute and declared, in a now famous pronouncement, that the parties to such a contract were entitled to agree, even against the mandatory rules of a municipal law governing their contract, a gold value clause valid under a French law of 25 June 1928 in keeping with the French concept of international public policy.

55. This case shows that the concept of public policy enabled the creation of a rule (of “substantive” private international law) specific to international payments and different from the rule of French law applicable to domestic payments. This new rule was that of the validity of gold clauses in international contracts. According to Dean Lerebours-Pigeonnière, the case is based upon a public policy “which does not underlie the particularism of French domestic life and, quite to the contrary, is based on the desire that private transfrontier relations be governed by an international legal order ... the exception of public policy leads here to the creation within French domestic law of a kind of ius gentium parallel to the domestic common law”.\(^{(42)}\) page “274”

56. Analogous examples of such a method may be found in several countries. One thinks here of some recent American cases, which seem to have received a widespread and well-deserved applause in the international community, in which the courts decided that certain mandatory or prohibitive rules were only”of domestic public policy” and should be disregarded in international relations in order to make way for more appropriate and less prohibitive rules.

57. Cases in point are the three well-known decisions in the cases Zapata,\(^{(43)}\) Scherk\(^{(44)}\) and Mitsubishi,\(^{(45)}\) Suffice it to recall that, in the first case, of 1972, the Supreme Court of the United States decided, with regard to the validity of choice of forum clauses, that the restrictive tendency of American domestic law should not prevail over the requirements of international trade. In the second case, of 1974, the Supreme Court accepted the validity of an arbitration clause, having regard to the international character of the contract, thereby excluding the restrictions imposed by the Security Exchange Act on arbitrability. Lastly, the famous Mitsubishi decision accepts the argument, developed, inter alia, in the amicus curiae brief of the American Arbitration Association and decides that, in antitrust matters, the principle of non-arbitrability does not extend to international contracts. We can limit ourselves to these very brief indications and refer to the analysis and comments of our colleague and friend Professor Böckstiegel in his Report.\(^{(46)}\)

58. It is worth noting that, in those cases, a rule of domestic law, of an imperative or “domestic public policy” character, is set aside, in international relations, in a manner which, prima facie, resembles that of the rejection of a normally applicable foreign law by the international public policy of the forum. But in fact, there is a greater analogy with the intervention of “positive” public policy which
(instead of imposing as in the classical case the extension of a mandatory rule of domestic law to international situations) allows and indeed requires the application (and creation) of specific substantial rules adapted to the needs and context of international commerce.\(^{47}\)

59. It seems possible to conclude that the function of international public policy may also be to enable the State of the forum to impose its views and requirements as to the proper and specific regulation needed by international situations, for “the national interest may precisely consist sometimes of taking into account and satisfying the interests and need of international trade, in the broadest sense of page “275” this term, notwithstanding the rules of domestic law [rules which have been elaborated and imposed for domestic situations].”\(^{48}\)

2. The Application of Rules Common to Several Systems

60. Notwithstanding the preceding observations, the prevailing doctrine appears today to restrict the intervention of the international public policy of the State to safeguarding mandatory rules and fundamental principles which are particular to the lex fori.\(^{49}\) In certain countries, however, doctrinal writings or judicial decisions are found which recognize a broader concept of public policy and give it a more or less marked “supranational” meaning or contents.\(^{50}\)

61. Examples are first found in the field of contracts, a field in which “mandatory” general principles appear to benefit from a very widespread international consensus whenever they express rules of “contractual morality”, a morality which has in itself nothing local or national even though it is translated into mandatory rules of domestic law.

For instance, a French court decided that the sale of a foreign decoration – in the particular case the title of Commander of the Order of Queen Isabel the Catholic – was against public morality.\(^{51}\)

The same result was reached by the Supreme Court of the United States with regard to a contract in which the seller was paying to the other party the exercise of illicit influence upon a third party with a view to obtaining the conclusion of a contract.\(^{52}\)

Similarly, the Swiss Federal Tribunal decided that the contract aimed at the purchase of the illegal influence of a party upon a third person was against “good morals” and therefore totally null and void.\(^{53}\)

62. It is indeed in cases of bribery that – as will be shown in the following part, on arbitral practice – many illustrations can be found of the efforts made at the international level, to “moralize” the practices of trade. International interests and the general interest in a normal functioning of international trade appear to coincide and to justify the conclusion that there does exist a principle of truly international or transnational public policy which sanctions corruption and page “276”: “bribery contracts”. But the delicate problem remains to determine precisely where the line should be drawn between legal and illegal contracts, between illegal bribery and legal “commissions”.

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63. In a decision given on 25 May 1948, the Civil Section of the French Court of Cassation considered that public policy was “the reservation of such principles of universal justice which are considered by French opinion as having an absolute international value.”

64. Similarly, Italian courts have often expressed the idea that international public policy aimed at safeguarding principles common to all civilized nations. According to the Italian Court of Cassation, “the respect of international public policy is based first and foremost on the need to safeguard a legal and moral minimum which is common to the feeling of several nations.”

65. The idea of an international public policy which is common (although part of State law) to various nations reappeared in French judicial practice with the famous case of the Banque Ottomane. In a decision of 19 March 1968, the Court of Appeal of Paris had clearly rejected the application of “principles of an alleged international public policy the existence of which is not recognized by any system of positive law and, in particular, not by French law.”

66. Facts and ideas have evolved since then. A decision by the Tribunal of Commerce of Paris, of 11 October 1982, already shows a different perception:

The plaintiffs contended that, in company law, the information of shareholders is so essential that the right to information, recognized by many legal systems, is promoted to “the rank of a general principle of international law” and recognized by a “specifically international public policy”, superior to the international public policy to be found in the private international law of any given State.

The Tribunal declared that “it would not be hostile to the application of the general rules of a common international law of companies, on the condition that such public policy be recognized in French law or in French judicial decisions.... The plaintiffs have not proved the existence of such an international public policy”.

67. Lastly, in a third decision given in the same case of the Banque Ottomane, on page “277” 3 October 1984, the Court of Appeal of Paris appears now to recognize the concept of a “common” international public policy, when holding that:

“The security of international commercial and financial relations requires the recognition of a public policy which is, if not universal, at least common to the various legal systems which protect the interests of the shareholders of joint stock companies; that, in such circumstances, one cannot consider as against international public policy practices which offer the plaintiffs the minimum of safeguards which are recognized to the shareholders of banks established in England”.

68. It follows from such cases that, “international” public policy remains always national by its source for the judges, but that it may well, however, on occasions, be inspired by supranational legislative purposes and therefore that it may have, by its object, a truly international purpose.

69. It is erroneous or far too narrow to state, as is often done in doctrinal writings, that the international public policy of the forum can have no other purpose or result but to impose the application of a
mandatory rule or fundamental principle of the domestic law of the forum. Such a statement misses the point, since the real question is not to ascertain the source of international public policy, but it is to determine its precise normative contents.\(^{(59)}\)

3. The Protection of Foreign Mandatory Rules or of Foreign Public Policy

70. Such a sub-title would have doubtless seemed a heresy some thirty or forty years ago. According to a classical doctrine, the essential validity of a contract depends on one law only which governs the whole contract (proper law or \textit{lex contractus}). The quasi-universal recognition of the principle of autonomy of the will, on the one hand, and the traditional conception of international public policy of the forum (assumed to aim solely at the protection of the fundamental principles of the \textit{lex fori}) on the other hand, lead to a logical consequence: the violation of foreign rules (foreign to the \textit{lex contractus} and to the \textit{lex fori}) will in general not be sanctioned at all.\(^{\text{page "278"}}\)

71. Such a result is hardly satisfactory and may indeed be shocking from the point of view of ethics or of equity. Attempts have, therefore, been made to restrict the traditional principle. Some German writers, for instance, have suggested as early as the 1940's a theory allowing the application, in certain cases, of some foreign provisions which are internationally mandatory.\(^{(60)}\) A well-known recent example is to be found, in European private international law, in Article VII of the Rome Convention on the law governing contractual obligations.\(^{(61)}\)

72. Generally speaking, judicial practice has been cautious in this respect, and has hesitated to depart from the principle of the application of the proper law to the legality and morality of the contract. Some decisions, however, have shown a greater spirit of international cooperation and solidarity leading them to apply or at least to take into consideration some foreign provisions designed to be internationally mandatory; this amounts to an application of a foreign “international public policy” or, better, to an extension of the international public policy of the forum to cover and include the protection of essential interests of a foreign State.\(^{(62)}\)

73. One of the leading cases in this respect in the well-known decision \textit{Regazonni v. KC Sethia Ltd.}, decided in 1958 by the House of Lords.\(^{(63)}\)

The facts are well-known: an international contract, concluded between a businessman domiciled in England and a businessman domiciled in Switzerland — a contract perfectly legal with regard to the English “proper law”, was considered null and void according to Indian law which prohibited the trade of jute with South Africa, following the apartheid measures imposed on Indians.

74. The question which arose was whether the violation of a foreign law, which was neither the proper law nor the \textit{lex fori}, nor (or so it seems) the law of the place of performance, could lead to an intervention of the international public policy of the forum (which was
also that of the *lex contractus*). At least a short passage of this famous case warrants a citation, from the opinion of Viscount Simons:

“It is, on the other hand, nothing else than *comity* which has influenced our courts to refuse as a matter of public policy to enforce, or to award damages for the breach of, a contract which involves a violation of foreign law on foreign soil, and it is the limits of this principle that we have to examine...”.

75. Conflicting interpretations of this case have been suggested. Is the decision a mere derogation (from the basic competence of the “proper law” of the contract) in favour of a foreign law closely connected with the contractual operation and which intended to impose the respect of its mandatory provisions? If this were so, the Regazzoni case would be a kind of *ante litteram* illustration of the modern theory of “special connection”, of the “mandatory rules” (*lois de police*) of third States. According to another possible interpretation, the House of Lords did not merely apply Indian law, instead of English law, to the legality of the contract; it extended the protection of the international public policy of the forum to the public policy of a foreign State (thereby intentionally neglecting, or so it may be assumed, the public policy of South Africa) and the decision would thus be a manifestation of a transnational public policy.

76. True it is that the decision appears to be based on the desire to recognize a certain solidarity with a friendly State (a member of the Commonwealth, but the same could be said of South Africa). It is an application of “comity”, in the traditional sense of the great Dutch Statutists or of Joseph Story, or an example of what Savigny called the *freundliche Zulassung*, i.e., of a factor aimed at correcting the rigidity of the territoriality of private international law. The Indian statute which was taken into consideration in that case was indeed a retaliation, but it was not aimed at safeguarding particular or “selfish” interests of the Indian State but rather, in the last analysis, to counter a racist legislation contrary to the elementary requirements of the protection of human rights. It stands to reason that the protection of human rights does belong to a common, and therefore transnational, public policy. The interpretation of the Regazzoni case, therefore, can hardly be limited to one single ground or to one single legal interest: while showing solidarity towards a given State and offering its help by deciding the absolute nullity of a contract which would similarly have been annulled in India, the English courts were simultaneously upholding, and recognizing, the public policy of the international community.

77. Two other decisions, already quoted, one German, the other Italian, must be mentioned here concerning artifacts illegally exported from Nigeria or Ecuador. Without really “applying” the Nigerian or Ecuadorian statute prohibiting export, and without applying the UNESCO Convention which was not yet in force, the Court considered as against *bonos mores* the illegal traffic of cultural goods.

78. These cases, and in particular the decision of the German Bundesgerichtshof, appear to call for remarks analogous to those made about the Regazzoni case, in particular, upon the contrast existing between the formal reasoning of private international law and the actual facts of the case. The German Court applied the *lex fori*, which under its own conflict rules governed the contract, but, in...
reality, it was respecting a foreign law (of Nigeria) which was not applicable under the relevant conflict rule; this was done by means of the concept of “good morals”. It should be observed here that this concept does not totally coincide, or so it would seem, with the purely domestic concept applied to those domestic contracts governed by German law. The notion belongs in fact to a morality specific to international trade, which includes the respect of foreign laws at least to the extent to which they protect the cultural heritage of a State. In other words, the court used a concept borrowed from the system of values of the international community rather than from that of a particular State, be it the forum or not.

79. In the same context, a number of decisions may be recalled which, sometimes in a contradictory manner, concerned foreign export prohibitions.

80. A first illustration may be found in the famous “Borax cases” decided by the German Federal Tribunal in the 1960’s. In the first case, the plaintiff, who had bought in order to resell, had been unable to obtain from its own Danish buyer a declaration of non-export and, for that reason, the German defendant had been unable to obtain delivery in the United States and had been sued for damages as a result of the breach of contract. In the second, analogous case, the buyer had purchased Borax from the United States in order to re-export it to Poland, and the dispute related to the validity of the insurance contract for maritime transport.

In both cases the Bundesgerichtshof held that the contract (of sale or of insurance) was null and void, since the violation of the American embargo was against good morals. The decisions observed that the parties had acted fraudulently in order to deceive the competent American authorities. Both cases are based largely on an analysis of the interests protected by the American embargo.

