Public Policy in English and American Law

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Introduction

Freedom of contract rests on the principle that it is in the interest of the public to grant broad powers to individuals in order to facilitate their transactions. It also implies that parties of full age and competent understanding must have the greatest freedom of contracting. Consequently, courts will generally enforce them without passing on their substance. However, they occasionally consider that certain types of contracts should not be enforced on grounds of public policy. The refusal of their assistance may indeed be an appropriate sanction to discourage undesirable conduct in the society.

Public policy in English and American law has been described as a will-o’-the-wisp of the law which varies and changes with the interests, habits and needs. The notion has indeed been considered as vague and elusive amongst the courts. The first chapter will thus focus on the concept of public policy.

In a common law system, courts have mainly relied on their own perception of public interest in order to refuse the enforcement of some contracts. In this regard, they have endeavoured to recognize that changes in social conditions may call for a changed concept of what the interest of the public demands. However, with the growth of an elected and democratic legislative body, two questions are raised in relation to the judicial lawmaking. The first is whether public policy is the instrument of the judiciary or the legislature. The second question concerns the factors that courts must take into account in determining the non-enforcement of an agreement. The second chapter will therefore examine these two questions as they are closely interrelated.

The vagueness of the term public policy and its application by the doctrine have further given rise to a variety of contracts considered as unenforceable. Rules based on public policy vary over the institution that they aim to protect. For instance, policies related to restraint of trade are more likely to change than these concerning the primary morality, such a contract in marriage. The purpose of the second chapter is therefore to analyze the most common contracts unenforceable according to the doctrine on grounds of public policy.

Although, the general rule is the non-enforcement of a contract injurious to interest of the society, courts adopt in some cases a severe attitude and refuse to assist a person implicated in the illegality in any way whatsoever. In others, public policy does require that such a person should not be so completely denied a remedy. In this regard, Anglo-American courts have provided some mechanisms to mitigate the non-enforcement on grounds of public policy, e.g. restitution and the doctrine of severance. Therefore, the last chapter will focus on the remedy applied by the courts to best serve public policy.

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The primary aim of this master thesis is consequently to understand public policy in English and American law through its concept, doctrine, applications and remedies. The idea behind this work is to emphasize the specific lawmaking relationship between the legislature and the courts in a common law system as well as to analyze social changes in conditions and attitudes which impact public policy rules.
I. Concept of public policy

1. Introduction

In a legal system based mainly on cases, it is not surprising that, since early times, Anglo-American courts considered it to be their job to act as censor of certain activities which were against public policy. In this regard, they have been more concerned with practical remedies and litigations than with an attempt to systematize the law in accordance with any formal scheme. This absence of definition can be surprising, as the common law courts have developed the idea of public policy from the fourteenth century. In this respect, this chapter will first analyse the reasons for such absence of definition and will try to give the characteristics of public policy.

2. Public policy

2.1. Absence of definition

In the common law, the term of public policy has been an intuitive concept developed by the courts. In the past, they indeed claimed on their own view of what constituted a threat to community. For instance, in the eighteenth century, an English judge referred to public policy as "political arguments, in the fullest sense of the word". This position was nevertheless not maintained with the growth of a more active and democratically elected legislature. The foundations of public policy varied therefore over time and it is important to analyze briefly its numerous applications. In this regard two periods should be distinguished:

"One is the unconscious or half-conscious use of it which probably pervaded the whole legal system when law had to be made in some way or other, and when there was not much statute law and practically no case law at all to summon to the judges' assistance. The other is the conscious application of public policy to the solution of legal problems, whether it bore the name by which it is now known or was partly concealed under some other designation which, however, really expressed the same thing".

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3 17A C.J.S. *Contracts* IX A, 1955, Section 278, database updated June 2014 (Westlaw US). In England, it has been said "the concept of public policy is by nature elusive and leads to paradoxical results. [...] Some judges have thought [public policy] indefinable, that others have given descriptions not easily reconcilable, and that others again have made inconsistent statements in the self-same decision", per P.H. Winfield, Public policy in the English Common Law, *Harvard law review*, Vol 42, n°1, 1928, pp. 92-93.
4 *Chesterfield v Janssen* [1750] 26 E.R. 191 at 225 per Lord Hardwice.
5 J.B. Bell, *op. cit.*, p. 158.
2.1.1. Unconscious application

From the fourteenth-century, the first brand of public policy was identified with the equity, natural law, the law of reason and ultimately the divine law. Already at that time, it is referred by the early legal commentators as an intuitive concept based on the law of reason which is written "in the heart of every man and tells him what to do and what to avoid".

Based on this intuition, common law courts' decisions declared a covenant void as it was against the "common ley" ("common law"), "the benefit of the commonwealth", or because it is contrary to the maxim "nihil quod inconveniences is licitum". These early expressions reflect some terminology confusion. English courts applied thus the notion of public policy under widest generalization since there was clearly a lack of statute or written law at that time.

Moreover, these considerations of public policy, from the fourteenth until the end of the seventeenth century, can be said to differ from the modern theory. In this respect, a decision rendered by the Star Chamber in 1641 is an interesting example. The latter body cancelled an agreement because it is contrary to the common good, despite no prohibition from the positive law and from any custom of the common law. However, the Star Chamber was dissolved the same year, making it difficult to assess the importance of the judgment. Hence, although public policy finds its roots from the fourteenth-century, it has been impossible, until the eighteenth century, to find any principle at all comparable to that invoked today.

2.1.2. Period of transition

During and beyond the eighteenth-century, England became a major trading nation. Against this economical backdrop, common law courts had to find a way to satisfy the interests of

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5 "It is better, said the law, to suffer a mischief that is peculiar to one, than an inconvenience that may prejudice any" recognized as an early expression of public policy and cited by Judge Pollock in Egerton v Brownlow [1854] 4 H. L. C., at 146.
6 W. S. M. Knight, op. cit., p. 208.
7 The Star Chamber was a former English court of law from the fifteenth-century until 1641. About an interesting discussion of the history of this court, see D.J.C. Thomson, Parliament in the 17th century: when the speaker and the commons were respected by the people: Part 1, Scots Law Times, 2009, pp. 131-137.
9 In this regard, for example, M. Moller has written that this decision cannot be considered as part of the theory of public policy because of the dissolution of the Star Chamber. See M. Moller, Some aspects of the doctrine of public policy, New Zealand Law Journal, 1947, p. 91.
10 W. S. M. Knight, op. cit., p. 208.
trade. As number of precedents and statutes began to swell, there was increasingly less need for a general, undefined idea of the common good to fill the gaps of the common law.\(^1\) In this commercial context, although during the eighteenth century contractual freedom was fostered, any contract that tended to prejudice the social or economic interest of the community was forbidden.\(^2\)

Common law judges have indeed refused to enforce contracts which were "a general mischief to the public"\(^3\), "against the public good"\(^4\) or "\textit{contra bonos mores}"\(^5\). However, such sweeping terms still demonstrate that the latter concept is still unclear and is subject of a vague and indeterminate language.\(^6\)

Moreover, courts applied the concept of public policy without perceiving its difficulties neither its dangers. This shows that common law judges in the eighteenth century did indeed claim to act on their own view of what constituted a threat to community without any dictatorial thoughts. In this regard, Lord Hardwicke referred to the public policy as "\textit{political arguments, in the fullest sense of the word}".\(^7\) In another case for example, the same eminent judge also declared that “these reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion”.\(^8\) Therefore, although the transition period reflects a less undefined idea of public policy, the "modern" concept was not laid down until the nineteenth century.

\textit{2.1.3. Conscious application}

From the nineteenth century, Anglo-American courts referred to the term public policy in a way which is comparable to that invoked nowadays.\(^9\) One the one hand, they refused to enforce contracts that were contrary to public policy "in that they injure the public welfare or interests, or are contrary to public decency sound policy and good morals".\(^10\) On the other, and more importantly, they admitted the vagueness of the term public policy. In this regard, in an often-quoted case either by English and American courts, Lord Burrough stated that:

"If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest [...] against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail".\(^11\)

\(^1\) B. Kain, and D.T. Yoshida, \textit{op. cit.}, p. 7.
\(^3\) \textit{Mitchel v Reynolds} [1711] 24 E.R. 347 at 349 per Lord Macclesfield.
\(^4\) \textit{Collins v Blantern} [1767] 2 Wils 341 at 350, per Wilmot LCJ.
\(^5\) \textit{Girardy v Richardson} [1793] 1 Esp 13 at 16 per Lord Kenyon.
\(^6\) M.P. Furmston, \textit{op. cit.}, p. 468.
\(^7\) \textit{Chesterfield v Janssen} [1750] 26 E.R. 191 at 225 per Lord Hardwicke L.C.
\(^9\) W. S. M. Knight, \textit{op. cit.}, p. 208.
\(^11\) \textit{Richardson v Mellish} [1824] 2 Bing at 252.
Therefore, from the nineteenth century, Anglo-American courts have not tried to define the concept of public policy. For instance, English judges believed that considerations based on public policy rested either on the freedom of contract or on the protection of the interest of the community. In the United States, although the Restatement (Second) of Contracts makes mention of the term public policy, it avoids the task to define it.

However, there have naturally been attempts to define "public policy". In England, for example, it was described as "a principle of judicial legislation or interpretation founded on the current needs of the community". In the United States, the treatise Corpus Juris Secundum precisely states that "contracts contrary to public policy, that is, these which tend to be injurious to the public or against the public good, are illegal and void, even though actual injury does not result therefrom". These attempts reveal again that the term public policy is a vague and malleable expression which refers to both legal and extra-legal elements.

2.2. Characteristics

2.2.1. Legal element

The legal element of public policy is based on the function itself of its doctrine. The essential function of the latter, in the common law, is to bring "into judicial consideration the broader social interest of the public at large". Anglo-American courts therefore created rules of public policy and any contract that contravenes these rules is unenforceable. Therefore, the legal element is clearly evidenced in the effects of illegality.

The general common law principle is indeed the non-enforcement of a contract injurious to the public or against the public good on grounds of public policy. This refusal finds its roots in the early English case Holman v Johnson, the classic authority of the doctrine of illegality, when Lord Mansfield said:

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1 For example, it was stated in an American case Kekewich, J., Davies v. Davies L. R. 36 C. D. 364 (1887) at 367 that "public policy does not admit of definition and is not easily explained. It is a variable quantity; it must vary and does vary with the habits, capacities, and opportunities of the public". In this regard, a French legal commentator noted that the absence of general definition of public policy implies that common law courts have reached more nuanced solutions than in other civil law system. See R. David, Les Contrats en Droit Anglais, Centre de Droit Comparé, Faculté de Droit et de Sciences Politique d'Aix-en-Provence, 1973, p. 255.
2 See e.g. Lord Jessel in Printing and Registering Co. v Sampson [1875] 44 at 465: "Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."
3 See for instance Judge Pollock in Egerton v Brownlow [1854] 4 H. L. C. at 381 "Where a contract is directly opposed to public welfare it is void".
5 P. H. Winfield, op. cit., p. 92.
8 Idem.
"The principle of public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causâ, or the transgression of a positive law of this country, there the court says he has no right to be assisted.2

This statement has naturally been quoted and reaffirmed in both England and America.3 In line with this principle, the American Supreme Court stated that "the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction".4 Moreover, many state courts have also followed this approach and stated that "consistent with public morality and settled public policy, we hold that a party will be denied recovery even on a contract valid on its face, if it appears that he has resorted to gravely immoral and illegal conduct in accomplishing its performance".5

The non-enforcement of a contract is the negative effect of public policy that is underlying to the positive one. The reason for prohibiting such contract is indeed to protect the interests of the community. Although the power of the courts to refuse the enforcement of an undesirable contract is unquestioned, the positive and negative effect of public policy must be balanced with the freedom of contract. This is indeed fundamental that parties of full age and competent understanding must have the greatest freedom of contracting.6

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1 From dishonourable cause an action does not arise.
3 In England, see e.g. Tinsley v. Milligan [1994] 1 A.C. 340 at 355, whereby Lord Goff referred to the Holman case in stating "the principle [of non-enforcement of an illegal contract] has been applied again and again, for over 200 years." In the United States, Reiner v. North American Newspaper Alliance, 259 N.Y. 250, (1932) at 261 where it was held that: "From a very early day the law has refused to aid plaintiffs in similar situations. While the law does not approve the defendant's conduct yet, being called upon the choose between two evils, it prefers to permit the defendant to retain the benefits of such an unlawful contract than to aid a plaintiff in enforcing it. As stated by Lord Mansfield in the case of Holman v. Johnson [...]". The American case Oscanyan v. Arms Co. 103 US. 261 (1880) also refers to the Holman case at 269 in stating that "the law will not lend its support to a claim founded upon its violation".
6 In the United States, the reaching of a balance between public policy and the freedom of contracts is particularly emphasized in 5 Williston on Contracts Ch. 15, 4th Edition, 2011, Section 2, database updated May 2014 (Westlaw US). Moreover, there is an interesting example in the American case Twin City Pipe Line Co. v. Harding Glass Co. 51 S. Ct. 476 (1931), at 475 where the court stated: "The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests". In England, in Printing and Numerical Registering Co v Sampson [1874-75] L.R. 19 Eq. 462 at 465 the court said: "If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice."
2.2.2. Extra-legal element

A. Principles

The extra-legal element confers the rule of public policy its flexibility. The term public policy covers a variety of social, economic and cultural considerations which may have a bearing on the issue before the courts. These extra-legal considerations are in fact the intuition of the common law judges from the fourteenth-century to describe contracts contrary to public policy as they are "injurious to the interests of the public," "against the public good" or as "against the public benefit."