81. It is noteworthy that these German decisions take into consideration a foreign public policy or, in other words, a foreign loi de police or mandatory law (whereas the German Federal Republic had, on its part, enacted no similar statute); the decisions are based not only on the protection of American legitimate interests, but also on the absence of damage to German economy and, first and foremost, on the general interest of “the whole of the Western free world” and, therefore, on the very interests of the Federal Republic. The question may be asked whether the decision would have been the same if the American embargo, for example, had been enacted after the execution of the contract and if, therefore, no intention to defraud had existed. Be that as it may, the method followed by the Court is significant: starting from an analysis of the interest protected by the foreign embargo, it notes the existence of a common interest (the protection of peace, i.e., the underlying ground for the embargo on the export of sensitive material capable of reinforcing “the military strength of the East”) and finally concludes therefrom that the foreign interest coincides with the national interest of the forum.

82. The decisions in the two “Borax cases”, as is often the case with regard to international public policy, may well reflect the particular, and indeed political, circumstances of the period or the particular position of a given State, but this fact does not detract from their legal interest.
83. Analogous remarks may well be made, *mutatis mutandis*, with respect to those European decisions which refused to take into consideration other American measures. Two well-known cases need only be recalled here, in passing: one is the French decision in *Fruehauf v. Massardi* (70) – which is specific in the sense that an attempt had been made, not directly but indirectly, through instructions given by the American mother-company through its French subsidiary, to apply the foreign embargo – and the more recent, Dutch, decision in the *Sensor* case, concerning President Reagan's embargo of 1982 on deliveries of material for the construction of the Siberian pipeline. (71)

84. Contracts concerning smuggling have given rise for a fairly long time to judicial decisions in several countries, which considered them as null and void either on the basis of respect for foreign law, or because of solidarity with foreign States or by a sort of general and diffuse concern for contractual morality. Such a tendency appears to have prevailed in particular in German decisions (72) and in the French case law of the first half of the twentieth century. (73) As an example one may quote a French judgment of about thirty years ago in which it was stated that “If French judges are not called upon to sanction in French courts the violations committed abroad against the public policy of a given State, nevertheless, they must consider as illegal and therefore devoid of validity smuggling operations which, as they violate foreign laws, do infringe as in the present case international public policy ...”.

85. Similar ideas have on occasion been expressed in Swiss judicial practice (74) although, at least in comparatively old decisions, it was often quite reluctant – like the case law of other countries according to a traditional attitude – to accept (or solely with very restrictive conditions) that the violation of a mandatory foreign rule could be a violation of “good morals”, a reluctance which led to some harsh but not undeserved comments by F. A. Mann. (75) It may be noted, in passing, that some arbitrators have relied upon this restrictive judicial attitude and held that the applicable law did not permit them to take into consideration, for instance, foreign exchange regulations. (76)

86. It would be difficult and indeed rash to suggest a general conclusion on the basis of those few indications. One may, however, say that there is a definite evolution of judicial practice; it is less reluctant than earther and it does show, rather cautiously and according to the whole circumstances of each concrete case, an increasing tendency to “sanction” violations of foreign law, be it that of a “third” State. This tendency is noticeable when several conditions are simultaneously realized: (a) that the contract has a sufficient connection with the foreign State the law of which has been violated; (b) that such foreign law has a mandatory or imperative character and insists on being applied, according to its own criteria; (c) that such foreign law aims at protecting interests which are not purely selfish but appear worthy of protection in a supranational perspective. When such conditions are fulfilled, it is no longer rare today that the courts of the forum take into consideration, in international economic relations, basic requirements of solidarity and of “comity”. When performing this often delicate, not to say political, function, the judge of the forum, of course within the well-understood limits of its international public policy, accepts the task of...
protecting a *common* international public policy.  

87. This is not to say that the judge should or can blindly respect foreign and purely national political aims or bow before what some German writers called a “heterogeneous regulation”. But, for the same writers, the judge could and should take into consideration mandatory foreign laws whenever they tend to safeguard a “typically international interest”.

88. When certain recent provisions, such as Article VII of the Rome Convention, are kept in mind, it should be recognized that such theories have a great deal of truth: a State judge cannot of course, within the context of his own (national) private international law, go beyond the classical (national) concept of international public policy unless he is called upon to respect rules or principles which are based on an international consensus which is, if not universal, at least sufficiently widespread.

4. Transnational Public Policy and Public International Law

89. In the first part of the present Report, certain general considerations were submitted on the relationship between the concept of public policy and public international law. Another reference to the same subject is called for here in order to briefly conclude this survey of judicial practice.

90. It has been shown above that public international law may contribute to “nourish” or to define the contents of the international public policy of the forum, and that, on the other hand, the distinction between the two becomes blurred when public international law is applicable, as such, within the legal system of the forum.

91. Independently of such a case, there is little doubt that fundamental principles of the law of nations have been applied, more or less directly and through a variety of formulas, by national judges. A good example, already mentioned, is that of the protection of cultural goods, which belongs to a transnational public policy as shown by the decisions of the German Federal Tribunal and the Tribunal of Torino.\(^{(77)}\) The *protection of cultural goods and of environment* would have played a more important role (as a criterion of the compatibility of the contract with transnational public policy) in the so-called Pyramids case,\(^{(78)}\) decided by the Court of Appeal of Paris and now pending, at the time of writing, before the French Court of Cassation. If this had been the case, it might have been difficult to discern, in the reasons for the decision, what belonged to transnational public policy, on the one hand, and on the other hand, considerations of traditional international public policy, inasmuch as the UNESCO Convention of 16 November 1972 on the protection of the cultural and natural heritage is in force in France.\(^{(79)}\)

92. Another field where vital interests of the international community are clearly at stake and where the intervention of international public policy is called for is the sale and *traffic of drugs*. On 14 June 1927,\(^{(80)}\) the German Reichsgericht held that a contract for the import of heroin in India, in violation of the Treaty on Opium of 1912 and of Indian public law provisions was contrary to good morals and therefore totally null and void (the decision failed to specify clearly which States were actually bound by the said Treaty of 1912).
93. The Court of Paris held on 9 February 1966 that a contract organizing the traffic abroad of weapons, by private persons of foreign nationality, was contrary to the international public policy of France. The court said, “that the claim related to the performance of a contract of sale of arms, that such traffic was contrary to international public policy as expressed in particular by the General Act of the Brussels Conference of 2 July 1890, Article 8, by the Agreement of 13 December 1906 between France, Great Britain and Italy and lastly by the International Convention of 17 June 1925 concluded under the aegis of the League of Nations on the repression of arms traffic; that it follows also from French legislation as a whole on this subject and in particular of the Decree of 18 April 1939 that everything which relates to the trade of combat weapons is against French public policy.”

94. The reference to French public policy in the present case appears to go beyond the traditional concept in private international law but it is ambiguous, inasmuch as the various international conventions referred to were in force in France.

95. Finally, a very recent decision of the Swiss Federal Tribunal should be mentioned which relates to another of the evils which threaten vital interests of the international community, i.e., terrorism. The legal point in dispute was the admissibility of a request by the United Kingdom for judicial assistance in criminal matters, a request to which a Swiss bank had expressed its opposition.

An English firm had been enjoined by the IRA to pay a ransom of £2 million and serious threats had been proffered by the Irish organization against the firm and one of its managers. The same amount appeared to have been transferred by the Swiss bank to the account of its subsidiary in New York, from which it had been re-transferred to an Irish bank in New York and later to the same bank in Ireland. The Swiss bank relied in particular on (a) the danger that the IRA would later similarly threaten some of the bank’s customers and (b) the risk that the victim, having yielded to blackmail, be prosecuted under English law.

96. The Federal Tribunal rejected the opposition of the bank, since all the prescribed conditions for granting judicial assistance were fulfilled and it pointed out that, in all States, there exists a major public interest in the prosecution of terrorists, an interest which must prevail over the private interests of the businessmen and agents concerned. No bank and no State member of the legal community of Western Europe, including Switzerland – stated the Swiss Supreme Court – can accept to become, through negligence, a turning-point or basis for the financial operations of terrorist movements.

97. From the preceding presentation, which did not attempt to be exhaustive, one thing at least seems clear: in an increasing number of cases, a national judge, although a State organ having the function to state and apply the law of a particular State and to ensure the respect of its fundamental principles (in particular by means of the traditional concept of external public policy) has not hesitated to recognize and give effect to a wider notion, more
international or perhaps supranational, of public policy, based on the vital interests not only of the national community to which the judge belongs but also of a broader, regional or universal, international community.

98. The question then naturally arises: if such is the situation for the judge of a State, should not the international arbitrator also, and so to speak a fortiori, take into account transnational public policy and enforce it? This is the question which the last part of the present Report will attempt to answer.

V. Fourth Part: Contents and Reality of Transnational Public Policy in Arbitral Practice

1. Introduction

99. It is hardly necessary to emphasize the exceptional difficulty of the subject, for a variety of reasons which relate both to the sources and to the object of the present Report.

100. As to sources, every reader should know how difficult it is to get access to them and to obtain a global vision of arbitral practice. And what is known of such practice appears particularly scarce, for a plurality of reasons which it is useful to recall:

a. In the nature of things, there are and should be comparatively few opportunities for the international arbitrator to resort to the concept of transnational public policy; since the arbitrator can only be called upon to act on the basis of an agreement by the parties, it is up to one of them to invoke a contract whose execution or performance would be contrary to transnational public policy! A significant illustration in this respect is the classical example of bribery.

b. Even if the opportunity was offered to him, it is far from certain that the international arbitrator would have the courage, or as some would rather say the page 286 foolishness, to express his decision in innovative formulas (such as a reference to transnational public policy) whenever he is able to motivate his decision in more traditional terms, which seem more likely to ensure the judicial recognition and enforcement of the award in the States concerned. In contradistinction to a judge, who has all the necessary authority to render a judgment, if need be, on the basis of the public policy (national – international or even transnational) inspired by the international policy of his State, the arbitrator is likely to prefer, as grounds for his decision, such rules or notions (perhaps not necessarily of national origin) as are supported by a well-established opinio juris; this could of course be the case whenever transnational public policy is based on considerations of social ethics, but less frequently when transnational public policy would be largely inspired by political considerations.

c. It is understandable that, in general, the international arbitrator would show great caution when using his “creative powers” and would refrain from resorting unduly to concepts or standards as relative and difficult to define with certainty as that of public policy. It is of course much easier for the international arbitrator to refer in a given case to the international public policy of a State, since judicial precedents make it comparatively easy to establish its existence and
its limits.

101. From this apparent scarcity of arbitral decisions on the subject, it would be erroneous to conclude that the concept of transnational public policy is either nonexistent or useless. A first reason is the fact, previously mentioned, that several judicial decisions did refer to and even did recognize the concept of a common policy, truly international or universal, in appropriate cases; and this fact is all the more significant since, in most cases, the judge would have been able to arrive at the same practical result by resorting to the traditional concept of public policy within his own private international law.

102. There is reason to believe that, if judges have not hesitated to accept the idea of transnational public policy, international arbitrators by their very function and, let it be repeated, so to speak a fortiori, (a) could do the same and (b) should be naturally inclined to do the same, in order to reach practical conclusions, either negative (setting aside the normally applicable law or rules), or positive (imperative application, by priority, of certain superior and fundamental norms or principles essential in the law of international trade). In both cases this resort to transnational public policy should aim at protecting certain of the essential values and interests of the international community (of businessmen and States). Since he has no allegiance to a particular State, by the nature of his function, the international arbitrator could have greater difficulty than a judge when defining (at least in a case primae impressionis) the content of the international public policy of a State. But he would seem to be in a better position than a State judge when called upon to ascertain and understand the specific needs of the international community (at least that of businessmen), and it is precisely one of the reasons why the parties, ex hypothesi, have resorted to international arbitration.

103. Admittedly the task of determining, in a concrete case, the existence of a principle of transnational public policy may not be an easy one. But why should it be considered a priori as much more difficult than, in many cases, the task of the international arbitrator called upon to elicit and define, and then to apply, the usages of international trade or other national rules whenever applicable?

104. As a matter of fact, the two tasks appear closely connected or even identical, subject to some reservations to be mentioned later: and it is in any case of interest to compare to the question presently under examination the problem posed to the arbitrator by the application (and therefore by the prior determination) of the lex mercatoria. Such a comparison may be illustrated by reference to an excellent and recent study by Professor Ole Lando: An arbitrator applying the lex mercatoria will act as an inventor more often than one who applies national law. Faced with the restrictive legal material which the law merchant offers, he must often seek guidance elsewhere. His main source is the various legal systems. When they conflict he must make a choice or find a new solution. The lex mercatoria often becomes a creative process by this means.

Arbitrators of different nationalities who have applied the lex mercatoria in collegiate arbitral tribunals have not experienced great difficulties in reaching consensus....
Most arbitrators have common ethics and common notions of how business should be conducted. That leads them in the same direction.... In their attempt to give reasons they sometimes realize that the issue is governed by a rule which has still to be framed. Even courts sometimes face such situation."

105. According to most recent studies on the subject, arbitral practice, at least in Europe, appears to accept more and more the application, unless of course the contract would preclude that, of the lex mercatoria to international disputes. As to the content of such "law merchant", it is worth noting in passing that it includes (according to Lando's article just mentioned) elements borrowed from a variety of sources, such as public international law.\(^{(85)}\)

106. Another fact is worthy of note: this tendency of arbitrators appears to have been supported, in recent times, in a significant manner, by doctrinal writings and some international conventions,\(^{(86)}\) and also – which is perhaps even more striking – by some national laws (such as the French Decree on international arbitration), or certain "judgments", in France, Austria and Italy in particular.\(^{(87)}\)

107. Added to the judicial recognition, noted above, of the existence of a transnational public policy, these indications appear most significant: they seem to justify the conclusion that there does exist a general tendency of States (notwithstanding their legal "particularism" or even their narrow interests and selfishness as expressed by traditional "international public policy") to become more conscious of their increased international solidarity. Another factor did bear witness to that same tendency: the modern rejection of the alleged principle of "inapplicability of foreign public law" and the trend to apply, in certain circumstances, a foreign public policy or foreign mandatory rules (lois de police étrangères).

108. After these general observations, of a somewhat tentative character, we shall now review some examples (either real, likely or possible) of resort to transnational public policy by the international arbitrator.

109. Two preliminary remarks appear called for:
First, having regard to the scarcity of known arbitral decisions on the subject, it is justified to reason, by analogy, from the starting point of examples taken from court judgments, at least in those cases which could easily have arisen, or are likely to arise, also before international arbitrators.

Second, one should bear in mind the variety of the terminology used in arbitral awards, where it is not always easy to distinguish what really belongs to the concept of transnational public policy and what "merely" relates to general principles, common or fundamental principles of the law of international trade, of the lex mercatoria, of an emerging "transnational law" or also of an "international law of contracts". Among all these principles, it would appear that only which are really essential and are supported by a widespread, if not universal consensus, or as possessing, owing to their importance, a particular force and a particular imperative nature, will deserve to be considered as included in the concept of transnational public policy.

110. In traditional private international law, a characteristic feature
of the notion of the international public policy of the State could be called its "polyvalent" or versatile character, i.e., the possibility to apply it in a great variety of fields. The same holds true in transnational relations, to the extent, of course, that they relate to trade. For the purpose of the present Report, the following examples will be divided into five categories, while bearing in mind the possibility of overlapping and the somewhat arbitrary character of any attempt at classification.

2. The Validity of the Contract

111. As any international arbitration is based on the contract and relates, nearly always, to a contractual dispute, it is, of course, in the field of contracts that most examples are likely to be found of arbitral recognition of fundamental principles capable of forming or "nourishing" the concept of transnational public policy. Various references have already been made above to interventions of judges or arbitrators aimed at protecting "bona fides", "good morals", fundamental principles of contractual morality or of natural law.

112. It would be wrong to assume, as seems to be done in certain studies on the subject, that the recognition by the international arbitrator of the moral character of certain transactions dates from 1963, with the justly famous award by Judge Lagergren, which will be commented upon later. Already in awards given in the last century, public policy was resorted to in order to safeguard morality in international trade relations.

113. Two cases in point are that of the ships "Créole" and "Maria Luz" respectively decided by the Mixed Commission of London on 15 January 1855, and by the Tsar of Russia, on 17–29 May 1875. While they came to opposite results in fact, they were based on similar legal considerations, and they constitute a significant illustration of the role of transnational public policy (or rather, to use the terminology of the period, of the public policy of the "law of nations") in respect of human rights and, more precisely, of slavery.

The facts of the two cases were different but raised the same basic question: should the rights of ownership on slaves be recognized, when such slaves were transported by the "owner" in a ship which failed to reach its original destination following (in the case of the "Créole") a revolt of the slaves and (in the case of the "Maria Luz") their liberation by the Japanese authorities?

114. The first award, of 1855, does recognize the right of the owner on his slaves, but in terms which are worthy of note and clearly allow the conclusion that arbitrators deciding today would come to the opposite conclusion on the basis of transnational public policy: "We do not think that it is necessary to refer to authorities to demonstrate that slavery, however odious and contrary to the principles of justice and humanity, may be recognized by the law of a given country, and that, since it has in fact been established in several States, it cannot be contrary to the law of nations." page 290

115. The second award, of 1875, holds that the Japanese government, having freed the slaves in keeping with "its own laws
and customs”, has not violated “the general rules of the law of nations nor the provisions of particular treaties”. The decision appears to have merely a historical interest and it would have been more significant if Japan had been bound by a bilateral treaty prohibiting the intervention of its maritime authorities in such a case, but had relied, nevertheless, on a superior principle of humanity or of the law of nations.

116. As to bribery, the award given by Mr. Lagergren in an ICC arbitration[89] has been so often quoted, and recently in the important Report of Professor Böckstiegel on public policy and arbitrability (see III.2.d.) that it is hardly necessary to comment it further. It would indeed be hard to dispute the validity, on the merits, of the arbitrators' observations, to the effect that “contracts which seriously violated bonos mores or international public policy are invalid ...”.

117. While he referred to French law as the proper law of the contract and added, probably ex abundanti cautela, that Argentinian law contained similar provisions, the arbitrator did refer to a general principle of law, of a fundamental nature (the prohibition of “bribery”) and to the destructive effect of such violation on international trade: “such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations...”.

118. It is irrelevant for the purpose of the present discussion that Judge Lagergren, perhaps influenced by a traditional British conception (which does not seem to have accepted yet the prevailing doctrine of the autonomy or “separability” of the arbitration clause) should have thought it necessary to decline his own jurisdiction, a solution which has generally been criticized by recent writers, such as Goldman, El-Kosheri and Leboulanger, and Böckstiegel.[90]

119. From this point of view, one should, therefore, approve the different approach adopted by an Austrian arbitrator in a recent case. It is worth noting that the arbitrator, with typical caution, based his condemnation of corruption on a national law, i.e., French law which was the law of the contract, but added: “Lastly, one may also judge the case, apart from any national law, from the point of view of what is considered as morality in international relations”.

120. Arbitral condemnation of corruption may thus be characterized as either the application of a general principle of law “recognized by civilized nations”, or as the recognition of a “substantive law of necessary application”, or as the resort to a “transnational public policy”; notwithstanding the variety of the labels or expressions used, the same concept is in fact involved.

121. From this point of view, arbitral practice appears to be in full harmony with judicial practice, as shown by a recent decision of the German “Bundesgerichtshof”[91] or by an old decision of the Supreme Court of the United States which, on 24 April 1881, refused to order the payment of a commission for the illicit use of influence, notwithstanding the fact, aptly emphasized by L. Matray, that the State whose citizen was involved in the transaction did accept such a bargain[92]
122. In an ICC award of 1982, the question in dispute was the validity of a nexus of contracts between two Yugoslav firms and foreign firms. This was supposed to be an export–import transaction, but the export part of it was fictitious and solely designed to enable the Yugoslav firms to obtain – in violation of Yugoslav rules on foreign exchange and export credit – a credit in foreign currency for the purchase of consumer goods. The arbitrators first determined the true nature of the contractual operation and established the violation of Yugoslav law; they then concluded that such operations were “contrary not only to Yugoslav law but also to morality and bonos mores”. According to the award, since the object of the contract was contrary to mandatory or public law rules, as well as contrary to morality, it was “absolutely null and void”: “This principle is recognized in all countries and all systems of law. It does constitute an international rule, an element of the common law of contracts in the international field. In the present case, the parties deliberately concluded a fictitious contract, in violation of the governing Yugoslav legislation, in order to procure to the fictitious exporter a credit equally fictitious which he would not have been able to obtain otherwise. There is therefore a violation of law, morality and good morals”.

123. In another ICC case, the arbitrators were not deceived by the lawful appearance of a contract of commission and decided that the payment of bribes by a British firm was the cause of the obligation undertaken by a French firm. Deciding the nullity of the contract, the arbitrators made it clear that “This solution is not only in keeping with internal French public policy, it is also dictated by the concept of international public policy as is recognized by the majority of States”.

124. In another case, between French and Iranian parties, the defendant contended that the “commissions” claimed were not payable because the contract was null and void. The award decides accordingly the nullity of the contract, but it is interesting to note that this conclusion is based on a detailed analysis of both Iranian and French laws. In particular, the award observes that in fact, during the years when the performance of the contract was taking place in Iran, “corruption or at least the sale of influence was in constant practice” so that it “was extremely difficult if not impossible to obtain any contract for public works without resorting to such methods”, while the Iranian government had attempted, but in vain, to remedy this situation through various statutes.

125. In its formulation, this award is less explicit than the former ones as to the existence of a truly international public policy but it does reflect a similar approach and philosophy.

126. Again, an ICC case of 1982, already cited (No. 2730) clearly states that the immorality of such practices of bribery and sale of influence is based on a rule truly international in character, so that there is no doubt that such a rule must be considered as belonging to transnational public policy.

127. True it is that the concept of “good morals” in international
trade relations has flexible and evolutive contents and limits (just as, by the way, *mutatis mutandis*, the domestic law concept of "good morals", although to a lesser degree since the national community involved is more homogeneous than the international community). While the difficulty to draw a clear-cut distinction between bribery and the "normal" payment of commissions according to trade usages should be kept in mind, it must be recognized that transnational public policy is directly involved by a type of behaviour contrary to principles whose ethical and legal bases are supported by a general consensus. The prohibition of such behaviour is not only provided for (if not always effectively enforced) by the domestic laws of most States; the reprehensible character of such practices also appears from a series of international instruments.\(^\text{(96)-(98)}\)

128. International arbitration is now known to be "the" ordinary and normal method of settling disputes of international trade. It follows that the arbitrators’ function is no longer (as would seem to appear from Judge Lagergren’s approach in 1963) to declare admissible or inadmissible the request for arbitration of a person claiming the payment of commissions, according to the degree of contractual morality of the claimant (to some extent as a doctrine of "clean hands" might do). The protection of the superior interests of the international community, rather, requires the arbitrator, not to decline his jurisdiction, but to examine the merits and the conformity of the contract with the requirements of transnational public policy.

129. What other types of conduct (apart from bribery) will be considered as contrary to *bonos mores* (a notion which appears to be an essential part of that of transnational public policy)? Other examples are contractual practices aimed at facilitating drug traffic,\(^\text{(99)}\) the traffic of arms between private persons (generally considered as against the international public policy of those very States which claim the monopoly of this disreputable activity!), contracts aimed at favoring kidnapping, murder, or generally the subversions or evasion of the imperative laws of a sovereign State (such as through the employment of mercenaries) or violations of human rights,\(^\text{(100)}\) etc.

130. Analogous considerations could be made about contracts and the illicit transfer of cultural goods (but it should be noted, in passing, that the international consensus existing in this domain appears somewhat more limited than what a reader of UNESCO Conventions might believe, since there are some conflicts of interests between importing and exporting countries of cultural goods, in particular of artifacts and works of art.\(^\text{(101)}\)

131. In all those fields, arbitral practice could usefully rely upon those court judgments which, as we have seen, show an increasing consciousness of the need for greater international solidarity and the recognition of an emerging transnational public policy.\(^\text{(102)}\)

132. The *validity of the contract* may also be questioned, before the arbitrator, in other fields, e.g., in the case of contracts violating embargos of economic sanctions recommended by international organizations (such as the well-known case of the sanctions against Rhodesia). Here also, arbitral practice could gradually develop and render more precise the experience made by judicial practice, through concepts such as those of "good morals" or of *comitas*...
Let us imagine for example that a dispute like that in *Regazzoni v. Sethia*\(^{(103)}\) is brought before an international arbitrator. It cannot be excluded that the arbitrator, notwithstanding a natural reluctance to adopt political positions, could react in a manner very similar to that of the English courts.

### 3. The Common Law of International Arbitration

133. There is little doubt that a number of essential principles of the international law of arbitration have acquired the character, or the “dignity”, of general principles of the law of international trade; arbitrators no longer hesitate to apply them as a common law (and the terminology they use appears of little relevance, e.g., a substantive private international law common to several States or common to both international law and the private international law of the State, or *lex mercatoria*, etc.). There is no denying that such principles enjoy a general acceptance or “consensus” in international practice (while other principles appear to be in the process of acquiring such consensus). But the question remains whether these principles must necessarily prevail, as a part of a transnational public policy, over the normally applicable rules designated either “directly” by the parties or by the traditional method of a choice of domestic law.