The distinction between these concepts and public policy has not been free from misgivings amongst Anglo-American courts. It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good. The term public policy is thus an umbrella term covering a variety of ethical considerations. These considerations represent values deemed so fundamental for the society that it necessitates the intervention of the courts.

The ethical considerations are found in the public interest or for the public good. This implies two consequences for the public policy rule. First, public policy varies over time and space through the changing interest of the public. Second, the notion of "public" in the common law has given rise to a certain judicial misconception which is important to briefly analyze.

B. Variation over time and space

The temporal variability is very important in assessing the public policy. As the interests of the society change, courts are called upon to recognize new policies, while established policies become obsolete. And this variability is one of the problems in the determination of rules of public policy in the common law. For instance, in England, in Besant v. Wood, Lord Jessel declared that:

"It is impossible to say what the opinion of a man or a Judge might be as to what public policy is. For a great number of years, both ecclesiastical Judges and lay Judges thought it was something very horrible, and against public policy, that the husband and wife should agree to live separate, and it was supposed that a civilised country could no longer exist if such agreements were enforced by Courts of

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2 Grenfell v Dean and Canons of Windsor [1840] 2 Beav at 549 per Lord Langdale.
3 Collins v Blantern [1767] 2 Wils 341 at 350, per Wilmot LCJ.
4 Fletcher v Sondes [1826] 3 Bing at 590 per Best C.J.
Law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy; other considerations arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of Court, although the consequence might be that they would live separately, and that was the view carried out by the Courts when it became once decided that separation deeds per se were not against public policy".1

In line with this statement, the United States Supreme Court said that "the standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interest, at a more advanced stage are treated as legal and binding".2 In the same approach, an American court also stated that "public policy is not static, but is uncertain and fluctuating, varying with the changing economic needs, social customs, and moral aspirations of a people".3

Thus, because these habits, opinions, and wants are different in different places, what may be against public policy "in one state or country may not be so in another".4 This is also known as spatial variability. In the United States, the spatial variability is of particular importance in the determination of public policy which is subject to local variations. Therefore, while certain principles are regularly encountered in the formulation of "public policy" by the common-law courts, local variations introduce an element of uncertainty in the application of these principles to the actual cases.5

C. Notion of "public"

An interesting question related to the extra-legal element concerns the notion of "public". As an early legal commentator noticed, public policy signifies that "the interests of the whole public must be taken into account; but it leads in practice to the paradox that in many cases what seems to be in contemplation is the interest of one section only of the public."6

One the one hand, many questions of public policy are uninteresting to the whole community.7 For example, it does not matter for all the citizens that matrimonial agencies flourish or not. The taking in account the interests of the whole society is thus a source of problems in determining public policy. On the other, there is a danger that public policy decisions may be unduly influenced by vocal pressures groups anxious to protect their own

1 Besant v Wood [1879] 12 Ch. D. 605 at 620.
3 Grant v. Butt, 17 S.E.2d 689 (1941) at 694.
7 Idem.
particular interests. In this regard, an American court said that "the rule that public policy precludes the enforcement of an otherwise valid contract should be applied cautiously and only in cases involving dominant public interests". In line with this approach, an English Court of Appeal stressed the social repercussions in order to determine the public interest. The notion of public is thus difficult to determine in some cases and can lead to opposite decisions amongst Anglo-American courts.

3. Conclusion

Although the concept of public policy in the common law has a long history, courts have been reluctant to define it. However, they have endeavoured to recognize that changes in social conditions may call for a changed of what the interest of the public demands. Based on this intuitive concept, judges have refused to enforce contracts on grounds of public policy. The term public policy covers thus a variety of social, economic and cultural considerations which may have a bearing on the issue before the courts.

The difficulty for the courts is that these considerations may vary over time and space. Moreover, the notion of "public" itself is sometimes elusive in practice not obvious and this has lead to a certain judicial misconception of what is in the interest of the society. Therefore, public policy in English and American law may rightly be described as a will-o'-the-wisp of the law which varies and changes with the interests, habits and needs.

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II. Doctrine of public policy

1. Introduction

The essential function of the doctrine of public policy is to bring into judicial considerations the broader social interest of the public at large.\(^1\) In this regard, there is no absolute rule by which to determine what contracts are against the interests of the public since each case must be determined from all the circumstances.\(^2\) In this regard, two questions arise in the common law which will be examined in this chapter.

The first concerns the determination of contracts which contravene public policy. Although courts have considered since early times to be their job to censor socially undesirable contracts, this judicial power is nevertheless questionable in a modern democracy where the will of the people first resides in the legislature. The second refers to the application of contracts which contravenes public policy and more specifically, to the factors taken in account by courts in order to determine the enforcement of an agreement.

2. Determination of contracts against public policy

2.1. Judge made versus legislative public policy

Intervention by the judges on the basis of public policy has a long history. Each generation has sought to decide which private transactions it will countenance and which it will not. Until roughly the beginning of the twentieth-century, there was a lack of judicial precedent and a lack of comprehensive statutes.\(^3\)

Therefore, judges had to determine what were socially desirable rules and it is not surprising that they also considered it to be their job to act as censor of certain activities which were immoral or otherwise contrary "to the good of the community".\(^4\) This judicial mechanism is called the doctrine of public policy. In this respect, the doctrine whereby the court may refuse to enforce a contract solely on the ground of "public policy" raises two interesting questions.

The first concerns the legitimacy, from a separation powers standpoint, to legislative activity on the part of the judges.\(^5\) However, with the growth of a more active and democratically

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\(^1\) C. R., Symmons, *op. cit.*, p. 189.


\(^5\) R. A. Buckley, *op. cit.*, para. 6.01.
elected legislature, the question arose if Anglo-American judges were allowed to change rules or even to create new head of public policy. These heads are categories of contracts which are generally held as unenforceable by Anglo-American courts on grounds of public policy. This is the case, for instance, of contracts in restraint of trade, injurious to good government or involving the administration of justice.

The second refers to the degree of rigidity of the public policy rule. Once a particular aspect of public policy has assumed a settled form, does it have to be applied with the rigidity customarily associated with rules of law? As the interests of the society change, is the public policy bound by prior judicial decisions, i.e. the rule of precedent, with the same accuracy as other rules of law? The question of the rigidity of the public policy rule is related to the ease for Anglo-American courts to change the public policy in order to reflect the changing social attitudes.

These questions are particularly sensitive with respect to the role of the judiciary in society and it is appropriate that they should feature prominently in any general discussion of the doctrine of public policy. The following section will therefore analyze the debate related to these two issues in English and American law.

2.2. The debate in English law

_Egerton v. Brownlow_ is the leading case of the English doctrine of public policy. In this case, Lord Alford who bequeathed his property by specifying that if the legatee dies without having acquired the title of Marquis of Bridgewather, the legacy would be solved. The validity of this clause was challenged in the House of Lords. The House asked eleven judges their opinions. The disagreements concerned the question whether the public policy was the judge and not the legislature. And if so, whether rules of public policy have a different nature than the other principles of the common law.

_Egerton v. Brownlow_ was defined by a confrontation of ideas between Judge Pollock and Judge Parke. The first is in favour of a broad interpretation of rules of public policy. As Judge Pollock pointed out, the doctrine should advocate a creative power of the courts in matters of public policy and the variability of its rules:

"[...] It may be that Judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it. Is it, or is it not, a part of our common law, that in a new and unprecedented case, where the mere caprice of a testator is to be weighed against the public good, the public good should prevail? In my judgment, it is."  

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1 _Idem._
3 _Egerton v Brownlow_ [1854] 4 H. L. C. at 151.
Conversely, Judge Parke was in favour of a restrictive conception of rules of public policy. The rule of public policy should therefore be rigid and immutable. Judge Park argued that it is the role and in the power of the legislature to determine what is public policy. In this regard, he stated that:

"It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community."\(^1\)

Eight of the eleven judges supported the position of Judge Parke, believing that public policy does not give power to judges to review an agreement if they could not rely on their own assessment of the interest of the State. However, the House of Lords, by a majority of four against one, agreed with the minority judgment. It was this decision which laid the seeds of the modern origin of the theory of public policy.\(^2\)

### 2.2.1. Broad view

There is first judicial support for the view that there remains a broad field within which the courts can apply variable notions of policy as "a principle of judicial legislation or interpretation founded on the current need of the society".\(^3\) The broad view invoked two main arguments to justify its position.

First, this theory considers that there is a legitimacy on the part of the judges to be flexible with public policy. Judges favourable to the extensive view generally based their reasoning on the extra-legal element of the public policy, arguing notably that this concept changes over time. In this regard, Lord Watson pointed out in *Nordenfelt v. Nordenfelt* that:

"[The function of tribunals], when a case like the present is brought before them, is, in my opinion, *not necessarily to accept* what was held to have been the rule of policy a hundred or a hundred and fifty years ago, *but to ascertain*, with as near an approach to accuracy as circumstances permit, *what is the rule of policy for the then present time*."\(^4\)

The same view prevailed in *Rodriguez v. Speyer Brothers* where Lord Haldane declared that:

"What the law recognises as contrary to public policy turns out to vary greatly from time to time. [...] There are many things of which the judges are bound to take judicial notice which lie outside the law"

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\(^1\) *Idem* at 124.


\(^4\) *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894] AC 535, at 553 -554.
properly so called, and among these things are what is called public policy and the changes which take place in it.\textsuperscript{1}

Secondly, the broad view implies thus that, since rules of public policy are variable, they should not be applied with the customarily rigidity associated with rules of law as "they cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal".\textsuperscript{2} It is fundamental to provide judges a certain degree of latitude on issues concerning public policy in order to reflect changing social conditions or attitudes. In this regard, courts may therefore modify or even create heads of public policy. However, such ease granted to the courts ultimately leads to legal uncertainty, and this is one of the main arguments raised by the restrictive theory of public policy.

2.2.2. Narrow view

The narrow view hinges on the premise that courts cannot create new heads of public and that their power to extent the existing heads is very limited. This view is based on three main arguments.