134. The question also arises – although this may be rare in practice – whether the transnational public policy of the arbitrator should lead him, in a given case, to ignore the international public policy of a certain State, be it that of the place of arbitration or one of the States concerned in the dispute.\(^{(104)}\)

135. A general and abstract answer does not appear to have much sense, especially since the concept of public policy, as we have seen, has a dynamic and evolutive character and must be considered *in concreto*, in the light of all the circumstances of the case. However, it can probably be asserted that certain principles of the law of international arbitration, because they receive general acceptance and because of this fundamental character, should be recognized as particularly imperative and having acceded to the “rank” of transnational public policy. page 7295

136. Such appears to be the case for several and perhaps all of the principles which, for instance, recognize the impossibility for a contracting State, or a State company or public organization (a) after the execution of the contract containing an arbitration clause to invoke its incapacity to arbitrate; (b) to challenge the validity of the arbitration clause on the basis of absence of special powers to sign the contract; (c) unilaterally to rescind an international arbitration clause, either directly, or through retroactive legislation; (d) to contend that its immunity of jurisdiction entails the invalidity of the arbitration clause and thus the arbitrators’ lack of jurisdiction; (e) to rely on the sovereignty of the State as a ground for the restrictive interpretation of the arbitration undertaking contained in an international contract.

**a. Subjective non-arbitrability or incapacity of the State to arbitrate**

137. There is no need to repeat here the analysis and distinctions put forward by Professor Böckstiegel, in his Report (see III.2.e) and
his other works on the subject, and the major role played in international commercial arbitration by this problem is well-known. Particularly enlightened court decisions in certain States, e.g., in France, have found an appropriate answer to the objection which the State or a public entity attempted to base on its municipal law. Depending on the interpretation given to such court decisions, the answer was the creation of a domestic rule of substantive private international law or an intervention of the “positive” international public policy of the State. When the question of the power to arbitrate is characterized as one of capacity, there is much strength, in classical private international law, in a conflict rule favouring the application of the “personal law”, i.e., the law of the State or public entity involved. If such is the normally applicable law, then it is up to the concept of public policy to intervene in order to avoid a result which would be morally unacceptable and harmful to the very interests of the State as an actor in international trade.

138. In the countries where the courts were incapable or unwilling to find the adequate answer (such as a restriction of the alleged incapacity to purely domestic situations), the international arbitrator may have to deal with it in the guise of an objection to his jurisdiction. There is no doubt that the general trend of arbitral practice today tends to reject this kind of objection (a rejection which can be expressed according to a variety of formulas, as aptly observed by Böckstiegel, p. 187 and 203): application of the principle of good faith, of the notion of venire contra factum proprium, of abuse of right, of estoppel or of international public policy. Such rejection appears to be based on two lines of reasoning, one ethical, the other practical: on the one hand, there is an obvious moral reason for not allowing a State or public entity to invoke, after having signed an arbitration undertaking, its own domestic incapacity; on the other, such type of behaviour would gravely undermine the trust and security which are indispensable to the normal functioning of international trade, in particular with States, and it would be clearly against the general interests of States (an argument which is in full harmony, by the way, with the very conduct of States, the vast majority of which respect international arbitration undertakings). By the nature of his function, the international arbitrator has to protect a certain basic “contractual morality” and the superior interests of international trade, and he is therefore called upon, in the nature of things, to resort to the concept of transnational public policy, if need be, against the international public policy of a particular State. A good example of such a situation is found in the recent award, of 18 November 1983, in an ad hoc arbitration Benteler v. the Belgian State.105 The same principle is expressly recognized by Article 178 of the Swiss Draft Code on Private International Law.

b. Absence of special powers (of the signatory of an arbitration undertaking)

139. Analogous observations may be made with regard to this second type of objection. The principle of bona fides as well as the security of international transactions do not permit that a State or public entity be allowed to invoke, after the execution of a contract, alleged irregularities such as the absence of those special powers which would for instance be required under domestic law for the signing of arbitration undertakings. But some distinctions have to be drawn in such a case, as shown by the recent ICC arbitration award (No. 3896) in the case Framatome-Atomic Energy Organization of...
Iran, it stands to reason that the objection would prevail if the foreign contractual party knew, or should have known, the alleged irregularities, or had failed, in the circumstances, to exercise proper care.

140. Apart from the exceptional case when the foreign contracting party did know the absence of special powers or other irregularity or had seriously failed to show “due diligence”, arbitral practice clearly tends to reject – as against fundamental principles of arbitration law (principles which include perhaps the idea of favor validitatis) the defence or objection to jurisdiction which is based either on the idea of incapacity to arbitrate or of the invalidity or formal irregularity of the undertaking. Lastly, it may be added that, for the defending State or State entity, such objections are difficult to reconcile with the higher principle of bona fides, all the more so since, in the nature of things, the objection is often raised at a time when the main contract (if not the arbitration clause itself) has already been performed to some degree by both parties, which does constitute ratification by conduct!

**c. Unilateral rescission of the arbitration undertaking**

141. A well-known precedent is the famous Losinger case, where the Kingdom of Yugoslavia used retroactive legislation in order to annul a prior arbitration undertaking. Another case in point, and a more recent one, is the case Topco Calasatic v. Libyan Government, where the latter government initially challenged the power of the President of the International Court of Justice to designate the sole arbitrator on the ground that the arbitration clause which conferred to the President such authority had itself been annulled, together with the whole arbitration clause, by the Libyan Decree of Nationalization.

142. The general rejection of such State attempts to renege on their promise to arbitrate may be interpreted as based on an application of the “separability” or “autonomy” of the arbitration clause, which is a generally recognized principle (although a country like England appears to be reluctant to accept it). But it must be seen rather as a direct application of the concept of good faith or bona fides and is a fundamental principle of common sense as well as of the law of international arbitration.

**d. Immunity from jurisdiction?**

143. A similar fundamental principle, closely related to the preceding one, does not allow a State which has signed an international arbitration clause to invoke later its immunity from jurisdiction in order to challenge the jurisdiction of the arbitrator. Such a claim would be in total contradiction with the practice and behaviour of most States, a practice from which it follows that the signing of an arbitration clause is, or is equivalent to, a waiver of immunity from jurisdiction, perhaps implied but certain.

**e. Restrictive interpretation of State undertakings**

144. A different principle, based however on similar underlying considerations – and which has been recognized for example in one
of the ICSID awards\(^{(112)}\) – has led international arbitrators to reject the claim that the quality of sovereign State would suffice to justify the restrictive interpretation of arbitration undertakings in an international contract. This would seem to be a mere application of the principle of equality of the parties in arbitration rather than a principle of interpretation properly speaking (and it would seem difficult, a priori, to consider principles of interpretation as capable of constituting or “nourishing” the concepts of transnational public policy).\(^{(112\text{bis})}\)

4. Procedure

145. The very first fundamental principle of arbitration, and in particular of arbitral procedure, is undoubtedly that of the impartiality of the arbitrator, a principle which partly overlaps with the general principle of law *nemo iudex in causa sua*.\(^{(113)}\) Reference should be made here to the Schwebel-Lahne Report, which contains many illustrations of national practice or, more precisely, of application of the international public policy of States. An example is the German decision of the Oberlandesgericht of Cologne, on 10 June 1976,\(^{(114)}\) where the arbitrators’ impartiality was considered as “a fundamental principle both of the German legal system and of the international legal order”. According to another German decision, given by the Supreme Court of the Federal Republic,\(^{(115)}\) the prohibition to decide in one’s own cause is a guarantee of the impartiality of the judge and arbitrator and the respect of this principle belongs to those rules of procedure which are absolutely mandatory.\(^{(116)}\)

146. The other fundamental principles of any arbitral procedure can be summed up by the concept of *equality of the parties* and in particular by the old Roman principle *audiatur et altera pars* (or “principle of contradiction”). This is the well-known concept of “due process” which is summed up in the Schwebel Report p. 216.

The fact that the public policy requirements of due process are so obvious in the conduct of arbitral proceedings has the result that cases in which such questions have arisen are neither many nor controversial.\(^{(117)}\) The shared, general principles of international due process in this sphere are (a) equal treatment of the parties, (b) fair notice (both of the appointment of arbitrators and the conduct of proceedings), and (c) fair opportunity to present the case. These principles characterize model laws and rules and municipal legislation as shown by UNCITRAL’s Model Law, Article 19(3), Article 24(3), etc.

147. Those principles are undoubtedly a part of transnational public policy, as is demonstrated, on the one hand, by the remarkable harmony between national decisions and internal practices (or, in other words, by the coincidence of the concepts of domestic international public policy) and, on the other hand, their recognition by international instruments such as UNCITRAL Model Law, as well as by the practice of international jurisdictions or commissions.\(^{(118)}\)

148. Can a similar statement be made about certain general
principles with regard to proof? An affirmative answer is called for without doubt, with regard, for instance, to the inadmissibility of “secret proof”,[119] which would be a glaring breach of the equality of the parties. It is more difficult to suggest an answer with regard to the principle *Actori incumbit probatio*—which an ICC award of 1981 considered as belonging to transnational public policy.[120] Caution is required before accepting that a given principle or idea has already found its place within the concept of transnational public policy. Such hesitation or caution appears to be justified by two considerations: on the one hand, the diversity of national procedures, the often formalist and detailed character of laws in such matters render slower and more difficult the gradual birth of general principles of law based upon a comparative analysis (although the diversity of procedural systems appears to decrease, at least in arbitral practice). On the other hand, the nature of arbitration, and in particular the specificity of international arbitration, hardly permit a simple transposition to arbitration of those general principles which emerge from a comparison of national rules of *judicial* procedure. Account must be taken, in particular, of the exceptions or adaptations required by the higher principle of good faith, in particular, in the field of proof. As an example, an ICC award of 1975[121] may be quoted: *... Reference must be made here to the rules which relate to the burden of proof, although arbitrators are not bound to apply such rules in the same strict manner at some State courts. Moreover, both parties are in duty bound to cooperate, according to the principle of good faith, to the administration of proof, in particular in arbitration.*

149. There is little doubt that arbitral practice reveals a definite reluctance (which may be sometimes exaggerated and even a source of injustice) to rely on a strict distribution of the burden of proof and, more generally, on a strict application of rules of procedure. The context and general spirit of international arbitration, its flexibility, its liberalism and its absence of formalism are characteristics of arbitration and they do not favour (apart from fundamental principles such as those already referred to) the gradual emergence or recognition of transnational public policy with regard to proof.

150. In the matter of arbitral jurisdiction, the question may arise whether the so-called principle of *compétence-compétence* of the arbitrator has not become (notwithstanding a certain reluctance of some national systems, influenced by the Anglo-American tradition) a fundamental principle of transnational public policy, especially now that it has been recognized by various international instruments. An analogous question could be asked in respect of the principle of *autonomy of the arbitration clause* already mentioned.

151. What about the obligation to motivate the award, in the absence of an agreement of the parties to the contrary? The Geneva Convention of 1961 (Article VIII) provides that “the parties shall be presumed to have agreed that reasons shall be given for the award” unless they expressly agreed to the contrary or “have assented to an arbitral procedure under which it is not customary to give reasons for awards” but this assent can always be nullified by one party before the end of the hearing or before the making of the award. In any case, the absence of reasons can never conceal a violation of due process.[122]
5. General Principles of Private International Law

152. As shown in the Second Part of the present Report, the international arbitrator, *ex natura rerum*, has no *lex fori* and therefore no national system of private international law. This does not and cannot mean that he enjoys *unlimited* freedom and has no guiding principles, not to speak in terms of a “system of private international law (which is a controversial term, for reasons of general theory of law, as shown by the discussions about the concept of *lex mercatoria*). It is submitted that the international arbitrator does have, and is bound by, a private international law, but that such private international law can only be a “transnational” one, constituted as it is by a number of general principles, either common to all the parties (including States) concerned by a given case, or universal.

153. As to the exact number and contents of such general principles of common private international law, doctrinal opinions do of course vary. It is however possible to cite those principles, already mentioned above in a different context, relating to the validity of the international contract, the law of arbitration or even international procedure (e.g., on the impossibility for a State or State party to rely on its own incapacity under domestic law or to rescind the arbitral clause unilaterally). Without repeating what has previously been said about those principles, we should like to discuss briefly three general principles clearly belonging to private international law (whether “conflictual” or “material”): (a) the principle of autonomy of the will, (b) the principle of the “closest connection” and (c) the principle of the legitimate expectations of the parties.

a. The autonomy of the will

154. This principle is so generally recognized in all national systems of private international law that it may be considered as an international *custom* or as a “general principle of law recognized by civilized nations” (within the meaning of Article 38(3) of the Statute of the International Court of Justice) or as a central element of the *lex mercatoria*. The acceptance of the principle (although perhaps not of its exact limits or modalities of application) is indeed so universal that, according to some writers, whenever the parties have chosen the applicable “law” or “rules”, the question of the private international law of the arbitrator has implicitly been solved so that it would be superfluous to attempt to ascertain it.

155. On the practical level, this point of view is quite understandable, but it does not really explain the problem as a whole and, for instance, does not explain on what basis an international arbitrator could solve a dispute on the limits or modalities of such principle. Logically speaking, this could only be on the basis of a transnational and common private international law. Reference may be made here, as an example, to an ICC award of 1975, where the arbitrator did analyze in detail the question of the applicable law notwithstanding the existence of a choice by the parties themselves.