First, this is the role of the legislature and not the judges to expound what the social conditions or attitudes are. Public policy has indeed been recognized as "an excellent principle, no doubt, for legislators to adopt, but a most dangerous one for Judges".\textsuperscript{3} Moreover, the courts cannot determine the current needs of the society. They are indeed more trusted "as interpreters of the law than as expounders of what is called expired public policy".\textsuperscript{4} This cautiousness has been expressed in the famous declaration of Judge Burroughs when he considered public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail".\textsuperscript{5}

The second argument invoked by courts favourable to the narrow view is to be found in judicial dicta and the application of the rule of precedent. This fundamental rule of the common law requires that all rules expressed by judges continue to apply until they have been modified by the legislature, the latter has the only power to review them. This immutability of rules of public policy ensures legal certainty and avoids arbitrariness of judges and judicial

\begin{itemize}
\item \textsuperscript{1}Rodriguez v Speyers Brother [1919] A.C. 59 at 79. In this regard, it was stated in a Canadian case Eventurel v Eventurel [1874-75] L.R. 6 P.C. 1 at 29: "It was well observed during the argument that the determination of what is contrary to the so-called “policy of the law” necessarily varies from time to time. Many transactions are upheld now by our own Courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion".
\item \textsuperscript{2}Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. Ltd [1894] AC 535, at 553 -554.
\item \textsuperscript{3}Egerton v Brownlow [1854] 4 H. L. C. at 106 per Lord Alderson. In this regard, in Janson v Driefontein Consolidated Mines Ltd [1902] A.C. 484 at 491, Earl of Hasbury L.C. declared that "I deny that any Court can invent a new head of public policy […] because these [contracts] have been either enacted or assumed to be by the common law unlawful, and not because a judge or Court have a right to declare that such and such things are in his or their view contrary to public policy."
\item \textsuperscript{4}Re Mirams [1891] 1 Q. B. 595 per Lord Cave.
\item \textsuperscript{5}Richardson v Mellish [1824] 2 Bing. 229 at 303.
\end{itemize}
anarchy. The rule of precedent must therefore apply to the doctrine of public policy with the rigidity customarily associated with other rules of law. In this regard, Lord Alderson has pointed out:

"Public policy would introduce an ever-shifting principle of decision, and that no case hereafter could be ever determined upon precedents, if it was to be adopted [and] it is impossible to foresee where such a principle will stop. I shall not venture to take this, therefore, for my guide. [...] My duty is as a Judge to be governed by fixed rules and settled precedents".\(^1\)

**Finally**, some judges considered that the freedom of contract must be fostered. In this respect, in *Printing an Numerical Registering Co v Sampson*, the judge Kessel stated that:

"It must not be forgotten that you are not to extend arbitrarily these rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice".\(^2\)

The narrow view has found a strong echo in the purist spirit of English judges until the twentieth-century. Courts generally were reluctant to create any new heads of public policy. It is only from the twentieth-century that they have tried to find a balance between on the one hand, a judicial distrust related to the creation of new heads, on the other, the ongoing evolution of public policy.

### 2.2.3. Contemporary doctrine of public policy

**A. Classification**

From the twentieth century, there was thus a need to find a compromise between the narrow and the broad view. In this regard, Lord Haldane has tried to classify rules of public policy in three categories:

"[I]The class of cases in which the law, although originally based on public policy, has become so crystallised that only a statute can alter it, and [II] the different class in which the principle of public policy has never crystallised into a definite or exhaustive set of propositions. [...] There lies [III] an intermediate class. Under this third category fall the instances in which public policy has partially precipitated itself into recognised rules which belong to law properly so called, but where these rules have remained subject to the moulding influence of the real reasons of public policy from which they proceeded."\(^3\)

The function of this classification is to emphasise that the techniques employed by the courts are different. In the first category, the courts are seeking to discern the application of a settled

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rule of public policy. Conversely, in the latter two categories, the courts have greater scope to identify their own conceptions of public policy and apply them to cases.

B. Qualification

The degree of crystallisation varies over the type of contract. For example, a rule of public policy related to the primary morality, e.g. the institution of marriage, is more settled than these related the economic institutions, e.g. restraint of trade. The issue of qualification of a public policy rule is therefore of paramount importance. The rule may indeed extend, move from one category to another, or become obsolete. This remarkably reflects the process of the growth of the common law. For example in Bowman v Secular Society Ltd, Lord summer stated that:

"The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. [...] The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact".1

C. Modern English determination of public policy

The classification and the qualification are fundamental in the modern determination of public policy rules. The modern determination of public policy reflects a compromise between the narrow and broad views.

First, the modern judicial reluctance stems from the growth of a more democratic and elected legislative body since the last century. Certain decisions are more appropriately made "by the collective wisdom of Parliament briefed by officials who have investigated over a wide field the repercussion of the decision".2 English courts are therefore especially reluctant to extent public policy rules, especially when parliament might be expected to legislate about issues of the allegedly harmful tendency.3

Secondly, in cases where courts are willing to extend a head, it is important that the doctrine must only be invoked in limited situations: (i) "in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds"; or (ii) "upon some occasion as to which the legislature was for some reason unable to speak and where there was substantial agreement within the judiciary and where circumstances had fundamentally changed".5

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1 Bowman v Secular Society Ltd [1917] A.C. 406 at 467.
4 Fender v St John Mildmay [1938] A.C. 1 at 55.
5 Idem.
However, the application of any particular ground of public policy may well vary over time and the courts will not shrink from properly applying the principle of an existing ground to any new case that may arise\(^1\) or from declaring certain rules obsolete.\(^2\)

In conclusion, the modern doctrine of public policy grants a certain legitimacy, from a separation powers standpoint, to legislative activity on the part of the judges. This reflects a change in the view of the majority of courts until the twentieth century. They are nowadays likely to recognize their judicial activity in public policy as "a stone in the edifice of the doctrine, and not a missile to be flung at it."\(^3\) The rigidity customarily associated with rules of law applies to some aspects of public policy. The latter is indeed present when the rule of public policy is so settled that only a legislative act can alter it. However, there is a limited ease for English courts to change the public policy in order to reflect the changing social attitudes. This ease varies indeed over the institutions that the rules tend to protect. It is indeed assumed that the extension of contracts in restraint of trade is facilitated by the ongoing evolution of the economic interest. Conversely, contracts involving or tending to promote sexual immorality that affects an elementary morality change more slowly.

### 2.3. Position of the American judge

American courts were also faced with their limits related to the determination of public policy rules. The debate in American law is nevertheless different than in England and this is mainly due to the theory of legal sources. The United States were an English colony until the end of the eighteenth-century. This is an important fact since it has two main consequences on the American public policy doctrine.

First, the American law of contract stemmed from the English common law. It implies therefore that American courts are influenced by the first public policy intuitions developed from the fourteenth century as well as authority English cases in this area of illegality. It is thus not surprising that American courts refer to their English counterparts when applying public policy rules.\(^4\) In this regard, they have certainly been influenced to some extent by the English debate surrounding the limits of their creative powers in policy matters.

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2. In this regard, in *Egerton v Brownlow* [1854] 4 H. L. C., at 149, Judge Pollock, founder of the extensive concept, advocates a reserve function of public policy by declaring that the judge is "bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise."\(^2\) This opinion reflects the contemporary theory of public policy and is not fundamentally different from the restrictive approach as demonstrated by a modern conservative opinion on the duties of the judge which is "to expound, and not to expand, such policy. That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances, where such circumstances are clearly within the scope of the policy." This was stated in *D v National Society for the Prevention of Cruelty to Children* (NSPCC) 1977, A.C. 171, at 235 per Lord Thankerton.
4. See e.g. *Reiner v. North American Newspaper Alliance*, 259 N.Y. 250, (1932) at 561, where it was held that: "From a very early day the law has refused to aid plaintiffs in similar situations. While the law does not approve
Secondly, since the founders were impregnated with the history of their English colonial predecessors, the question of the judicial independence arose.\(^1\) It was indeed sensed almost from the beginning of the United States that the judiciary would play an important role in forming and guiding the new nation. On one hand, this was in part because it was new and there would be much to be done. On the other, the founders were aware that the English judges had played an important role in forming their Constitution.\(^2\) American judges come thus from a long tradition of judicial independence. As Sir Edward Coke, the father of American judicial review, declared: "when an Act of Parliament is against common right and reason, or repugnant, or impossible to performed, the common law will control it, and adjudge such Act to be void".\(^3\) However, each state provided for varying levels of judicial independence and enacted various devices for limiting the runaway judges.\(^4\) From the beginning of its history, Americans had thus models for both independence of the judiciary and a strong legislative will.\(^5\)

These two pillars of legal source have naturally played an important role in the debate surrounding the determination of public policy in the United States. On the one hand, public policy has a more significant (1) legislative nature compared to England. On the other, the judicial independence has lead to courts to consider themselves, in some circumstances and to some extent, as public policy makers through (2) judicial activism.

The examination of these two pillars is related to the two main issues related to the English public policy doctrine. First, the legitimacy, from a separation powers standpoint, to legislative activity on the part of the judges. Second, the degree of rigidity of the rule of public policy and the question whether the latter, once a particular aspect of public policy has assumed a settled form, have to be applied with the rigidity customarily associated with rules of law. The question of the rigidity of the public policy rule is thus related to the ease for Anglo-American courts to change the public policy in order to reflect the changing social attitudes.

### 2.3.1. Legislative nature of the public policy rules

Based on the common law system, the substantive law in the United States is naturally composed of non-written rules recognized by courts, originating from principles established by the case law. However, a number of legislations\(^6\) expressly deal with the issue of

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\(^2\) Idem.


\(^4\) S. Sherry, *op. cit.*, p. 17.

\(^5\) Idem.

\(^6\) The term legislation is used here in the "broadest sense to include any fixed text enacted by a body with authority to promulgate rules, including not only statutes, but constitutions and local ordinances, as well as
contractual enforcement. The declaration of public policy has indeed become largely the province of legislators rather than judges. This is in part due the fact that legislators are supported by facilities for factual investigations and can be more responsive to the general public.\(^1\) Nevertheless, when proscribing conduct, legislators *seldom* require to weigh the policy indicated by the statute against the policy of enforcing contracts.\(^2\)

The American legislature declares thus more often public policy rules in contrast to its English counterpart.\(^3\) However, it must not be forgotten that there is a strong independence of the judiciary which stems from the principles of the common law. This implies that American courts do sometimes not hesitate, for example, to interpret extensively rules of public policy enacted by the legislature. The strong independence of the judiciary from legislature has indeed lead to a controversial debate surrounding the judicial activism.

### 2.3.2. Judicial activism: myth or reality?

The judicial activism occurs when judges decline to apply the Constitution or laws according to their original public meaning or ignore binding precedent and instead decide cases on personal preference.\(^4\) It refers in other words to the American courts’ practice of applying their authority to bring about particular social goals.\(^5\) The judicial activism has lead to a controversial debate which is partly related to the doctrine of public policy. On one hand, some (a) problems of interpretations surrounding public policy rules have been found. Public policy rules were indeed either applied extensively or not used in accordance with the supposed intention of the legislator. On the other, the (b) constitutional review, whereby the final step of the making of public policy rules relies on the American supreme courts, has naturally fundamental consequences on the determination of public policy rules.

#### A. Problems of judicial interpretation

Interpretation generally arises when the legislature has not spoken directly and positively in declaring public policy. In determining whether the contract is impliedly prohibited by statute, the courts will not declare illegal a contract unless such was the intention of the legislature.\(^6\) In order to interpret the intent and purpose of the legislature, American courts will particularly focus on the clarity of the language of the statute as they value the freedom to contract so

\(^1\) Restatement (Second) of Contracts, 1981, §179, comment a, database updated June 2014 (Westlaw US).

\(^2\) Idem.

\(^3\) Idem.


\(^5\) Idem.

\(^6\) 17A Am. Jur., Contracts III C Refs, 2nd, 1964, Section 230, database updated May 2014 (Westlaw US). See *In re Peterson's Estate*, 230 Minn. 478, (1950) at 482. "Although the general rule is that a contract executed in violation of a statute which imposes a prohibition and a penalty for the doing of an act—such as the pursuit of an occupation, business, or profession without being possessed of a license as required by law for the protection of the public—is void, such rule is not to be applied in any particular case without first examining the statute as a whole to find out whether or not the legislature so intended."

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highly. In this regard, three problems, related to the judicial activism and the interpretation of a statute, arose when determining public policy rules.

First, in some cases, American courts have interpreted in extensively prohibitions enacted by the legislature. As it was noticed by a legal author in the beginning of the twentieth-century, some courts have indeed persisted in speculating and have reached divergent conclusions concerning the intention of the legislature.

Secondly, public policy inferred from statutes is recognized as a delicate and troublesome area for the courts. The courts often identify the public policy behind a statute with its purpose. However, the problem arises when the statute admits more than one purpose and especially when these purposes seems somewhat contradictory objectives. This was the case in Burnet v. Guggenheim. While assessing a statute imposing taxes, the Supreme Court declared that the problem often becomes "a choice between uncertainties [in which] we must be content to choose the lesser."

A third problem arises when a statute radically alters common law concepts. This raises the question of the limits or the extent of the interpretation powers' of judges. It seems in this regard that a statute in derogation of the common law must be strictly read. As the Court pointed out in Bovi v. Hess:

" [...] Under well–established rules a change in the common law, taking away rights, is to be strictly construed. It may be said that it gives rights to the employee, and is therefore to be liberally construed to effect that result; but, where it is necessary to take from one man to give to another, it would seem that the common law, the growth of ages of careful development of the rights of man, should not be changed further than is required to meet the letter of the statute."

In a common law system, where courts make law by deciding cases and establishing legal principles that bind future litigants and judges, it is not surprising that the interpretation of statutes give rise to some problems. In addition to the interpretation problem, raises the question of the extent of the constitutional review in the United States.

B. Constitutional review

The lawmaking function of courts in the common law ensures that judges have a powerful role as public policy makers. In this regard, American supreme courts have the constitutional

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4 Burnet v. Guggenheim, 288 U.S. 280, at 288 (1933) per Mr. Justice Cardozo.
review. This constitutional review is based on the authority of the case *Marbury v. Madison* where the Supreme Court of the United States indeed said that:

"It is emphatically the province and duty of the judicial department to say what the law is. These who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. [...] So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty".¹

In the lawmaking of the United States, the constitutional review is a fundamental element. The United States is indeed a federation of fifty states, each with its own legislature in addition to the federal legislature, and naturally each with its own supreme court in addition to the Supreme Court of the United States. Therefore, although, public policy is more often expressed by the legislature, the courts' power to determine the validity of public policy is an important policy maker tool.

### 2.3.3. Modern American determination of public policy

The modern doctrine of public policy in American law has tried to find a compromise between the more-often legislative nature of public policy and an active and independent judiciary.

First, American courts, in line with their English counterparts, have been cautious in the application of public policy rules. They recognize indeed that "the meaning of the phrase 'public policy' is vague and variable; courts have not defined it, and there is no fixed rule by which to determine what contracts are repugnant to it".² And therefore, that the principle that contracts in contravention of public policy is not enforceable must be applied with caution and only in cases plainly within the reasons on which that doctrine rests.³

Secondly, they recognize that the determination of public policy resides first, with the people as expressed in their constitution and, second, with the representatives of the people, the state

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¹ *Marbury v. Madison* 5 U.S. 137 (1803) at 177-178 per Marshall. At that time, there was a political debate in the United States about the separation of powers and the constitutional review. On the one hand, Thomas Jefferson said that: “[T]he opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action, but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch” see Thomas Jefferson to W. H. Torrance, 1815. ME 14:303 cited by C. G. Haines, *The Role of the Supreme Court in American Government and Politics* 1789-1835, University of California Press, 1944, p. 201. On the other, Alexander Hamilton, stated that: "A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute." Cited by C. G. Haines, *op. cit.*, p. 202.


³ *Idem.*
legislature since the legislative branch is much better suited than the courts to set public policy.\textsuperscript{1} Moreover, the courts must always endeavour to apply to the facts of a particular case a direct or closely analogous precedent.\textsuperscript{2}

Thirdly, although American courts are reluctant to "install a public policy in the absence of guidelines set by the lawmakers"\textsuperscript{3}, they still rely on their own perceptions to determine the social standards and therefore extent or modify public policy rules. This can happen not only through the extensive interpretation and the constitutional review but also via the source of information of public policy. In this respect, they have indeed recognized that the constant practice of government officials is considered a proper source for such information\textsuperscript{4} or that public policy may also abide in the customs and conventions of the people in their clear consciousness and conviction of what is naturally and inherently just and right between people.\textsuperscript{5}

In conclusion, the American modern determination of public policy grants a certain legitimacy, from a separation powers standpoint, to legislative activity on the part of the judges. The legitimacy stems from the theory of legal sources since Americans know from the beginning of the nation two models, i.e. an appropriate and independent judiciary stemming from the common law system and a strong will of the legislature. Secondly, the rigidity customarily associated with rules of law applies to some aspects of public policy. When the rule is settled either by the legislature or by judicial decisions, there is a limited ease for American courts to change the public policy in order to reflect the changing social attitudes.

3. Determination of the enforceability

3.1. Principle

The previous section focused on the determination of which contracts contravene public policy. It is important now to analyze the factors taken in account by courts in order to determine the enforcement of an agreement. In this regard, the general rule is that Anglo-American courts will refuse the enforcement of any contract contrary to public policy. This refusal finds its roots in the early English case \textit{Holman v Johnson} where it was stated that "no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".\textsuperscript{6}

\begin{enumerate}
\item See e.g. \textit{Martin v. Allianz Life Ins. Co. of North America} 573 N.W.2d 823 (1998), at 828.
\item \textit{Sheppey v. Stevens}, 177 F. 484 (1910) at 490. In this regard, see also 17A \textit{C.J.S. Contracts} IX A, 1955, Section 279, database updated June 2014 (Westlaw US).
\item \textit{Mertz v. Mertz} 271 N.Y. 466, (1936) at 572 the New York Court of Appeals said: "The courts must always \textit{endeavor} to apply to the facts of a particular case a general rule of law which they find expressed in statute or judicial decision or which they formulate to meet new conditions; and even in formulating a rule individual notion of public policy may be given effect only where the court finds that its notion of public policy is so generally held and so obviously sound that it is \textit{in fact a part of the law of the state}".
\item \textit{Schnackenberg v. Towle}, 4 Ill. 2d 561 (1954), at 565.
\item \textit{Skutt v. City of Grand Rapids} 275 Mich. 258 (1936), at 264-265.
\item \textit{Holman v Johnson} [1775] 130 E.R., at 294 per Lord Mansfield.
\end{enumerate}
3.2. **Position in the United States**

The non-enforcement of a contract on grounds of public policy in American law is dealt in §178(1) of the Restatement (Second) of Contracts. The latter states:

"A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."

American courts have in this regard a high degree of flexibility in determining whether the agreement is enforceable. The factors spelled out in §178 of the Restatement are indeed broad and reported as merely illustrative. The most common factors which are considered when deciding the enforcement of a term are the parties' justified expectations, any forfeiture that would result if enforcement were denied, and any special public interest in the enforcement of the particular term. Similarly, when weighing public policy against enforcement of a term, account is taken firstly of the strength of that policy as manifested by legislation or judicial decisions, secondly the likelihood that a refusal to enforce the term will further that policy, thirdly the seriousness of any misconduct involved and the extent to which it was deliberate, and finally the directness of the connection between that misconduct and the term.

3.3. **Position in England**

3.3.1. **Issues and the Tinsley case**

The complexity surrounding the non-enforcement of contracts in English law led to the creation of three Law Commission Reports. Four main problems were identified. First, due to the complexity of the present law, there is a crude application of the general contractual illegality rules which could lead to unnecessarily harsh decisions. Secondly, there is a legal uncertainty not only where it is not possible to state clearly what the relevant rules are but also as to how the law will be applied. Third, at certain points, the rules relating to illegality of contract appear to draw arbitrary distinctions. Finally, the complexity and uncertainty of the present law sometimes mean that it is impossible to analyze why the claim was allowed or denied.

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1 Restatement (Second) of Contracts, 1981, Introductory note Chapter 8, database updated June 2014 (Westlaw US).
5 Law Com. No 189, para. 3.53.
6 Idem, para. 3.57-3.58.
7 Idem, para. 3.59.
8 Idem, para. 3.60.
The recent case *Tinsley v Milligan*\(^1\) clearly demonstrates these problems in the field of public policy. In this leading case, the House of Lords refused to rely on the public conscience test under which the court must weigh, or balance, the adverse consequences of granting relief against the adverse consequences of refusing relief.\(^2\) The house argued that "the 'public conscience' test is inherently uncertain in its application".\(^3\) This decision inevitably led to considerable judicial and academic criticism of this position.\(^4\)

The conflict surrounding the application of the public conscience test perfectly reflects the dilemma confronting English judges in the field of public policy. On the one hand, English courts do not want to overstep their power\(^5\) and therefore create a legal uncertainty. On the other, the common law has proven to be a poor instrument for the regulation of illegal contracts, principally because of the perceived lack of remedial flexibility in the common law rules.\(^6\) In this context, Lord Goff, in *Tinsley v Milligan* expressly stated that the present rules are not only unprincipled, but also rather indiscriminate in their effect, and thus capable of producing injustice.\(^7\) He also added that any reform is the province of Parliament, not the courts.\(^8\)

**3.3.2. Recommendations of the Law Commission Reports**

Therefore, in the Law Commission Reports, two important questions were analyzed concerning the need for a legislative reform and the role playing by the present rules in determining the enforcement of a contract.

First, the Report, in 1999, concluded that there is a need for legislative reform of the law on the effect of illegality in relation to the enforcement of contracts and trusts.\(^9\) It recommended further that the current complex and technical rules relating to the effect of illegality on contracts and trusts should be replaced by statutory discretion.\(^10\) However, in its one more

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\(^1\) *Tinsley v Milligan* [1994] 1 A.C. 340.
\(^2\) Ibidem, at 353.
\(^3\) Ibidem, at 345.
\(^4\) Law Com. No 189, para. 6.70.
\(^5\) *Tinsley v Milligan* [1994] 1 A.C. 340, at 346 "the 'public conscience test' inevitably calls for 'a value judgment.' Such an exercise imposes standards which are not merely variable but are not readily ascertainable. How are the dictates of 'public conscience' to be ascertained? It is no proper function of the court to be grading illegalities 'according to moral turpitude'."
\(^7\) *Tinsley v Milligan* [1994] 1 A.C. 340, at 365 per Lord Goff: "The real criticism of the present rules is not that they are unprincipled, but rather that they are indiscriminate in their effect, and are capable therefore of producing injustice. It is this effect which no doubt prompted the reform of the law in New Zealand, embodied in the Act of 1970; and it prompts me to say that, speaking for myself, I would welcome an investigation by the Law Commission, if this is considered desirable and practicable by the authorities concerned; and that I would be more than happy if a new system could be evolved which was both satisfactory in its effect and capable of avoiding the kind of result which flows from the established rules of law in cases such as the present".
\(^8\) *Idem*.
\(^9\) Law Com. No 154, para. 9.2.
\(^10\) *Idem*, para. 9.1.
recent Report in 2009, the Law Commission concluded that legislation was not needed\(^1\) and that in most areas the courts could reach the desired result through development of the case law.\(^2\)

The Law Commission pointed out first that the scope of their proposals was unclear and as a result would introduce further uncertainty into this already complex area of the law. Moreover, in attempting to draft their proposals into legislation, they encountered many difficulties concerning definition. Finally, an additional reason for no longer supporting a statutory discretion is that, even though the statutory scheme could be made to work satisfactorily, it would deliver less than they hoped.\(^3\) These reasons prompted the Law Commission to produce a new report in 2010, in which it confirmed that legislative intervention was unnecessary given the incremental developments that have taken place in the case law except for a limited class of trusts.\(^4\)

Secondly, the Law Commission Report 2009 recognized that the courts do in fact take into consideration a whole variety of factors which are tied to the policies that underlie the illegality doctrine.\(^5\) In this regard, the Law Commission suggested that:

"Courts should consider in each case whether the application of the illegality defence can be justified on the basis of the policies that underlie that defence. These include: (a) furthering the purpose of the rule which the illegal conduct has infringed; (b) consistency; (c) that the claimant should not profit from his or her own wrong; (d) deterrence; and (e) maintaining the integrity of the legal system. Against these policies must be weighed the legitimate expectation of the claimant that his or her legal rights will be protected. Ultimately a balancing exercise is called for which weighs up the application of the various policies at stake. Only when depriving the claimant of his or her rights is a proportionate response based on the relevant illegality policies, should the defence succeed. The judgment should explain the basis on which it has done so."\(^6\)

### 3.3.3. Modern application: the Parkingeye case

The dicta of Sir Robin Jacob and Toulson L.J in the Parkingeye case\(^7\) provide a good illustration of the present judicial attitude towards the recommendations of the Law Commissions in the area of illegality defence. The principle is that illegality does not immediately render the contract unenforceable, as each case must be considered on its own particular facts.\(^8\) In this respect, the Court sets out a number of factors that had to be considered and based its reasoning on the Law Commissions Reports.\(^9\)

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1. Law Com No 189, para. 3.122.
2. Idem, para. 3.108.
3. Idem.
4. Law Com No 320, at paras 2.24-2.54.
5. Law Com No 189, para. 3.125.
8. Idem, at 848 referred to Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277.
The first refers to the object and intent of the claimant. The case demonstrates how it is important to "go back to 'basics' in applying the doctrine, rather than merely looking for the most similar recent decided case."\(^1\) In referring to the historical common law distinction, the Court stated that if the parties were not aware from the beginning of the illegality of their agreement had not a “fixed intention” of acting unlawfully, the contract may be upheld.\(^2\)

The second factor is the centrality and gravity of the illegality since the non-enforcement of a contract should not merely be based on a merely minor act.\(^3\) Thirdly, the Court of Appeal also analysed the nature of its function in determining issues of illegality. In this regard, it applied the "test of disproportionality" to consider whether the gravity of the illegality was sufficient to make the contract unenforceable.\(^4\)

In conclusion, the *Parkingeye* case is the first judicial discussion about the recommendations of the Law Commissions Reports. The contractual non-enforcement is still complex in English law and can lead to uncertainty in some cases. However, as the Law Commission stated in 2009, the unfair decisions occurred occasionally, as English judges have tried "to trace a careful path through the various rules in order to reach an outcome that most would regard as fair between the parties involved".\(^5\)

4. Conclusion

The essential function of public policy doctrine in the common law is to bring into judicial consideration the broader social interest of the public at large. With the growth of an elected and more democratically legislative body, questions arise surrounding the role of the judiciary in the application and the creation of public policy rules.