156. Such indications may suffice for the purpose of the present Report; their interest is in general more theoretical than practical, inasmuch as the choice (by the parties or by the arbitrator) of the applicable law is not a reason for refusing to recognize the award.
within the meaning of Article V of the New York Convention of 1958, so that the international arbitrator has a wide freedom of action, as aptly shown by Mr. Yves Derains in his Report (in particular, nos. 4–9).

157. In an ICC award of 1971, in the famous Dalmia Cement case, the defendant had insisted on the idea that “the power to choose the applicable law is necessarily based on law and therefore can have no effect until and unless it is connected with a given system of law”. (126) While this well-known logical argument did contain a grain of truth, the present writer came, as single arbitrator, to the conclusion that it was irrelevant since the fundamental principle of autonomy of the will was universally accepted; and he ventured the following opinion, which he still holds, that:

“Few principles are more universally admitted in private international law than the one implied by the usual expression of “proper law of the contract”, according to which the law governing the contract is that which has been chosen by the parties, either expressly, or (with some differences or shades of opinion in the various national systems) implicitly....The parties having made an express choice in the present case, it is therefore unnecessary to examine precedents or doctrinal writings on the implied intention of the parties or the power of the arbitrator to interfere with the choice of law, or to examine which facts or elements of the case have to be taken into consideration in order to decide with which legal system the contract is most closely connected. The arbitrator has no power to substitute his own choice to that of the parties, as soon as there does exist an express, clear and unambiguous choice and no valid reason has been alleged which could lead to a refusal to give effect to the choice of the parties.”

158. Similarly, the Topco-Calasistic award, already cited, states that:

“All legal systems ... apply the principle of autonomy of the will to international contracts. As to the merits, all legal systems recognize this principle, which appears therefore as universally accepted, even if it is not always interpreted or applied exactly in the same sense or with the same effect ...”. (127)

159. It should also be recalled that the principle of autonomy of the will is recognized in a much more liberal way in the (transnational) private international law of arbitration – and in particular in the case of arbitration with a State or public entity – than in national systems of conflict of laws. As a result one may mention the recognition for example of the power of the parties to choose several laws to govern their contract, to insert so-called stabilization clauses, to set aside or discard any national law and to choose “rules” (as is shown by international instruments such as Article 42 of the Washington Convention of 1965 of the World Bank or Article 28, (i), of UNCITRAL Model Law, not forgetting provisions like Article 1496, of 1981, of the new French Code of Civil Procedure (as cited in Yves Derain's Report, no. 7). (128)

160. It seems to be more and more accepted, in the private international law of arbitration, that the principle of autonomy of the will permits the parties to “denationalize” their contract, through clauses referring to good faith, equity, the general principles of law, the lex mercatoria, or indeed by clauses of a mere “negative” choice which reject, in part or in total, any particular State law. (129)
161. To sum up, it is a fundamental principle of transnational private international law that the choice by the parties of the “law”, principles or rules page 303 governing the contract must be respected, as a general rule, by the arbitrators in international trade who have no power to substitute another choice to that of the parties.

162. In a case decided by the Arbitration Commission of the Chamber of Commerce of Romania, however, the arbitrators did not take into account the choice by the parties of the applicable law, as the law of Greece was in their opinion more appropriate to govern a contract of sale of books than the chosen Romanian law.\(^{(130)}\)

163. Their approach may well appear much closer to that of a State judge than of that of an international arbitrator, at least in the “Western” sense of the term – a fact which may perhaps be explained by the particular nature of the permanent Arbitration Commissions in Socialist countries and by the great importance, in that particular context, of the system of conflict rules of the seat of arbitration. On the other hand, one may note that this award has the “virtue”, if it is one, to prefer a “foreign” law to the domestic law of the “seat” of arbitration.

164. It is difficult to accept, in the private international law of commercial arbitration, in principle, such freedom of the arbitrators to reject the law or rules chosen by the parties and to substitute the arbitrators' own judgment on what is “most appropriate” to the judgment of the parties themselves. But what can be, and indeed should be admitted, it is submitted, is not only the freedom of the international arbitrator but also the duty to disregard the choice of the parties, if this is required by a really international or transnational public policy. This is both a logical, advisable and inevitable transposition, to the domain of international arbitration, of the relationship which, in domestic private international law, exists between the normally applicable law and international public policy (of the State). There is no need to repeat here what was said above about the cases (e.g., of bribery, drug traffic, etc.) where the international arbitrator can and indeed must disregard the rules of the applicable law.

b. The criterion of the closest connection

165. In the absence of a choice by the parties, all the existing conflict rules (in State systems of private international law) relating to contracts appear to be based on the idea of the “closest connection” (and there is no need to discuss here whether such connection must be territorial or can be merely a rational one). This fact may lead one to consider that this is also a general principle of private international law, a principle which is likewise somewhat vague and undetermined. However, account should be taken of the great liberty of the arbitrator (as underlined by Mr. Derains) with regard to the selection of the applicable “law”, and one should also keep in mind that there is no clear-cut distinction nor any total opposition between the so-called “subjective connection” and the “objective connection” in matters of contracts. This being the case is it possible to assert that the international arbitrator is bound, by a general principle of transnational private international law, to determine in each case with which State law the contract has the “closest connection”? A negative answer appears to be called for, inasmuch as modern practice clearly allows the arbitrator, again failing a choice by the parties, to disregard any
State law – an approach which appears to amount to saying that the contract has in fact its “closest connection” with the international community of merchants (hence a resort to the *lex mercatoria*, to the usages of international trade, general principles, and the like).

166. It is, however, doubtful that the freedom of the arbitrator should be here considered as totally unlimited or should be placed so to speak on the same level as the autonomy of the will of the parties. As this problem can hardly be explored fully within the limits of the present Report, it may suffice to submit the provisional conclusion that (again in the absence of a choice by the parties) the international arbitrator should take inspiration from the idea of “closest connection” (but that this connection need not always and necessarily be “territorial”, i.e., limited to the connection with a given State law).

c. The legitimate expectations of the parties

167. It is submitted that, in the private international law of arbitration, there exists a general principle which obliges the arbitrator to respect the legitimate expectations of the parties as they emerge from the contract, in accordance with the mission conferred upon him. The function of the arbitrator, as defined by the parties in the exercise of their autonomy, is to give a solution to the dispute on the basis of the rules chosen or objectively applicable and, it may be added, a solution safeguarding the higher interests of international trade in accordance with the common “expectations” of the parties. It is perhaps not decisive whether this is an independent “general principle” or one of the composing elements of the mission of the arbitrator. But it must be recognized that the use of one or the other of these various expressions or formulas is not entirely neutral; by stressing one particular aspect rather than another of the arbitral mission, one may be led, consciously or not, to give priority, in a given case, either to individualism and the particular interest of the parties or, to the contrary, to a transnational public policy capable of countering the common will of the parties.

168. One fundamental value in this field is undoubtedly foreseeability, which constitutes one of the traditional justifications of the autonomy of the will in private international law. There is no doubt that the international arbitrator, when performing his function, must have what the Supreme Court of the United States, in the famous *Mitsubishi v. Soler* case, called a “sensitivity to the need of the international commercial system for predictability in the resolution of disputes”. And this calls, for example, for the use of such rules or principles of interpretation of contracts which are generally recognized.

169. The parties trust that their common will and expectations will be respected by the arbitrator, but this can be assumed to mean only the “legitimate expectations” of the parties. And this is obviously where the concept of transnational public policy comes in. The international arbitrator is only bound to take into account those expectations of the parties which are “legitimate” and, by reason of this characterization, he may have to apply or take into consideration, in a given case, not only the (classical) “international public policy” of one of the State directly concerned, but also and first of all transnational public policy (two concepts which, let it be repeated, frequently overlap but which may also happen to play in opposite directions, in which case transnational public policy should
6. Other General Principles

170. A few other general principles should finally be briefly recalled – most of which have already been mentioned in different contexts – and a great deal of which stem more or less directly from public international law, be it general or conventional public international law or what is sometimes called “economic international law”.

171. Both judicial and arbitral practice revealed, in fairly numerous cases, interventions of a transnational public policy based upon an observation of the present state of development of the law of nations. One need not examine again such very general principles as that of good faith, of the prohibition of abuse of right (estoppel, venire contra factum proprium) or other aspects of a universal notion of “good morals” or elementary contractual morality. But it is interesting to note that, in several cases, when the arbitrator applies (or one might rather say “creates and applies”) transnational public policy, he does so with reference to certain multilateral treaties or other international texts (such as recommendations, resolutions of international organizations, codes of conduct, etc.).

172. At least a passing mention must be made of a particular form of international public policy which might be called “multinational” or “common” or “community” public policy (well-known examples are Articles 2 and 85–86 of the Treaty of Rome establishing the EEC or, according to certain writers, the imperative provisions flowing from the General Conditions of Sale and Delivery page “306” of the CMEA countries. Whether this common or community public policy is incorporated within the internal public policy of the member States is no particular phenomenon and does not prevent it being a matter of a transnational (non-universal) or “multinational” public policy.

173. The question, of course, arises – which cannot be discussed in the present Report – whether or to what extent such a common or regional public policy must be taken into account, for instance, in an international arbitration taking place in a third country, between parties one of which or both are foreign to the community of States concerned. One general remark may however be put forward here: although the law of international arbitration is characterized by liberalism and the autonomy of the parties, it can hardly be accepted as a legitimate means to evade or nullify either the strictly mandatory rules or rules of international public policy of a State directly concerned or the principles of transnational public policy.

174. Let us return to transnational public policy strictly speaking, whose various applications, in judicial practice and in arbitration, have already been mentioned above. What is particularly worthy of note here is the influence of international treaties or other international instruments on the observation, determination and application of such transnational public policy.

175. A case in point is that of bribery, where the influence should not be underestimated of the studies, recommendations and resolutions of the United Nations, the International Chamber of Commerce or the European Communities. The same observation may be made with respect to drug traffic and the...
important Resolutions of the United Nations on the subject or with respect to terrorism, where recommendations of the Council of Europe, of the United Nations, or an Agreement of the European Communities regarding the application of the European Convention on the Suppression of Terrorism should be mentioned.

176. The same is true with regard to the international protection of human rights, and the influence of the Universal Declaration on Human Rights, and the work of the UN Commission on Human Rights or of the Organization of American States. Reference may also be made to the examples cited above, at the beginning of this Report, on the protection of the cultural heritage of States and the UNESCO Conventions, a subject where the most "advanced" position appears to have been that of the German courts.

177. A distinction should of course be drawn in this context between general principles recognized or implicitly accepted by international treaties in force, on the one hand, and those principles recognized in treaties which are not in force or not yet in force. One should also distinguish, of course, the influence of treaties from that of other instruments of international origin, and among the latter a distinction should be made between the texts adopted by international governmental organizations (such as UN Organizations, the OECD, etc.) and, on the other hand, texts adopted by NGOS like the International Chamber of Commerce.

178. On several occasions and in particular in disputes arising from measures of nationalization or unilateral abrogation of international contracts, international arbitrators have had to examine the exact role and scope of certain "resolutions" or "recommendations" voted or adopted by consensus by some international organizations (for instance when the arbitrators had to apply "generally recognized principles" or "principles common to international law and to the law of the nationalizing State"). When confronted, for instance, with an argument based on the so-called "new international economic order", the arbitrators had to ascertain the exact degree of general approbation or consensus existing in the international community. Well-known examples are the arbitral awards given in the Libyan nationalization cases, in particular in the Topco-Calasitastic case, and, more recently, by the award of 24 March 1982 in the Aminoil-Kuwait case.

179. Arbitral awards show, as could be expected, a great variety of formulations, from which many controversies, often more political than scientific, arise. Some common or permanent features, nevertheless, seem to characterize this arbitral practice: the arbitrators of international trade always attempt first to ascertain the rules governing the dispute, by an interpretation of the mission conferred upon them in the arbitration clause, arbitration agreement or "choice of law clause" and such contractual clauses can hardly be considered, in general, as masterpieces in clarity or precision, for obvious reasons. From a number of international texts and from the practice of States, the arbitrators may thus have to try to deduce the existence of generally (or universally) recognized principles – a difficult task indeed but not an impossible one, as shown by many arbitral awards. Once the existence of such principles has been observed, the problem remains whether they have such an imperative or mandatory character as to have to be applied, either
because of a direct choice by the parties, or because they may be characterized as *ius cogens* or transnational public policy. Is this solution only or primarily a matter of personal and subjective choice of the arbitrators, or a “question of sensitiveness” if one may use the expression of Mr. Derains about page “308” the negative international public policy? Will the arbitrator's decision be merely a subjective or even arbitrary one? Is the arbitrator's function here one of “creation of law”, which goes beyond admissible limits, unless he is authorized to act *ex aequo et bono*, as *amiable compositeur*? Such are some of the questions or objections which should at least tentatively be answered, by way of conclusion.