Concerning the creation of public policy rules, the question arises surrounding the role of the judiciary in the application and the creation of public policy rules. The doctrine whereby the court may refuse to enforce a contract solely on the ground of "public policy” raises indeed two questions. The first concerns the *legitimacy*, from a separation powers standpoint, of essentially legislative activity on the part of the judges. The second concerns the *degree of rigidity* of the public policy rule and consequently the ease for Anglo-American courts to change this rule in order to reflect the changing social attitudes. These two issues were debated from different points of view amongst Anglo-American courts. On the one hand, English judges focused on whether public policy rules are the instrument of the judiciary or the legislator. On the other, American courts were faced with the judicial activism, which occurs when judges decline to apply the Constitution or laws according to their original public meaning or ignore binding precedent and instead decide cases on personal preference.

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3. *Ibidem*, at 857-858.
4. *Ibidem*, at 858.
5. Law Com. No 189, para. 3.50.
The modern doctrine of public policy has consequently tried to find a compromise in both legal systems. From a common law point of view, there is certain legitimacy for a judicial intervention on behalf of the interest of the public. Anglo-American courts have therefore an active function in the making of this area of law. However, they have generally applied cautiously public policy rules and are especially reluctant to extend them when the legislature is expected to intervene. Moreover, they have recognized that the determination of public policy first resides with the people as expressed in the legislature and secondly in the settled judicial decisions. The ease to change social conditions and attitudes varies thus over the institution that public policy tend to protect and over the degree of importance that legislature grants to the judiciary.

Concerning the application of public policy rules, the question about the application of the doctrine concerned the factors which Anglo-American have to take in account. In this regard, the factors provided by the American courts grant them a high degree of flexibility in determining whether an agreement is enforceable. Conversely, the question of the enforceability of an agreement contrary to public policy has led to a lack of transparency and complexity in this area of English law. Three Law Commissions examined the common law rules in order to find a solution. Interesting is that, although the first Report advocated a legislative intervention, the two latter have reviewed this position and expressly stated that further developments of these rules rest on the courts. Lastly, referring to the Law Commission, the Court of Appeal in the Parkingeye case recognizes the importance that law is not a "straitjacket".\(^1\) In this regard, it is now interesting to analyze the heads of public policy to follow their evolutions.

\(^1\) Parkingeye Ltd v Somerfield Stores Ltd [2013] Q.B. 840 at 848 referring to Law Com. No 189, para. 3.31.
III. Contracts contrary to public policy

1. Introduction

The vagueness of the term public policy has given rise to a number of contracts which are deemed contrary to public policy. These contracts may be "classified" into categories called heads of public policy. An example of one head of public policy would be contracts in restraint of trade. Moreover, the interest of the society varies over the category of contract and more specifically, over the institution that the rules aims to protect. For instance, policies related to restraint of trade are more likely to change than these concerning the primary morality, such a contract in marriage. The purpose of the second chapter is therefore to analyze the most common contracts unenforceable on grounds of public policy according to the doctrine.

In this regard, the examination will focus on several heads of public policy, namely contracts injurious to sexual morality, affecting marriage, involving the administration of justice, injurious to good government and the states, to commit an unlawful act and in restraint of trade. A two-step analysis is used to examine these categories of contract. The first step refers to the public policy in general that aims to render a contract unenforceable. It refers thus the concept of public policy. The second question analyzes the approach of the doctrine to determine the enforceability of a contract and refers to the doctrine of public policy as developed in the previous chapter.

2. Contracts promoting sexual immorality

2.1. Introduction

This head related to sexual morality is one of the most dynamic areas of the doctrine's application. Public policy in the area of sexual immorality has indeed changed over recent years. Some Anglo-American courts have taken into account the changing social attitudes and therefore relaxed their conservative view on the cohabitation agreements and contracts meretricious purposes. In this regard, as an Australian judge has said: "the social judgments of today upon matters of immorality are as different from these of the last century as is the bikini from a bustle".1 The second category will therefore focus on the enforcement of cohabitation agreements and of agreements for meretricious purposes.

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1 Andrews v Parker [1973] Qd R 93, at 104 per Judge Stable.
2.2. Public policy

Although it has sometimes been said that contracts contrary to good morals are unenforceable, the only aspect of immorality with which Anglo-American courts have actually dealt is sexual immorality.¹ There is a clear public interest in discouraging the promotion of immoral mode of life. In this regard, Anglo-American courts have identified two relevant public policy interests: discouraging contracts for sexual relations and encouraging ceremonial marriages. These public interests are thus essentially moralistic in nature. They reflect a view that sex outside the marriage should not be encouraged because it poses a harmful threat to society.

2.3. Doctrine

2.3.1. Cohabitation agreements

The traditional common law approach related to immoral contracts no longer seems applicable to persons who live together in a common household as husband and wife without being married.² However it is noteworthy to distinguish the extent of this approach in England and in the United States.

In the former, there was initially a sceptical attitude towards agreements concerning sexual partnerships between persons who were not married to each other³ as they were treated as being contract bonos mores.⁴ Yet, the massive increase of cohabitations in recent decades has meant that the courts routinely deal with disputes involving cohabiting couples, without any suggestion of there being legally relevant impropriety in the background.⁵ Finally, English courts nowadays recognize that "unmarried cohabitation, whether heterosexual or homosexual, is widespread".⁶

The situation is broadly the same in the United States. If originally Courts were not in favour of cohabitation agreements, the latter have become more numerous and courts have relaxed the restraints imposed on the parties' freedom to govern such relationships by contract.⁷ In this regard, the famous case Marvin v. Marvin provides an interesting example. The California Supreme Court held indeed that so long as the cohabitation agreement does not rest upon illicit meretricious consideration, the parties might order their economic affairs as they

¹ See e.g. Coral Leisure Group Ltd v Barnett [1981] ICR 503 at 506. In the United States, see Cusak v. White, 9 S.C.L. 368, (1818) at 371, it was stated that: "The law will not permit a woman to make her virtue an article of merchandise".
³ See Upfill v Wright [1911] 1 K.B. 506.
⁴ Coral Leisure Group Ltd v Barnett [1981] I.C.R. 503. In this regard, at 506, the court said "in this branch of the law the word 'immoral' connotes only sexual immorality".
choose, and no policy precludes the courts from enforcing such agreements.¹ Nevertheless, note that although many states have followed California's lead, a few still adhere to the traditional rule.² Therefore, while in England cohabitation agreements will generally be enforced, the Marvin case has not found universal favour even though it has had a substantial impact on his jurisdiction.³

2.3.2. Contracts for meretricious purposes

In line with the evolution concerning the cohabitation agreements, Anglo-American courts have slightly relaxed their conservative views related to the contracts for meretricious purposes since recent years.

Originally, the English courts took a strict approach to sexual morality so that a promise of payment in order to induce a woman to become a man's mistress was unenforceable.⁴ A contract was also illegal if it indirectly promotes sexual immorality. This was for instance the case in Pearce v. Brook where a contract to hire out a brougham to a prostitute for the purposes of her profession was held to be illegal.⁵

The change in the view of the English courts appeared since recent time. It was held that a contract for advertising of telephone sex lines was not contrary to public policy so that the operator of the lines had to pay for the advertising,⁶ and that a deed of cohabitation between two people in a slave sexual relationship was not contrary to public policy.⁷

In the United States, it is more difficult to stress the evolution concerning contracts promoting sexual immorality as it changes across the different States. However, the American approach is also generally stricter in discouraging contracts for meretricious purposes than the cohabitation agreements. In Marvin v. Marvin for instance, it was held that a contract between non-marital partners is unenforceable only to the extent that it explicitly rests upon the

² Hewitt v. Hewitt, 77 Ill. 2d 49, 31 (1979) The Illinois court disagreed, however, in a notable case that today stands largely alone in both its reasoning and result at 61 "[t]he question whether change is needed in the law governing the rights of parties in this delicate area of marriage-like relationships involves evaluations of sociological data and alternatives we believe best suited to the superior investigative and fact-finding facilities of the legislative branch in the exercise of its traditional authority to declare public policy in the domestic relations field". See also 5 Williston on Contracts Ch. 16, 4th Edition, 2011, Section 23, database updated May 2014 (Westlaw US).
³ E.A. Farnsworth, op. cit., p. 52.
⁴ Benyon v Nettlefold [1850] 3 Mac & G 94.
⁵ Pierce v Brook [1866] L.R. 1 Ex. 213. Yet, Pierce v. Brook is regarded as a doubtful authority, see Buckley, R.A., op. cit., para. 6.23. A contrario see Lloyd v. Johnson [1798] 1 B. & P. 340 where a contract to wash a prostitute’s linen was valid even though the linen included a quantity of gentlemen's nightcaps.
⁷ Sutton v Mischon de Reya [2004] 1 FLR 837, see Poole, J., op. cit., p. 587.
immoral and illicit consideration of meretricious sexual services.\(^1\) Conversely, for example, statutes against prostitution are prevalent and often stringently enforced.\(^2\)

Nonetheless, American courts are since recent years faced with new interesting challenges. This is for example the case of surrogacy contracts which involves the hiring of a woman to bear a child for another.\(^3\) In the famous case *In re Baby M*,\(^4\) it was held that the surrogacy contract is unenforceable due to violation of public policy. Yet, the authority of this case is doubtful. The area of surrogacy contracts is indeed still developing and may garner different results in every state since there is no real answer whether such contracts are illegal until a court or legislature sets the standard.

Another interesting example is frozen embryo and sperm donor agreements. For instance, the question arises whether the destruction of a frozen embryo should be destroyed when the couple divorces. Alternatively, should the use of a sperm be permitted once the donor has died even though the contract provides that the sperm of a donor will be destroyed in case upon his death. These situations pose a real dilemma for the courts and the legality of theses types of agreements have been challenged in some jurisdiction and usually turn on consent and public issues such as surrogacy contracts.\(^5\)

### 2.4. Conclusion

The category of public policy that is concerned with contracts involving immorality is a dynamic area of the doctrine's application and is currently undergoing a significant evolution. In this regard, Anglo-American courts have generally adopted a consensual approach.

In *England*, the consensus is shown in the telephone sex line. Although English courts recognize that such a contract can cause incontestable public harm, they recognize that "various types of sexual conduct necessarily represent a clear public consensus as to today's properly tolerable bounds of behaviour".\(^6\)

In the *United States*, the area of cohabitation agreements shows perfectly the consensus approach in a country with local variations. The majority of the courts are more akin to follow the case *Marvin v. Marvin* that has considered that no policies were against the enforcement of a cohabitation agreement. Other courts have adopted a middle position. This is for example

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\(^1\) *Marvin v. Marvin* 557 P.2d 106, 116 Cal. (1976).

\(^2\) Prince, H.G., Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?, *Minnesota Law Review*, Vol. 70, 1985, p. 192. It is also referred to the fact that that people believe that prostitution is closely related to other problems such as organized criminal activity, illegal drug traffic, various street crimes and venereal disease. See note 129, Prince, H.G., *idem*.


\(^5\) Tepper, P. R., *op. cit.*, p. 155. Other interesting examples are cited by this author such as agreements for the donation of human organs or bone marrow, or concerning same-sex unions which is a national debate in the United States.

\(^6\) R.A. Buckley, *op. cit.*, para. 6.24.
the case in Morone v. Morone where the New-York court recognized the enforceability of a cohabitation agreement except in certain circumstances, such as homemaking services.¹

3. Contracts affecting marriage

3.1. Introduction

Marriage is considered in England and America as a social institution which lies at the foundation of the civilization. It is therefore a matter of public policy since nothing should be allowed to impair the status of married persons, the institution and the sanctity of the marriage union.² However, the head of public policy which seeks to preserve this institution is nowadays faced with a significant cultural evolution of the society. Therefore, this section will focus on these changing social conditions and attitudes in analyzing two typical contracts in this area of law, i.e. agreements in restraint of marriage and detrimental to marital relationship.

Cultural and religious considerations play a primary role in the enforceability of contracts affecting marriage. It implies that judicial decisions may be different in the United States due to the local variations amongst the states. For this reason, the analysis of this topic will focus on the general tendency of the American case law and more specifically, on the rules provided in the restatement (Second) of contracts.

3.2. Public policy

It has long been established principle that Anglo-American courts will refuse the enforcement of any contract which unjustifiably restricts a person's freedom to marry on grounds of public policy or which is detrimental to marital relationship. The reasons for prohibiting such a contract are twofold and are of concern to society as well as to the individual.

From the community's point of view, the restrain on an individual's freedom to marry or detrimental to marital relationship can encourage individual's behaviour against the institution of marriage.³ From the individual's point of view, such contract can injury the moral welfare of the citizen.⁴ It is important to note that the interest of the society in the area of marriage is particularly influenced by cultural and religious considerations.

¹ Morone v. Morone, 50 N.Y.2d 481 (1980) at 496.
⁴ See e.g. in the United States, in Morrison v. Rogers, 115 Cal. 252 (1896) at 272: "A marriage brokerage contract is invalid, as being contrary to public policy, because it inhibits freedom of choice essential to a happy marriage". In the United Kingdom, in Lowe v Peers [1768] 4 Burr 2225 at 2230, it was stated that a promise not to marry another "is only a restraint upon him against marrying any one else, besides the plaintiff: not a reciprocal engagement “to marry each other;” or any thing like it."
3.3. Doctrine

3.3.1. Contracts in restraint of marriage

The Anglo-American approach is that the courts will execute a contract restricting a person's freedom to marry if they are limited in duration or otherwise reasonable.\(^1\)

In this regard, **English** courts have enforced a limited restraint imposed for the sake of a person's health.\(^2\) Moreover, they have sometimes considered a contract valid if it does not impose any contractual liability on a person as a result of marriage and even though it might restrain the freedom's individual to marry.\(^3\)

Conversely, **American** courts use the rule of reason in order to determine whether a contract in restraint of marriage is valid.\(^4\) The duration of the restraint and its extent are important considerations.\(^5\) The restraint is reasonable if it serves some legitimate purpose other than merely discouraging marriage.\(^6\) For example, an agreement under which parents promised to leave property to daughter, aged of 18, if she would postpone the contemplated marriage until she was 21, was held enforceable.\(^7\) Yet, a man's promise to pay woman a certain amount of money if she cared for him and did not marry until his death was considered as invalid.\(^8\)

The position adopted by Anglo-American courts concerning any restriction of marriage is thus generally flexible. However, their approach is not the same in respect to a marriage brokerage contract. Under common law, a marriage brokerage contract is an undertaking for reward to produce a marriage between two parties.\(^9\)

In **England**, the old jurisprudence was indeed based on a theory of marriage as a holy union "which should not be defiled by secular considerations".\(^10\) It was held that no distinction exists "between a contract for reward to introduce a number of persons with a view to procuring a marriage with one or other of them and the case of a contract the object of which is to procure the marriage with a particular person".\(^11\) Further, in another case, a marriage brokerage agreement was considered illegal "not for the sake of the particular instance or the

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1. In the **United States**, the Restatement (Second) of Contracts, 1981, §179, database updated June 2014 (Westlaw US) states: "A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of marriage". See also E.A. Farnsworth, op. cit., p. 40. In **England**, see PEEL, E., op. cit., p. 490
3. This is for example the case of a promise to pay an allowance until the promisee's marriage. *see Thomas v. Thomas* [1842] 2 Q.B. 251.
11. *Hermann v Charlesworth* [1905] 2 K.B. 123 at 135, per Mathew L.J.
person, but of the public and that marriages may be on a proper foundation."\(^1\) Yet, the authority of this case is in modern times questionable, as it does not reflect the contemporary public policy. There is indeed a substantial and profitable industry devoted to the finding of spouses, or other life partners, made by quite respectable marriage bureaux. Therefore, if the question arises before a modern court, it would probably be found that a marriage brokerage contract is enforceable.\(^2\)

In the **United States**, the old rule that a marriage brokerage contract is contrary to public policy "is so elementary that but very few cases involving the question have found their way into the reported decisions; but, whenever the question has been presented, courts have invariably declared that the action could not be maintained".\(^3\) And this rule is widely recognized in all jurisdictions where they have been tested.\(^4\) These contracts are indeed "calculated to bring to pass mistaken and unhappy marriages, to countervail parental influence in the training and education of children, and to tempt the exercise of an undue and pernicious influence, for selfish gain, in respect to the most sacred of human relations".\(^5\) Despite inevitable changes in societal mores and the marriage brokerage business since these two old cases, there remains ample basis for concern regarding "pernicious tendencies in the twenty-first century world of marriage brokerage contracts".\(^6\)

Therefore, the area of marriage brokerage contracts remarkably demonstrates that a cultural difference sensibly affects the enforceability of an agreement. It is nevertheless surprising that Anglo-American courts seem to be more flexible about a limited or reasonable restriction in marriage than a marriage brokerage.\(^7\)

### 3.3.2. Contracts detrimental to marital relationship

#### A. Affecting the marital relationship

The Anglo-American approach is relatively flexible, as the approach in the restrain of marriage. Courts will enforce these contracts if the latter do not imply an essential incident of the marital relation that could be detrimental to the public interest.\(^8\)

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7. For example, the Supreme Court of the United States recognizes "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival". Loving v. Virginia, 388 U.S. 1, (1967).
8. In this regard, Restatement (Second) of Contracts, 1981, §179, database updated June 2014 (Westlaw US) states that "a promise by a person contemplating marriage or by a married person, other than as part of an enforceable separation agreement, is unenforceable on grounds of public policy if it would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship. A separation agreement is unenforceable on grounds of public policy unless it is made after separation or in contemplation of an immediate separation and is fair in the circumstances".
In this regard, a separation agreement must be made after the parties have separated or when they contemplate immediate separation, and be fair in the circumstances, a matter as to which the court may exercise its continuing discretionary powers. For example, a contract for possible future separation is contrary to public policy as being opposed to elementary considerations of morality. Moreover, the marriage is in fact not disintegrated when the agreement is made and therefore not followed by immediate separation.

B. Encouraging divorce or separation

In the United States, paragraph 190 (2) of the Restatement (Second) of Contracts provides that a promise that unreasonably tends to encourage divorce or separation is unenforceable on grounds of public policy. A promise by one already married to marry another is clearly unenforceable, provided the dissolution of the first marriage. It is for example true when there is a promise by a married woman, whose husband had disappeared, to marry another man if the husband did not reappear within statutory period of five years or if she got a divorce. The question whether a promise unreasonably encourages divorce or separation is a question of fact that depends on all the circumstances, including the state of disintegration of the marriage at the time the promise is made.

In England, a promise made by a married person to marry a third person at some future time is also invalid on ground of public policy. Such a contract was said not to be "only inconsistent with that affection which ought to subsist between married persons, but is calculated to act as a direct inducement to immorality". In this regard English courts did not enforce a contract relating to the anticipation of death of spouse. In Wilson v Carnley it was indeed stated that a contract whereby a man had promised to marry a woman -even if his existing wife was unwell and was expected not to survive- is invalid. However, since the

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2 See Restatement (Second) of Contracts, 1981, comments under §190, database updated June 2014 (Westlaw US). In this regard, in the English case Fender v John-Mildmay [1938] AC 1 at 44, Lord Wright stated: "If a separation has actually occurred or become inevitable, the law allows the matter to be dealt with according to realities and not according to a fiction. But the law will not permit an agreement which contemplates the future possibility of so undesirable a state of affairs".


5 E.A. Farnsworth, op. cit., p. 44.

6 Johnson v Iss 114, 85 S.W. 79 (1905) cited by E.A. Farnsworth, op. cit., p. 44.

7 See Restatement (Second) of Contracts, 1981, comments under §190, database updated June 2014 (Westlaw US).

8 Wilson v Carnley [1908] 1 K.B. 729 at 740 per Farwell LJ.

9 Wilson v Harris [1908] 1 K.B. 729. In this regard, at 742, Kennedy L.J. said "I should have thought that discussion was needless to show that such a promise is against public policy as tending to immorality, and that nothing but mischief could follow from upholding such an unhallowed bargain, which would always be a temptation to bring about the dissolution of the marriage tie which hindered the defendant from carrying out his
abolition of actions for breach of promise of marriage, agreements concerning the anticipation of death of spouse and the ignorance of existing marriage are not longer subject to litigation. Therefore, this line of common law rules is not of practical importance nowadays.

3.4. Conclusion

The institution of marriage is nowadays faced with a significant cultural evolution of the society. In this regard, Anglo-American courts have adopted an ambiguous attitude. On the one hand, their approach is generally flexible in the enforcement of marriage contracts. They indeed mostly use the test of reasonableness. To some extent, this position demonstrates that courts follow cultural evolutions of the community. Public interest in marriage is indeed currently in flux. Take the example of cohabitation agreements. Although they were 50 years ago strictly forbidden, they are considered enforceable by a majority of Anglo-American courts. On the other hand, it seems that, in some areas of this head of public policy, courts are reluctant to enforce some contracts, such as marriage brokerage agreements, despite inevitable changes in societal mores.

4. Contracts involving the administration of justice

4.1. Introduction

A vital area of public policy is that which denies enforceability which are contracts likely to undermine the integrity of the administration of justice. Although this category has always been closely guarded by Anglo-American courts, some common law rules have been substantially modified by legislative interventions. In this regard, it highlights the complex nature of the relationship between legislation on the one hand, and public policy as developed by the courts, on the other.

Two policies of the common law are generally recognized: any agreement which (i) tends to abuse the legal process or to (ii) oust the jurisdiction of the court is considered as unenforceable on grounds of public policy.

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promise”. Note that since the abolition of actions for breach of promise of marriage under the Law Reform (Miscellaneous Provisions) Act 1970, agreements concerning the anticipation of death of spouse and the ignorance of existing marriage are not longer subject to litigation. Yet these are good illustrations for public policy in respect of marriage.


4.2. Public Policy

In this area of law, the Anglo-American approach is generally based on two interests related to the perceived need to protect the integrity of public justice.¹

On the one hand, the right of the citizen to seek the enforcement of his or her legal rights in a competent court is indeed fundamental. In this respect, any private arrangement tending to abolish, limit, or inherently promote interference with full and impartial justice will be carefully scrutinized by the courts. On the other, the integrity of public justice is based on the principle that no encouragement must be given to litigation by the introduction of parties to enforce these rights which others are not disposed to enforce.

4.3. Doctrine

4.3.1. Agreements which tend to abuse the legal process

A. Maintenance and champerty agreements

The law in connection with maintenance and champerty agreements provides a good example of how the scope of public policy can alter due to the intervention of the legislature. Since early times Anglo-American courts indeed recognized the necessary evolution of the perceived champerty and maintenance agreement.² In this respect, it is important to define maintenance and champerty agreements in order to examine two specific contracts in this area, i.e. the contingent or conditional fee and Mary Carter agreements.

Maintenance and champerty are the names given to agreements which may contravene the policy against the encouragement of speculative litigation. Maintenance may nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.³ Champerty however occurs where it is agreed

¹ McCombs v. Texas & N. O. R. Co., 178 S.W.2d 729 (1944). In England, see e.g. Giles v Thompson [1993] 3 All ER 321, at 328 per Steyn L.J: "The doctrine of champerty and maintenance is founded on considerations of public policy. Such life as the doctrine still retains must, therefore, be assessed by reference to these contemporary standards of public policy which serve to protect the integrity of public justice."