**VI. Conclusion**

180. As was emphasized at the outset but this need perhaps be repeated, the topic of the present Report, by its object and its nature, was one of particular difficulty.

181. By its object, first, since the very concept and the existence of a transnational public policy, or truly international public policy, have been questioned or denied. The question may thus be asked whether, in contradistinction to the three other Reports on public policy, by Böckstiegel, Derains and Schwebel-Lahne, the present Report has tried to study a ghost or a myth?

182. By its *nature* then, and its character which is both “multidisciplinary” and protean, the theme of the present Report offers considerable resistance to scientific analysis. One reason, but not the main one, is that (like the concepts of domestic public policy or, in traditional private international law, that of “international” public policy) it touches a very great variety of subjects (contracts, procedure, competition law, administrative law, protection of human rights, exchange control, etc.). This is indeed a “transfrontier” topic in various senses of the term, since it overlaps both private international law and involves, in particular, the difficult and changing question of the relationship between the law of nations and municipal law in the sphere of international economic relations.

183. As an example, the present study has shown the influence – and one might say the partial osmosis – of the (really international) public policy of the *law of nations* upon, or in, the concept of transnational public policy. We are here in the field of international trade arbitration, a field in rapid quantitative but also qualitative expansion which concerns, it must be repeated, the settlement of disputes in the *international community of businessmen* (a community which seems to involve more and more States and public entities). It follows that any question on the role of the arbitrator and its specific functions (in contradistinction to those of a State court) is closely related to a series of fundamental questions and theoretical controversies, on international organization, on the definition of law, on the role of rules, principles, standards, etc., on the role of States, on the “creative” power of the judge and of the arbitrator, to quote only a few! One need only think here of the doctrinal debates on the *lex mercatoria*, on the notion of “transnational law”, equity and the like page “309”

184. It stands to reason that the present Report did not and could not attempt to reopen or to conclude such fundamental controversies, which are both theoretical and practical, legal and political. But the danger was great, and perhaps impossible to avoid.
entirely, to seem to decide or take sides in such doctrinal controversies, if only because of the use of a particular terminology.

185. Be that as it may, one should recall that, in private international law, the traditional concept of a State's “international public policy” was largely based on a feeling of law and justice in a given community. The same is probably inevitable with regard to transnational public policy and to the international community (of businessmen, or States, or both), so that it may be contended, without verbal precautions, that, in the final analysis, a great deal if not everything is a question of personal feeling or sensitiveness, or of Weltanschauung!

186. The results of the present study can, nevertheless, be summed up, at least for the purpose of discussion, in the following propositions:

1. There exists a notion of transnational, or really international, public policy. This has sometimes been denied or questioned, at least until recent times. One should recall here the evolution of French court practice. As for the Swiss Federal Tribunal, it expressed in a dictum of 1976[142] its lack of understanding and scepticism, when it stated that international public policy was “rather a formula propounded by some writers who do not seem to ascribe to it a precise or an unequivocal meaning”. Somewhat similarly, President Jean Robert[143] observedpage “310” a few years ago, but with appropriate caution, that “judicial decisions do not seem to have recognized to date the concept of a truly international public policy”. But he conceded that, having regard, for example, to the principles of the European Declaration on Human Rights on 4 November 1950.

“One cannot exclude the possibility that, in a comparatively near future, a really international public policy would appear on that basis, with the help of court decisions.”

2. Any observation of modern practice, whether of State judges (Third Part) or of international arbitrators (Fourth Part) shows that it is impossible to deny the existence of the concept of transnational public policy, nor can the variety of its possible applications, nor its interest be questioned (an interest which, as will presently be shown, should not however be over-estimated). This being the case, it is submitted that there is no important reason to distinguish, as has sometimes been suggested, between a really international public policy by its contents (while national by its source), on the one hand, and a public policy which is really international both by its contents and by its source”, on the other hand.[144]

3. There is no valid theoretical reason to challenge the acceptance of a concept of transnational or really international public policy, a concept which, in practice, whether in the law of nations or in the law of international trade, has been recognized as real for quite a long time.

a. It is sometimes objected that the concept is vague and undetermined, but the same objection holds true, or is equally erroneous, for the traditional concept of the private international law of States. The wise remarks of the late Henri Rolin[145] should be kept in mind:

“Just as public policy, good morals escape any attempt at a precise
definition or an exhaustive enumeration. The concept is hardly mentioned in most legislations ... and is in general included in the concept of “public policy”. In fact, however, a concern for respect of good morals plays an important role in the elaboration of positive law, not only as a source of inspiration for the legislator, but also as the starting point of an exceptionally abundant and solid case law”.

b. As a “substitute for a true international commercial jurisdiction”, according to Ion Nestor’s formula, the international arbitrator, when called upon to solve a dispute on the basis of law, uses a variety of methods (conflict rules or substantive page “311” private international law) and can resort to a plurality of sources. To the extent, in particular, to which he relies on general principles of law and the usages of international trade, it can hardly be denied that he does contribute to the creation of the positive law of international trade. And the notion of public policy is a necessary component, as a corrective or equitable superior element, of the whole body of rules applied by the international arbitrator and which make up the (composite) “legal system” which he is called upon both to apply and to produce. It has been contended by some writers, mostly specialists of public international law, that the “usages of international trade”, the general principles, “transnational law” or the lex mercatoria, do not constitute per se a “legal system”. This objection is hardly convincing: on the one hand, neither the parties, nor the arbitrators, nor State judges care very much in practice whether or not the rules of principles applied in arbitration do constitute “a system” or not. On the other hand, and more decisively, it is irrelevant – as has been aptly pointed out by Alf Ross and other writers, particularly in Scandinavia – whether the lex mercatoria does constitute or not a “system” or a complete whole, inasmuch as the domestic legal order itself cannot be considered as “complete” either. Some theoreticians clearly over-emphasize the difficulties there may be to determine or to apply such “general principles”.

4. In international arbitration, the concept of transnational public policy would appear to have a dual function, both negative and positive (in a somewhat analogous manner as, in national private international law, the concept of “international public policy”): a. It has a negative function, i.e., of exclusion, partly to be compared to that of the “exception” of public policy in traditional private international law, but it is different insofar as it may lead, not only to exclude, in a given case, the laws or rules which are normally applicable by virtue of a choice of law or of a “objective” connection, but also to reject any intervention of the international public policy of a State. Thus, transnational public policy may give priority to the traditional international public policy of one State rather than to that of another State: let us suppose that an international arbitrator would have been asked to settle the dispute in Regazzoni v. Sethia: there is no doubt that he would have given priority to a transnational public policy hostile to any measures inspired by apartheid. The same is of course true of the international judge, as already noted in 1932 by Niboyet: “He (the international judge) shall not apply the foreign law – and one may add: neither page “312” shall he apply the notion of national public policy invoked – if it violates international public policy in the strict sense of the term, that is to say that of civilized nations”. Two observations may be added on the question of the “negative” transnational public policy. On the one hand, it is unlikely to play a role whenever the rules chosen by the parties, or applicable to the merits on an objective basis, happen to be general
principles or usages of the international trade. On the other hand, the negative function of public policy appears to be secondary, as judiciously remarked by Julian Lew\(^{(152)}\) in relation to its “positive” function, in which it is often likely to be absorbed: the main function of transnational public policy is to directly and positively influence the decision of the arbitrators, whenever fundamental and universal notions of contractual morality or the fundamental interests of international trade are involved.

5. As to the \textit{conditions for intervention of transnational public policy}, they appear analogous, although not identical, to those of the traditional “international public policy” of a State. One of these conditions, well-known in comparative private international law, was that, as shown above, the factual situation should have a \textit{sufficient connection} with the State of the forum which, in other words, must be sufficiently “concerned”. There is no ground for such a condition, \(^{(153)}\) in principle, in international arbitration – as least in the normal cases, where the arbitration takes place in a \textit{neutral} country, which has been chosen precisely because of its \textit{absence} of connection with the matter in dispute. In other words, the condition of a sufficient “connection” is always fulfilled, so to speak by definition, in international arbitration, as soon as the interests of international trade are involved, and it is hardly necessary to recall here the risks of confusion and error which arise out of a strictly territorial conception of the so-called “seat” of the arbitration. The problem arises mainly or only, it would seem, when a “\textit{regional}” transnational public policy (such as EEC common public policy) is involved, in particular, if the arbitrator was chosen \textit{outside} such community and when the parties do not belong to it.

6. \textit{Transnational public policy} governs the actions of both the \textit{parties and the arbitrator}. The former cannot attempt, for instance, to obtain through arbitration the recognition or enforcement, whether direct or indirect, of an international contract which would be against \textit{bonos mores} by its object (traffic of drugs, assistance to subversion or terrorism, etc.) or by the circumstances of its execution (bribery). As to the arbitrator, he would be committing himself a violation of transnational public policy – which he must protect and guarantee, if he happened to condone its violations by the parties or types of behaviour which are against good faith (this would be the case, for example, if he approved or recognized, against principles mentioned above, the allegation by the State of its own incapacity to arbitrate or a \textit{unilateral rescission} of the arbitration clause). \textit{Similar} principles are valid, as previously stated, in the domain of arbitral procedure.

As an example, a recent ICC award may be mentioned when the arbitrator, in violation of his duty to impose the respect for transnational public policy, merely bowed before political expediency and accepted an event as “force majeure” on the basis of a \textit{secret} act of government, the existence of which had never been proved but was only alleged \textit{orally} and indirectly, many years after the breach of contract, at the very end of the arbitral procedure!

The question may be asked whether, when the conditions are fulfilled, the arbitrator should resort to the concept of transnational public policy only upon the request of one party or \textit{ex officio}. It is difficult to give a general answer to this question, especially when one bears in mind the \textit{relative and dynamic} character of the concept and the variety of its possible applications; but \textit{ex officio} application appears preferable whenever fundamental ethical and social values
are concerned and when it appears that a decision ignoring transnational public policy could, to use the terms of the Supreme Court of the United States in Scherk, “damage the fabric of international commerce and trade” or, to resort to another expression, be incompatible with universal principles of justice.

7. As clearly appears from an examination of arbitral or judicial practice, the respective domains of “classical” international public policy of States and of transnational public policy largely coincide, each of them “feeding” so to speak the other or others (and there is little need to determine here according to which exact process or in what direction this kind of osmosis takes place, since the modalities of such process are inevitably influenced, in each State, by national conceptions on the relationship between the international legal order and the national, domestic legal order). However this may be, there can be no total identity or assimilation between the two kinds of “public policies”, inasmuch as the State international public policy inevitably retains a particular or even selfish character, at least in part. Similarly, the fundamental values and interests of a given State can hardly coincide fully with the values and fundamental interests of the international community, just as the national concept of “international public policy” cannot be identified with that of transnational public policy.

8. Since all national laws are “foreign” in a way, for the international arbitrator, and, therefore, all State “public policies” are foreign, although not necessarily to the same extent, it may happen, as shown above, that the international arbitrator has to take into account, like a State judge, a State international public policy (whether positive or negative). Positive, which may be the case, for example, of the public policy of the “proper law” or of the law of the place of performance, or also of the foreign “mandatory rules” according to the theory of “special connection” (or Sonderanknüpfung) – or “negative”, in order to exclude the possibility of an award which would not be recognized or enforced in a given State. But, contrary to a State judge for whom resort to transnational public policy appears to remain exceptional, the international arbitrator should first take into account the public policy of the international community of merchants (including, let it be repeated once more, many States or public entities). Like any law, the concept of public policy postulates the existence of a certain community and of certain common fundamental values, and the position of the international arbitrator confronted with the concept of transnational public policy can hardly be understood if its specific functions and position, outlined above, are not kept in mind.\footnote{\textsuperscript{154}}

9. True it is, of course, that the main function of the arbitrator is to perform the task conferred upon him by the parties (as the whole law of international arbitration is based upon autonomy of the will and liberalism, as stated above). From this point of view, the fear may be felt by some that a recourse to such concept, evolutive, dynamic and therefore imprecise as it necessarily is, may eventually lead to abuse. Such a fear is understandable, but two arguments at least should be advanced by way of answer:

a. It may well be that the intervention of transnational public policy does amount (like in traditional private international law before a court) to a restriction to the autonomy of the will (although it is hard to see how it could be an additional restriction, since most national...
legal orders and public policies already incorporate, as shown above, precisely those common values, ethical or social, which are expressed by transnational public policy, e.g., in the case of corruption). But transnational public policy may also be, quite to the contrary, a support for the autonomy of the will and a useful means of the liberalism characteristic of international trade and generally recognized by States today, whatever their own economic and political domestic system. The concept may well lead the arbitrator to disregard the particular and selfish interest of a given State in order to respect the superior values of the international community (as would seem to be illustrated by the examples of the incapacity of the State to arbitrate or its impossibility unilaterally to rescind its own arbitration undertaking).

b. On the other hand, autonomy of the will or “legal liberalism” can only exist within the general limits of the law of the international community, that is to say provided the superior requirements of ethics and of a minimum of solidarity are observed in the said community.