² On this subject, an English case Giles v Thompson provides an interesting discussion about maintenance and champerty agreements. It was indeed stated that "the law on maintenance and champerty has not stood still, but has accommodated itself to changing times: as indeed it must if it is to retain any useful purpose. [...] the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants". In the United States, in, Gilman v. Jones 87 Ala. 691 (1889) at 694, it was stated that: "It is not surprising, therefore, that the law [on champerty and maintenance] has gradually undergone a great change, which is recognized universally by jurists, judges, and law-writers everywhere. This change has been called for by the new conditions of modern society, considered in its varied relations, commercial, political, and sociological. [...] There is much reason, it thus seems, for the relaxation of the old doctrines pertaining to the subject, so that they may be adapted to the new order of things in the present highly progressive and commercial age. Necessity and justice have, accordingly, forced the establishment of recognized exceptions to the doctrine of these offenses".

³ Re Trepca Mines Ltd [1962] 3 W.L.R. 955, at 219 per Lord Denning. The same definition prevails in the United States, as the Restatement (First) of Contracts, 1932, §540, database updated June 2014 (Westlaw US) states that "maintenance consists in maintaining, supporting or promoting the litigation of another, with most
that the person who maintains another's litigation is to receive a share of the proceeds of the litigation.1 The difference between champerty and maintenance lies in the fact that the former is considered of a more aggravated form of the latter.2

B. Contingent or conditional fee agreements

In the matter of champerty and maintenance, the contingent fee (in the United states) or conditional fee (in England) provides an interesting change of the scope of public policy rules. This agreement means that an attorney is generally allowed to contract for a contingent or conditional fee, whether for a specified share of the property recovered or for an amount equal to a given percentage of the recovery.3 The underlying idea behind such contracts is to guarantee an access to justice for people who cannot afford to pay the attorney's fees and costs of civil litigation.

In England, such a contract was prohibited at common law until recently. For instance, in 1980, it was held that "modern public policy condemns champerty in a lawyer whenever he seeks to recover - not only his proper costs - but also a portion of the damages for himself: or when he conducts a case on the basis that he is to be paid if he wins but not if he loses".4 However, a radical change occurred in the common rule due to a legislative intervention. First in 1990, when the courts and Legal Service Act came into force; secondly in 1999, with the adoption of the Access to Justice Act.

These two legislative interventions nevertheless led to a judicial uncertainty.5 There were indeed different views about the effect of the legislation on further common law development in this area of public policy. In Thai Trading v Taylor, the Court of Appeal considered that an agreement by a solicitor only to charge his clients if she succeeded in litigation was lawful.6 It took the view that the progressive narrowing by the Courts of this head of public policy courts requiring that the maintaining party act as an officious intermeddle and be without any interest in the litigation".

1 Restatement (First) of Contracts, 1932, §540, database updated Juned 2014 (Westlaw US). In England, see e.g. in Neville v London Express Newspaper Ltd [1918] A.C. 368, at 382: "champerty is a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute." And see J. Beatson, A. Burrows, and J., Cartwright, Anson's Law of Contract, 29th Edition, Oxford University Press, 2010, p. 390.

2 In England, see e.g. the Court of Appeal in Trendtex Trading Corporation v. Credit Suisse [1980] Q.B. 629. In the United Kingdom, Section 27 of the Access to Justice Act 1999 (c. 22) and Section 58 of the Courts and Legal Service Act 1990 (c. 41) define a conditional fee agreement as: "(a) an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances".


4 See R.A. Buckley, op. cit., para. 9.03.

during the last half-century meant that, if Parliament wished to freeze further common law development, it had to do so more directly. However, this point was held to be flawed by the Divisional Court with the consequence that Thai Trading had been decided per incuriam. One year later the validity of this criticism was accepted by the Court of Appeal itself. The latter was indeed of the view that the carefully crafted legislative scheme shows and defines the extent to which Parliament has decided to make such agreements enforceable. The legalization of the so called "no win, no fee" agreement therefore means that it will no longer be possible for the English courts to develop rules of public policy such as the Court of Appeal did in Thai Trading.

In the United States, contingent agreements were held illegal by some courts until the mid-twentieth century. The transition made by American courts does appear to be more consensual and less chaotic than their English counterparts. They indeed realized the need of accessibility to justice for all which is based on the principle that no encouragement must be given to litigation. Therefore, nowadays, these agreements are generally accepted. Nevertheless, some restrictions on contingent fees remain in effect in most jurisdictions. Many of them require indeed contingent fee to be reasonable.

The area of the contingent or conditional agreement provides thus a striking example of change in the scope of public policy rules. Although the change was more consensual amongst the American courts, it led to legal uncertainty at the end of the nineties in England despite the legislative intervention. In the United States, courts were however faced with the

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2 Through or characterized by lack of due regard to the law or the facts. In this regard, it was stated in Hughes v. Kingston upon Hull City Council [1999] Q.B. 1193, at 1197 per Rose L.J.: "Thai Trading involves the presentation to this court of arguments of a crucial character not presented to the deputy stipendiary magistrate and it involves this court being invited to say that a decision of the Court of Appeal, reached subsequently to the argument before the magistrate, but the existence of which was known at the time that the case was stated, was decided per incuriam by reason of a previous decision of the House of Lords was not cited to the Court of Appeal." The decision of the House of Lord referred by Rose L.J. is Swain v Law Society where it was held that which decided that, a conditional fee arrangement was unlawful and void. See Swain v. Law Society [1983] 1 A.C. 598.
3 Awwad v Geraghty & Co [2000] 1 All E.R. 608, at 573 where the Court of Appeal held that "the notion that a differential fee arrangement should lead to a solicitor not being able to recover any fee is based on public policy, but public policy is not immutable and rules based on it can be expanded or modified. Circumstances and commercial expediency may change. [...] Thus, fee arrangements which were formerly held to be unacceptable on grounds of public policy would no longer be so".
5 See for example Anderson v. Elliott 555 A.2d 1042 (1989): "this supervision has been exceptionally strict in Maine. Since statehood, champerty has been prohibited by statute, and contingent fee arrangements were considered champertous. Only in 1965, by which time contingent fees were permitted in the other 49 states, did the legislature finally amend the champerty statute to exempt contingent fee agreements in civil actions."
7 See e.g. Randolph v. Schuyler 284 N.C. 496, (1974) at 498:"A contract made between an attorney and his client, during existence of such relationship, concerning the fee to be charged for the attorney's services, will be upheld if, but only if, it is shown to be reasonable and to have been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee, and burden of proof is upon the attorney to show the reasonableness and fairness of the contract, not upon the client to show the contrary".
Mary Carter agreements. The latter has, in the area of maintenance and champerty, led to a controversial debate relating to the application of public policy rules.

C. Specific to the United States : Mary Carter Agreements

The Mary Carter agreement derives from the case Booth v. Mary Carter Paint Company.¹ This is an agreement whereby "(a) the plaintiff settles with one of a number of defendants that (b) the settling defendant remains a party to the pending action without disclosing the full agreement to the non-settling parties and/or the judge and jury (unless there is a court order compelling that disclosure); that (c) the liability of the settling defendant is limited and the plaintiff is guaranteed a minimum recovery; and (d) if there is a judgment against the nonsettling defendant, some or all of it will be credited to the settling defendant, who ultimately may pay nothing".² The enforcement of such an agreement has led to a debate amongst American courts.

On the one hand, a few jurisdictions³ and some commentators⁴ held that Mary Carter agreements are per se not enforceable on grounds of public policy, based on the reasoning that adverse impact on the judicial process cannot be cured by judicially imposed safeguards.⁵ The main reason given by some American courts is that such agreements "often results in financial interest in a trial's outcome, and [tends] to promote unethical practices by attorneys, notwithstanding fact that such agreements promote partial settlements".⁶

On the other, despite these problems, the majority of courts considered Mary Carter agreements as valid, though under strict judicial supervision. In the Abbott case the court summed up the arguments invoked to enforce the Mary Carter Agreement:

"First, an enormous variety of contractual arrangements fall within the general rubric of sliding scale or Mary Carter agreements. Second, in addition to the variety of provisions that may supplement the sliding scale or "guaranty" clause of such agreements, the content and effect of the sliding scale provision itself and the factual background against which the agreement is negotiated frequently vary significantly from case to case. Third, and finally, a broad ruling on the inherent validity or invalidity of sliding scale agreements “in general” is inappropriate because such agreements may have a variety of effects at different stages of the litigation process—discovery, settlement, trial or appeal".⁷

¹ Booth v. Mary Carter Paint Company 202 So. 2d 8 (1967).
⁴ See e.g. E., John Benedict, It's a Mistake to Tolerate the Mary Carter Agreement, 87 Colum. L. Rev. 368, 1987, pp. 372- 396 where according to the author Mary Carter Agreements prejudice defendants at trial, distort equitable contribution, contravene legal ethics and considers therefore that the safeguards attempted by the courts are inadequate. See also, J.M. Phillips, Looking Out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation, 69 Wash. L. Rev. 255, 1994, pp. 255-272.
For these reasons, the modern and majority view is that generally courts do not broadly condemn the use of Mary Carter agreement but rather permit or deny them effect depending on the impact they have in the particular case.¹

4.3.2. Contracts purporting to oust the jurisdiction of the courts

An agreement is contrary to public policy if it seeks to oust the jurisdiction of the courts by stipulating that a contracting party is not entitled to access to the courts in the event of a dispute between the parties. In this regard, it is interesting to analyze the debate amongst approaches of the Anglo-American courts concerning the extent of an arbitration agreements whereby parties agree that their disputes will be resolved privately, outside any court system.²

In England, the validity of arbitration agreements was recognized at early times. It was indeed held in an old English case that it is permissible for the parties to agree that no right of action shall accrue until an arbitrator has decided on any difference which may arise between them.³ However, although the validity of arbitration agreements was recognized, there remained some doubts as to their extent. In Lee v Showmen's Guild of Great Britain, Lord Denning in this respect stated that:

"Another limitation arises out of the well-known principle that parties cannot by contract oust the ordinary courts from their jurisdiction. They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void".⁴

Therefore, at common law, an arbitration agreement was indeed invalid if it deprived parties of their right to go to court on a completed cause of action or if it excluded the court's power to control arbitrators' decision on a point of law. Nevertheless, this led to a conflict between two approaches of settlement. On the one hand, there is the court's system, the "ideal" justice which seeks justice, no matter what it cost. On the other hand, there is the "pragmatic" private institution, i.e. arbitration, which seeks to limit litigation and its concomitants costs.

³ Scott v Avery [1855] 5 HL Cas 811 at 852, Lord Campbell stated that: "what pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract, that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract."
⁴ Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329, at 342 per Lord Denning. This dictum was cited in the important case Baker v Jones [1954] 1 WLR 1005.
In this context began the writing of the Arbitration Act\(^1\). It confirmed the authority stemmed from *Lee v Showmen's Guild of Great Britain* in stating that an agreement that aims to oust the jurisdiction of the courts in favour of the jurisdiction of a private person or body is contrary to public policy except to the extent that it is permitted by the Arbitration Act.\(^2\) However, the scope of judicial action over the control of arbitration has indeed been radically reduced in two main aspects by the Arbitration Act. First, according to Sections 45(1) and 69(1), the parties to a written arbitration agreement can exclude such judicial control by agreement. Secondly, the use of such control will be exercised by way of appeal to the court on a question of law.\(^3\) Note however the principle that parties are free to agree how their disputes are to be resolved is subject only to such safeguards as are necessary in the public interest.\(^4\)

In the United States, arbitration as a means of settling disputes was first viewed with significant disfavour by the courts.\(^5\) The historic hostility to executory agreements to arbitrate in the United States is attributed to the adoption in the nineteenth century of the English rule disfavouring arbitration. Parties were indeed considered incapable of ousting the courts of their jurisdiction by contract.\(^6\) With regard to judicial hostility to arbitration, an American court stated that:

"The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts."\(^7\)

In fact, the courts had felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it.\(^8\) In this context, the Congress of the United States enacted the Federal Arbitration Act in 1925 in order to eliminate the judicial hostility to arbitration agreements. The Act declares that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.\(^9\)

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\(^1\) Arbitration Act 1996 (c.23).
\(^2\) Peel, E., *op. cit.*, p. 497.
\(^3\) *Idem.*
\(^4\) See Section 1(b) Arbitration Act 1996.
\(^8\) See *United States Asphalt Refining Company v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (1915) at 1008-1009.
\(^9\) This view has expressly been declared by the Supreme Court of the United States: "The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. [...] The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is “piecemeal” litigation, at least absent a countervailing policy manifested in another federal statute. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, (1985) at 242-243.
Nevertheless, there remains a debate amongst American courts about the extent of arbitration agreement. Some American courts are indeed still reluctant to enforce an agreement that all disputes and differences between the parties to a contract shall be settled by arbitration, to the exclusion of the courts. Conversely, there is also authority under which the common-law rule is relaxed. In this regard, an American court has recognized that "there is a split of authority in this country on this question of whether arbitration agreements should be binding on contracting parties" but however stated that "this court is of the opinion that the better rule is to enforce agreements to arbitrate where the terms are clear and specific".