10. Such statements, general though they are, should presumably help to pacify the understandable, although exaggerated fears of some opponents of a “law of international trade” or of “lex mercatoria” who, a few years ago, claimed to be worried by what they described as “the abdication” of States before the so-called “multinational and private powers”! Such line of argument is misconceived and forgets the essential features of the modern world as well as the reasons of the extraordinary expansion of commercial international arbitration: far from “abdicating” anything, States have chosen, in their own interests as they saw them, to participate in international trade, either directly, or through a “public” enterprise or organism, and to resort to contractual methods (private, public or “mixed”) and they have adopted, in relation to the business practices of the international community of merchants, an attitude of both tolerance and supervision which was excellently analyzed by Professors T. Popescu and R. David, in their general Reports to the Rome Conference of the International Institute for the Unification of Private Law (UNIDROIT) in September 1976. Since they were conscious of the totally inadequate adaptation of domestic laws to the needs of international commerce and of the difficulty to come to a general agreement on a uniform international law of trade, States preferred to leave to the international community of merchants a vast power of self-regulation. Such tolerance is of course limited through a supervision a posteriori of arbitration as well as through a number of important interventions of each State in economic life, while simultaneously there is a not inconsiderable effort towards the gradual development, through conventions or otherwise, of the law of international trade.

Transnational public policy constitutes in a way a limitation to this tolerance, but also a guarantee that this tolerance will be allowed to remain. Such limitation is clearly justified since it allows for the incorporation in the law of international arbitration, as soon as there is a sufficient consensus, of fundamental values and of interests which are superior to those “private economic powers” which appear so threatening to some.

Thanks to its evolutive and dynamic character, so often emphasized above, the concept of transnational public policy allows today, and
will allow in the future, the incorporation in arbitration of the **new needs and ideas** of the international community, in particular of the interests of developing States as expressed, for instance, by or implied in the concept of “new international economic order”. Also from this point of view, therefore, the concept of transnational public policy appears to be an indispensable and important **dynamic** factor in the development, through arbitration, of a law of international trade.

11. However, **it would be erroneous to over-estimate its importance today**, the frequency of its applications or its possibilities of intervention. We have seen that, in classical private international law (of individual States), the judge had to show great care and caution before deciding to resort to the “exception” of public policy or to accept the “positive” role of the concept. **Mutatis mutandis**, a similar caution **page “316”** appears to be called for with regard to transnational public policy. Keeping in mind the comparative scarcity of known arbitral awards on the subject, there is little reason to fear that international arbitrators will abuse the power implied by their function — a function which, by the nature of things and by the common will or the legitimate expectations of the parties, does include the application or taking into consideration of transnational public policy.

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N.B. The reader in a hurry is advised to read the **Fourth part only.** The reader in a great hurry need only read the Conclusion (Nos. 180-186).

The text is an English translation from the French original.

1 See Report by Y. Derains in this Volume, no. 1.

2 See, for example, Swiss Supreme Court in *Rothenberger v. GEFA*, ATF 93 II 379, 382: “The provisions of Article 493 Code of Obligations according to which a warranty must be in notarial form, are of mandatory nature. But this does not mean that they should also be considered as belonging to public policy”. This is a permanent principle in Swiss case-law (see the case *Société des grands travaux de Marseille v. People’s Republic of Bangladesh, Bangladesh Industrial Development Corporation*, ATF 102 Ia 574, 581).

3 While in continental systems, public policy is generally an obstacle to (a) the application of the normally applicable foreign law and (b) the recognition of a decision, arbitral award or other admissive act of a foreign country, in Anglo-American law a number of more particular situations are distinguished: see Rule 2 of Dicey & Morris, *The Conflict of Laws*, I, 83:

> “English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising
under the law of a foreign country, if the enforcement
or recognition of such right, power, capacity, disability
or legal relationship would be inconsistent with the
fundamental public policy of English law”.

But the formulation of such particular cases of application of public
policy has no influence on the definition of public policy as such, cf.
CHESHIRE/NORTH, Private International Law, 131.

4 See W. WENGLER, “Die allgemeinen Rechtsgrundsätze des
internationalen Privatrechts und ihre Kollisionen”, Zeitschrift für
öffentliches Recht (Vienna), 23 (1943), 473–509 No. 2. 476–477.
The following rules are well-known examples of expressions of the
concept of public policy: Article 26 of the Albanian Law of
21.11.1964; Article 14 of the Argentinian Civil Code of 1861; Article
17 of the Introductory Law to the Brazilian Civil Code of 4.9.1942;
para. 36 of the Law of Czechoslovakia of 4.12.1963; Article 28 of the
Egyptian Civil Code 1948; para. 4 of the Act of 5.12.1975 of the
German Democratic Republic; Article 30 of the Introductory Law to
the German Civil Code of 18.6.1896; Article 30 of the Law of Gabon
of 29.7.1972; Article 33 of the Greek Civil Code 1940–1946; Article
23 of the Law of Guatemala of 25.1.1936; Article 31 of the Italian
Civil Code of 1942; para. 30 of the Japanese Hôrei of 21.6.1896;
para. 5 of the South Korean Law of 15.1.1962; Article 73 of Law No.
5 of 14.2.1961 of Kuwait; Article VIII of the Civil Code of Nicaragua
of 1904; Article X of the Peruvian Civil Code of 1936; Article 6 of the
Polish Law of 12.11.1965 on private international law; Article 22 of
the Portuguese Civil Code of 1966; Article 851 of the Law of
Senegal on family of 12.6.1972; Article 128 of the Soviet Law of
8.12.1961; Article 12.3 of the Spanish Civil Code of 1881 version of
31.5.1974; para. 25 of the Law of Taiwan of 6.6.1953; Article 2404
of the Civil Code of Uruguay of 1868.

5 W. WENGLER, Internationales Privatrecht, 77, and Note 57; H.
BATIFFOL/P. LAGARDE, Droit international privé, I, 420, No. 263.

6 W. WENGLER, Internationales Privatrecht, 79; see, for example,
the decision of the Swiss Federal Tribunal Compagnie commerciale
tangeroise v. Compagnie grainière S.A., ATF 72 II 405, 416.

7 This aspect of the relativity of public policy in space was first
brought to light in the nineteenth century by F. KAHN, who deeply
influenced German private international law (see P. BENVENUTI,
Comunità statale, comunità internazionale e ordine pubblico
internazionale, Milan, 1977, 56 and Note 4).

The Swiss Federal Tribunal clarified, in 1952, the hesitations of its
prior case law and accepted that the so-called reservation of public
policy can only intervene if the concrete situation has a sufficient
connection (Binnenbeziehung; in later case law eine schwer ins
Gewicht fallende Binnenbeziehung) with Switzerland (see Loudon v.
Schweiz, Bankverein, ATF 78 II 243, 249). In German case law the
same condition is expressed by the term Inlandsberührung; Italian
private international law is influenced by the same idea (P.
BENVENUTI, op. cit., 108ff. and references; VITTA, Diritto
internazionale privato, I, 402–403); the same is true in French
private international law (H. BATIFFOL/P. LAGARDE, Droit
international privé, I 413ff., N 357–1), where the concept is
illustrated by the distinction between the full effect of public policy
and the so-called limited effect (effet atténué).

In English law, public policy has a traditionally limited role, owing to
the fact that English conflict rules confer competence less frequently
than continental conflict rules to a foreign law; the idea of relativity of

In the private international law of the *United States*, the so-called “new” methods have based the designation of the applicable law on the “interest analysis”; public policy is considered as one of the “pervasive problems” of conflict of laws (SCOLES/HAY, *Conflict of Laws*, 72ff.). Notwithstanding terminological differences, the idea of relativity of public policy in space is nevertheless known (SCOLES/HAY, *Conflict of Laws*, para. 3.16, 74–75).


9 Such is the case for the so-called positive function of public policy in the doctrines based on “interest analysis”.

10 See the important writings of Ph. FRANCESCAKIS on the subject and in particular


-- “Ordre public”, in: Répertoire I, 498–506;


For German doctrinal writings on the *Sonderanknüpfung* (on the application of the internationally mandatory rules of a foreign State), see infra, Note 60.


11 This principle was first outlined in an absolute manner by the Swiss Federal Tribunal which later attempted to qualify it in various ways, admitting, for instance, that foreign public law can be applied whenever Switzerland is bound to do so by an international treaty or whenever foreign public law “supports” the application in Switzerland of private law and helps in a prevailing or exclusive manner the protection of private interests (see Schw. Bankgesellschaft *v. Poljak*, ATF 95 II 109, 114–115; and recently *Ungrad v. Ungrad*, Sem. jud. 102 (1981), 216 (résumé); ASDI XXXVII (1981), 254, 419, note P. LALIVE/A. BUCHER).

12 In this sense the exception introduced by Swiss cases as cited in the preceding note. See also H. BATIFFOL/P. LAGARDE, *Droit international privé*, I, 296, No. 248.


14 See Rule 3 DICEY & MORRIS:
English courts have no jurisdiction to entertain an action:

(1) for the enforcement, either directly or indirectly, of a penal revenue, or other public law of a foreign State; or

(2) founded upon an act of State.


On these questions, see Ph. FRANCESCAKIS, Verbo’Fraude à la loi”, Encyclopédie Dalloz, Nos. 13–15; note on this point the difference between Article 21, Portuguese Civil Code and Article 12, n. 4 of the Spanish Civil Code.

There is no need to examine here whether this is a case of “advanced application” of the treaty itself or, which is a different matter, a case of the recognition of a general principle contained in a treaty which the State of the forum has not ratified and does not intend to ratify.

Problems have arisen in connection with the application of foreign rules which were declared contrary to the European Convention on Human Rights; see on this the decision Marckx of the European Court of Human Rights of 13 June 1979 and the Note by M. STOCKER in StAZ 34 (1981), 16–22.
Such was the case for example in the decisions quoted below, Notes 28 and 29.


29 See the decision of the Tribunal of Turin of 25 March 1982 Repubblica dell'Ecuador – Casa della cultura ecuadoriana v. Danusso, RDIPP 18 (1982), 625.


This example is cited by L. MATRAY in a very interesting study “Arbitrage et ordre public international”, typewritten p. 23; see by the same author his article in The Art of Arbitration, Liber amicorum P. Sanders, p. 242. The author refers here to the general act of the Brussels Conference of 2 July 1890, Art. 8, the Arrangement of 13 December 1906 between France, Great Britain and Italy, and lastly the International Convention of 17 June 1925 of the League of Nations on the repression of the traffic of armaments.

31 Articles 24 and 27 cited by L. MATRAY in his study quoted in the preceding note.

32 Reference is made here both to the general principles of the law of nations and to the principles mentioned in Article 38 para. 3 of the Statute of the International Court of Justice, which are recognized, according to the famous expression by Lord Phillimore, in foro domestico, i.e., resulting from a comparative analysis of the main legal systems in the world.

33 The expression or image of the “seat” together with that of the arbitral “tribunal” lead to many confusions, which are well-illustrated in the theory, now in decline, which tends to deduce from the so-called “seat” the law applicable to the arbitral procedure. As a matter of fact, it is not the “seat” of the arbitration which can or should determine the applicable law but much rather, to the contrary, the applicable law which can decide if the place of the arbitration is a “seat” or not!


35 This community received for instance an expression in the Final Act of the Helsinki Conference on Security or in the unanimous vote of the General Assembly of the United Nations in 1985 which adopted the UNCITRAL Model Law on Arbitration. See on this point the observations made by many writers, such as René David, on the tolerance or general acceptance by States as to a kind of distribution of functions between State courts on the one hand and international arbitration mechanisms on the other.

36 According to the Romanian-German Mixed Arbitral Tribunal, in its decision of 16 June 1925 (Recueil TAM, p. 200): “since they do not belong to any State and meet wherever they wish, mixed arbitral tribunals have no lex fori”.

38 Y. DERAINS’ Report, this volume, p. 232; these consequences do not relate only to the so-called negative public policy; it is submitted that they relate also to the so-called “positive” public policy.
39 See on this subject Article 26 of the ICC Arbitration Rules.
40 See on this subject Y. DERAINS’ Report in this volume Nos. 13ff. and in particular No. 14 in fine.


42 Clunet 1951, 6, 14.
47 Clunet 1951, 6, 14.
49 In recent Italian doctrinal writings, see the book by M. PALAIA L’ordone pubblico “internazionale” which is mainly devoted to a demonstration of the alleged “domestic” nature of the principles of international public policy.
50 In his book Comunità statale, comunità internazionale e ordine pubblico internazionale, P. BENVENUTI contends that the Italian case law has adopted the wide concept, as it has referred since the nineteenth century to the “principles common to civilized nations”. According to the author, some general principles having a supranational effect can be imposed by the international public policy of the forum.
57 Comité de défense des actionnaires de la Banque ottomane et autres v. Banque ottomane et autres, R. 1984, 93, note SYNVET.
58 Comité de défense des actionnaires de la Banque ottomane et
autres v. Banque ottomane, R. 1985, 526 note SYNVET.

See on this, the book already mentioned by P. BENVENUTI, who criticizes in a convincing manner the statements by a majority of legal writings and cases which often amount to petitiones principii:

"Quei giudici che si limitano ad affermare che i principî di ordine pubblico internazionale non possono non essere “sempre” valori propri dell’ordinamento giuridico nazionale, non pervengono, allora, a dire niente di diverso e niente di più di quanto già sia ricavabile dalle sentenze che essi criticano. In tal modo, essi si limitano a negare o, più semplicemente, a non tener conto di una esigenza di ulteriore specificazione circa il contenuto e la natura di alcuni principî di ordine pubblico internazionale che quelle sentenze cercano di esprimere, e che consiste nel fatto che tali principî, pur essendo indiscutibilmente propri all’ordinamento particolare, riflettono una realtà che è propria anche ad un ambiente più ampio di quello circoscritto nei confini del singolo Stato e che viene genericamente definito come l’ambito di convivenza dei popoli civili”

. (op. cit., p. 16. our italics).


See also, for Switzerland, Article 18 of the Draft Federal Code on private international law.

In this sense L. MATRAY, “Arbitrage et ordre public transnational”, 14, and citations.


See, for example, B. GOLDMAN, “La protection internationale des droits de l’homme et l’ordre public international dans le fonctionnement de la règle de conflit de lois”, in René Cassin Amicorum Discipularumque Liber, Paris, 1969, I. 449–466; idem, “Les conflits de lois dans l’arbitrage international de droit privé”, RCADI 109 (1963 II), 350–484, 430–443, whose ideas have been

See supra, Notes 28 and 29.


It should be noted that recent French doctrinal writings invoked in that case a "truly international" public policy in order to justify a decision disregarding the foreign embargo, whereas the German Federal Tribunal relied on that same concept in order to reach the opposite result, i.e., respect for the foreign embargo (see A. CHAPELLE, *Les fonctions de l'ordre public en droit international privé*, No. 450, p. 487).


See an isolated decision by the Tribunal of Commerce of Zurich, RSJ 64 (1968) 354.


On this point, see the interesting ICC Award No. 1399, of 14 April 1966, quoted by J. LEW, op. cit. No. 422:

"... French law is not concerned with foreign customs laws, and the fact of avoiding this foreign [Mexican] law is not in itself an illegal matter because there is no collaboration between national legislation on these matters."

See supra, Notes 28 and 29.

See supra, Note 26.

In this sense a note by B. GOLDMAN, Clunet 1985, 142, 154.

See supra, Notes 28 and 29.

JW 1927, 2288 = IPRspr 1926/1927, No. 15.

Paris Court of Appeal, 9 II 1966, R. 1966. 264, note P. LOUIS-
"some of the authors who oppose the parties’ right to choose the *lex mercatoria* will permit them to agree on amiable composition or decisions based on equity. This is, however, a yet more uncertain basis than the *lex mercatoria*. In spite of common traits, there is a difference between the *lex mercatoria* and equity. The *lex mercatoria* obliges the arbitrator to base his decision on the law merchant even when equity might lead him to another result" (p. 754–755).

And the author adds that

"the choice of the *lex mercatoria* need not give the parties any opportunity to evade mandatory rules of law".

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82 In this sense P. LOUIS-LUCAS in his note, R. 1966, 272.
83 Unpublished decision of 20 November 1985, reported in the newspaper "Neue Zürcher Zeitung" of 21 November 1985 No. 271, p. 34.
84 O. LANDO “The Lex Mercatoria in International Commercial Arbitration”, 34 ICLQ (1985), 752. It should be noted that the author rightly draws a distinction between “amiable composition” and an application of the “lex mercatoria”. He writes in particular:

“some of the authors who oppose the parties’ right to choose the *lex mercatoria* will permit them to agree on amiable composition or decisions based on equity. This is, however, a yet more uncertain basis than the *lex mercatoria*. In spite of common traits, there is a difference between the *lex mercatoria* and equity. The *lex mercatoria* obliges the arbitrator to base his decision on the law merchant even when equity might lead him to another result” (p. 754–755).

And the author adds that

“the choice of the *lex mercatoria* need not give the parties any opportunity to evade mandatory rules of law”.

85 The author cites here the *Vienna Convention of 13 May 1969 on the Law of Treaties*; Article 42 of the *Washington Convention of the World Bank*; some uniform laws (such as those introduced by the *Vienna Convention on the International Sale of Goods*); general principles of law (i.e., ICC Award No. 3327–81, cited in Clinet 1982, p. 973); certain rules, recommendations or codes of conduct enacted by international organizations; the usages of international trade, the general conditions for certain types of contracts and some arbitral “precedents”.
86 See the *Geneva Convention of 21 April 1961, Article VII para. 1 and 2*, the already quoted Article 42 of the *Washington Convention of 1965, Article 28 para. 4* of the *UNCITRAL Model Law on Arbitration*.
87 See the decision by the Italian Court of Cassation of 8 February 1932 (although it appears erroneous on other points as well-demonstrated by A. GIARDINA in Rivista di diritto internazionale privato e processuale, N. 4, 1982, p. 754–765) and the decision by the Supreme Court of Austria of 18 November 1982 (cited by L. MATRAY, Report, p. 16, note 1).
92 See supra, Notes 30 and 52.

On the ICC efforts towards a “moralization” in the field of bank guarantees, see J. DOHM, Les garanties bancaires dans le commerce international, Genève, 1986, No. 42.

"Council Regulation No. 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices", ILM XXIII (1984), 1419.

UN General Assembly, "Resolution 393/141 (International Campaign Against Traffic in Narcotic Drugs)", "Resolution 39/142 (Declaration on the Control of Drug Trafficking and Drug Abuse)" and "Resolution 39/143 (International Campaign Against Traffic in Drugs)", ILM XXIV (1985), 1157.


See the recent doctoral dissertation by Q. BYRNE-SUTTON, *Le trafic international des biens culturels sous l'angle de leur revendication par l'Etat d'origine (Aspects de droit international privé)*, Geneva – to be published.

See supra, No. 50ff.

See supra, Note 63.

For examples of such rules of truly international public policy, see above No. 111ff.


On this question, see again the Award Framatome v. AEOI, already cited.

PCIJ Series A–B, Fasc., No. 67 and 69; Series C, Fasc. No. 78.

On this point, see the Preliminary Award by Professor DUPUY – unpublished – on his jurisdiction, dated 27 November 1975, p. 7ff.


See, for example, a recent study by M. BLESSING/Th. BURCKHARDT, "Sovereign Immunity – A Pitfall in State Arbitration?", in *Swiss Essays on International Arbitration*, Zurich, 1984, 107–123.


All the more so since principles of interpretation should rather be considered, it is submitted, as recipes or methods which may guide the arbitrator in the art of interpretation, and not as rules of law.

See for example BIN CHENG, *op. cit.* in note 110, at p. 279ff.


In this case, the arbitrator took a decision without calling for evidence or estimating the proof, after a party had refused to pay an advance on the arbitrator's fees.

This opinion or its expression is perhaps excessively optimistic, at least if attention is drawn not to the principles themselves but to their modalities and their application in practice.

On this subject, see the standard work, already quoted, by Professor BIN CHENG, above, Note 110.

In this sense, German lawyers speak of *Parteöffentlichkeit der Beweisaufnahme*. An extraordinary example is found in a recent ICC award, of 1985, between a French company and an Asian public corporation: after a breach of contract, the French company invoked "force majeure" relying on secret instructions by the French Government, and a majority of arbitrators accepted as a "proof" of the alleged governmental decision the reading aloud by a "witness" of a decision (on the last day of the proceedings), the text of which was never communicated or filed to the other party or to the arbitral tribunal!

ICC Award No. 3344 of 1981, Clunet 1982, 978, note Y. DERAINS; see also the award of President Cassin in the famous case of the "cargaisons déroutées", R. 1956, 278, 286.
121 Award No. 1434 of 1975, Clunet 1976, 978, note Y. DERAINS.
122 See the Report by L. MATRAY, p. 8.
125 ICC Award No. 1434 of 1975, Clunet 1976, 978, note Y. DERAINS.
126 ICC Award No. 1512 of 1971, Clunet 1974, 904, Note Y. DERAINS/R. THOMPSON, in the case Dalmia Cement v. National Bank of Pakistan, [1974] 3 All E.R. 189; [1974] 2 Lloyd’s Rep. 98, a case which may be mentioned by name since it has become public following the defendant’s (unsuccessful) attempts to have the award annulled by the English courts.
127 See supra, Note 123.
128 On this question, see, for example, P. LALIVE, “L’État en tant que partie à des contrats de concession ou d’investissements conclus avec des sociétés privées étrangères”, in New Directions in International Trade Law, Dobbs Ferry, New York, I, 317, 373, 330 No. 23; and the “Athens Resolution of the Institute of of International Law”, 1979, following a report by G. VAN HECKE, Ann. Inst. Dr. Int. Vol. 58 II 192ff.
129 As an example of “partial” choice, half negative and half positive, one may perhaps quote the arbitral clause in the arbitration agreement between the Government of Kuwait and Aminoil; see also the arbitration clauses in the Libyan oil arbitrations referring to principles common to Libyan law and international law, etc.
131 On the community law of competition, see BÖCKSTIEGEL’s Report, p. 194.
132 See supra, Note 96.
133 See supra, Note 97.
134 See supra, Note 98.
135 See supra, Note 99.
136 See supra, Note 100.
137 See supra, Notes 100 and 66.
138 According to an opinion widely accepted in arbitral practice, only Resolution 1803 (XVII) expresses the present state of positive international law on the subject. Article 4 of this Resolution provides for the possibility of nationalization for reasons of public utility, security or national interest and foresees adequate compensation in accordance with the positive law of the State and in conformity with international law.
"The appellant invokes also, apart from Swiss public policy, an 'international public policy' which would prevent the application of the Bangladesh decree in the present instance. This concept seems never to have been used by the Federal Tribunal.... It seems to be a formula put forward by some writers who do not ascribe to it a very precise or unambiguous meaning (see for instance SCHNITZER, Handbuch des internationalen Privatrechts, 4 ed., I. 229 ff.; SCHÖNENBERGER/JÄGGI, op. cit. p. 115; LALIVE, ASDI 1971, p. 137; GENTINETTA Die lex fori internationaler Handelsschiedsgerichte, 1973, 264 and 266).

It is difficult to see in what way this so-called 'international public policy' would limit the application of foreign law more or in another manner than the classical 'reserve' of Swiss public policy. Since the appellant does not give indications to that effect, it is unnecessary to examine the question further"

(translation).

For a criticism of this very controversial decision, see P. LALIVE, "Arbitrage international et ordre public suisse", in Revue de droit suisse 97 (1981 I), 529–551.

J. ROBERT (L'arbitrage, 358) expresses a negative opinion as follows:

"Decisions, it must be stated, have not recognized to date the concept of a truly international public policy ...".

But the writer adds that certain rules (such as those contained in the European Declaration on Human Rights, of 4 November 1950, could constitute such a concept and he concludes that

"the possibility cannot be excluded, therefore, that, in a comparatively near future, a really international public policy would appear on such a basis, with the help of court decisions".

French court decisions appear as a matter of fact to have recognized such concept of a truly international public policy in the last decision in the Ottoman Bank case (see supra Note 47); but it would not seem necessary that judicial practice recognizes the concept as such or in so many words; what is decisive is that court decisions do recognize the existence of common principles of public policy, that they apply them and sanction their violation and on such basis, it is up to doctrinal writings to build up concepts and categories.

In this sense A. CHAPELLE, op. cit., 512–527, 513. The distinction appears to have mainly a scientific interest; what is more
important is the proof that there does exist a general principle or a rule having a particularly mandatory character and based on a sufficiently widespread consensus in the international community of businessmen and States.

145 See H. ROLIN, *Vers un ordre public réellement international*, 442, No. 2; see also on this point J. ROBERT, *op. cit.*, No. 423, 357.

146 Report of 1 March 1972 to the 5th Session of UNCITRAL Document A/CN9/64.


149 In this sense O. LANDO, cited in Note 84, p. 748 and Note 8.

150 See *supra*, Nos. 11ff.


153 “Binnenbeziehung” or “Inlandsberührung”.


155 A good example of this preoccupation, particularly widespread in leftist legal circles, deserves to be cited here:

“Today political authorities in traditional democracies discover with astonishment that they no longer dominate their own territory: delocalized private economic powers have taken over access to natural products and sources of energy, as well as of the techniques necessary to transport and commercialize them ... The drama (sic!) of contemporary international society is that it failed to build up an international power capable of resisting such private economic powers which arose under the protection of national laws all the more favourable to them since these powers helped the States’ will of domination and exploitation which Lenin called imperialism, the manifestations of which are either aggressive (as in the case of colonial powers in the nineteenth century or in the case of the United States in the twentieth century) or discreet (in the case of Switzerland as described by the recent work of J. Ziegler)”