4.4. Conclusion

The area of contracts involving the administration of justice has demonstrated the complex relationship between the judiciary and the legislature. On the one hand, contracts involving the administration of justice have always been closely guarded by the common law. That can in part explain the reluctance of the courts to enforce and maybe promote arbitration agreements for example. On the other, judges have taken into account the will of the legislature although it sometimes led to judicial uncertainty, for example in conditional feel agreements.

5. Contracts injurious to good government and the State

5.1. Introduction

The category related to contracts injurious to good government and the State is evidence of the prominent role of the courts with respect to the executive and legislature, and how far they are involved in re-examining the policy choices and decisions made by the latter. On the one hand, the executive and legislature have the primary function of directing the purposes of the States. On the other hand, the judges have sought to assert their independence of them in order to protect the citizen from the abuse of power. Moreover, this area of law provides some different approaches between English and American courts, especially in the application of public policy in lobbying agreements.

Two policies are generally recognized by the common law: contracts (i) encouraging corruption in public life and (ii) trading with the alien enemy.

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5.2. Public Policy

It has since long been established that Anglo-American courts will refuse the enforcement of any contract which is injurious to good government and the State. In this respect, this is naturally an area where judges emphasize the protection of the public interest and of the citizen from any abuse towards the State from the legislature and executive. It is indeed in the public interest that these two latter powers act for the good of the State. On the other hand, Anglo-American courts must endeavour to protect the citizen from the abuse of power by the legislature and executive.

5.3. Doctrine

5.3.1. Contracts encouraging corruption in public life

A. Sale of public offices

The common law rules concerning contracts for the sale of a public office aim to ensure that the executive has the duty to make the best appointments possible without reference to private interests.  

In England, the public has an interest in the proper performance of their duty by public servants and is entitled to be served by the fittest persons procurable. Therefore such contracts are prohibited on grounds of public policy since they tend to lead to corruption and inefficiency. This tendency was for instance found in an agreement to procure a knighthood as it would produce, or might produce, most mischievous consequences against the good of the State. The reasons invoked for the interest of the States is that such agreement "tends to induce the donee to do such service to the State, or the public, as may render him deserving of honour, but it is said that the prospect of obtaining the property has also this mischievous tendency that it may induce the donee to use means to acquire the title, the use of which may be mischievous to the State." English courts therefore emphasize the interest of the public in the welfare of the State over the private one.

The same protection of the interest of the State prevails in the United States. Courts indeed refuse to enforce bargains concerning appointment of officials because it is the duty of a public official charged with making appointments to make the best appointments possible.

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3 Peel, E., op. cit. p. 499.
4 "It would tend to induce the person who was to procure the title to use improper means to obtain it, because he had his own interests to consider. It would tend to make him conceal facts as to the fitness of the proposed recipient". Parkinson v College of Ambulance Ltd [1925] 2 K.B. 1, at 456 and 457, per Judge Lush.
5 Champion v Wallace [1920] 2 Ch. 274 at 289.
without reference to private interests. In this regard, the case Harris v. Johnson provides an interesting discussion at length about public policies underlying refusal to enforce agreements to make appointments by elected officials. It demonstrates the complex relationship between the executive and the judiciary from a separation of powers point of view. The court stated that:

"The nominating power of an executive is a political power to be exercised by the executive according to his own discretion. Public policy prevents us from enforcing a contract restricting defendant's executive discretion, and this court will not interfere with the executive's discretion in making appointments. Under the separation of powers doctrine, the judicial branch shall not exercise powers belonging to another branch. [...] As the appointment of chief of police was not a ministerial act but a discretionary act of the executive branch, we will not enforce the agreement and interfere with the administration of the City of Plano."2

Sale of public offices evidences remarkably the complex nature of the relation between the executive and the judiciary. It is not surprising that courts take a broader view of the public interest in this area. The non-enforcement of such contract requires indeed more legitimacy of the judge, from a separation of powers' point of view, to interfere in the executive's task.

B. Lobbying

Agreements to pay someone in order to influence the outcome of a supposedly objective decision-making process may be considered as unenforceable. The question is naturally a difficult one in a democratic system and weighs two major issues. First, it is vital for legislative bodies to exercise their functions with a single purpose of achieving results that they believe without bias to be most desirable for the public which they serve. On the other hand, it is also fundamental that legislators should be informed of the facts relevant to the questions before them and hear arguments based on such facts. The question has been differently considered in England and in the United States. If in the former the enforcement is still unclear, it is nevertheless clearly recognized as enforceable under some circumstances in the latter.

In England, a recent debate amongst the courts has made unclear the position whereby they will enforce agreements involving lobbying for government contracts. The old English authority in this area was based on two leading cases. In the first, Norman v Cole, it was said that a lobbying agreement is unenforceable because "it ought to be done gratuitously, and not

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3 See Restatement (First) of Contracts, §559, database updated June 2014 (Westlaw US) which states that: "(1)A bargain to influence or to attempt to influence a legislative body or members thereof, otherwise than by presenting facts and arguments to show that the desired action is of public advantage, is illegal; and if a desired method is provided by law for presenting such facts and arguments, a bargain that involves presenting them in any other way is illegal. (2) A bargain to conceal the identity of a person on whose behalf arguments to influence legislation are made, is illegal." In England, see Furmston, M.P., Cheshire, fifoot and furmston's on Law of contract, 16th Edition, Oxford: University Press, 2012, p. 478.
4 Restatement (First) of Contracts, §559, comment a, database updated June 2014 (Westlaw US).
for money: doing an act of that description should proceed from pure motives, not from pecuniary ones". The second case is in line with this approach in stating that it is contrary to public policy "that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the Government".

The test applied by English courts was therefore based on two principles derived from the Lemenda case. On the one hand, it is generally undesirable that a person in a position of power to use personal influence to obtain a benefit for another should make a financial charge for using such influence, particularly if his pecuniary interest will not be apparent. On the other, it is undesirable for intermediaries to charge for using influence to obtain contracts or other benefits from persons in a public position. In applying this test to the facts, it stated in the Lemenda case that the lobbying agreement was unenforceable in English law.

However, the recent Tekron case has ruled out these two principles. The High Court of Justice emphasized that the considerations require that "an intermediary who deals with an official, a minister, a government department and successfully builds a relationship of respect, of confidence, of trust, is to be barred from further dealings by the very fact of the relationship once it has been sufficiently established". The High Court therefore stated that, in the circumstances of the case, an agreement between the parties pursuant to which the claimant acted as an intermediary in negotiations with the Guinean government was not contrary to principles of public policy under English law.

In this context, the Bribery Act came in force in 2011 and provides that a person is guilty of an offence if the person offers, promises or gives a financial or other advantage to another person, with the intention to induce a person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function. The extent and the consequence on the common law rules have so far not been subject to a further judicial discussion. Consequently, it remains unclear whether the consideration applied in the Tekron case is in line with this new legislation.

American courts encounter the same problem about where the line is to be drawn in distinguishing between lawful and impermissible contracts. However, the American starting point of the courts concerning a lobbying agreement departs however from its English

2 Idem, at 245 per Judge Shearman.
5 Idem.
6 Idem.
8 Bribery Act 2010 (c.23) came in force from July 1, 2011.
counterpart. American courts' primary idea is that there must exist mechanism of promotion and opposition to the legislature. Since the legislative process is hardly accessible to laymen, there must therefore be a right to employ for example lawyers to act for them in these matters. Otherwise the republican form of government would not function "as the founders contemplated".\textsuperscript{1} The American judge will thus consider the contract unenforceable if it is to influence or to attempt to influence a legislative body or its members, otherwise than by presenting facts and arguments to show that the desired action is of public advantage.\textsuperscript{2}

Interesting is that, unlike in England, the activity of lobbying has been interpreted by courts rulings as freedom of speech and is consequently protected by the Constitution.\textsuperscript{3} Thus, for instance, in the famous case \textit{Troutman v. Southern Ry. Co}, the court stated that:

\textit{"It is of course true that a contract to influence a public official in the exercise of his duties is illegal and unenforceable when that contract contemplates the use of personal or political influence rather than an appeal to the judgment of the official on the merits of the case. [...] Nevertheless, all citizens possess the right to petition the government of redress of their grievances based on the United States Constitution [...]. To that end, one may employ an agent or attorney to use his influence to gain access to a public official"}.\textsuperscript{4}

Therefore, it seems that there are two different approaches related to the lobbying contract. On one hand, American courts, based on the Constitution, are inclined to grant rights to citizens so that they can represent their interests and influence the legislative process to some extent. On the other, in considering the cases \textit{Lemenda}\textsuperscript{5} and \textit{Tekron}\textsuperscript{6}, the English position rather bases its reasoning on the general undesirability of influencing an executive member of the legislature to refuse any lobbying agreement.

\textbf{5.3.2. Contracts trading with the enemy}

A contract made during the war in order to trade with the enemy is either prohibited by statute\textsuperscript{7} or illegal on grounds of public policy. This illegality found its roots from the early days of the world wars. The principle is that such contract tend to promote the economic interest of the enemy state or to prejudice these of the home country. For example, in \textbf{England}, it was stated that "the prohibition of intercourse with an alien enemy rests on public policy which requires that no act shall be done or permitted which may injure the interests of

\textsuperscript{1} Idem.

\textsuperscript{2} In the \textbf{United States}, 5 Williston on Contracts Ch. 16, 4th Edition, 2011, Section 3, database updated May 2014 (Westlaw US). See also Tartman v. Southern Ry. Co 441 F.2d 586, (1971) at 6 : "Moreover, once having obtained an audience, the attorney may fairly present to the official the merits of his client's case and urge the official's support for that position".


\textsuperscript{5} Lemenda Trading Co Ltd v. African Middle East Petroleum Co Ltd [1988] Q.B. 448.


\textsuperscript{7} In \textbf{England}, there is the Trading with the Enemy Act of 1939 (2 & 3 Geo 6 c 89). In the \textbf{United States}, there is the Trading With Enemy Act of 1917 (40 Stat. 411).
the state either directly or indirectly by benefiting the enemy state”.¹ In the same approach, American courts prohibit “all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries and every kind of trading or commercial dealing”.²

There is thus a strong public policy based on the interest of the State against such agreement. The principle is indeed that these contracts are either suspended or terminated by a declaration of war.³ However, questions arose amongst the Anglo-American courts to take into consideration the private interests. It could be the case of parties who have contracted before the war. Therefore, courts have recognized that there are exceptions and limitations to the doctrine of suspension and abrogation of existing contracts.

For example, in the field of property and performance, English courts admit that "so far at any rate as concerns benefit to the enemy, the further performance of contracts which have been completely performed on one side and in which all that remains is payment by the other are suspended, not dissolved, and in the same category are to be placed certain contracts particularly these which are really concomitants of the rights of property though still executory [...]").⁴ In the United States, since the enemy is generally excluded from suing, an interesting question arose whether a unilateral debt owed to an enemy is either merely suspended or annulled.⁵ The Supreme Court based stated in this regard that "executed contracts, such as the debt in this case, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue or to sustain".⁶

Therefore, although there is a strong public interest against the promotion of the economic interest of the enemy state, Anglo-American courts have been partly sensitive to the consequences of such rules on private parties.

5.4. Conclusion

The area of contracts injurious to good government evidence the prominent role of the courts with respect to the executive and legislative processes, and how far they are involved in re-examining the policy choices and decisions made by the latter. They do not indeed hesitate to take a broader view of the public interest in order to refuse the enforcement of contracts made

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³ An interesting question which arises out of the modern armed conflicts is when two countries will be found in a state of sufficient war for the principle of public policy to be engaged (see B. Kain, and D. T. Yoshida, op. cit., p. 19 note 89). Anglo-American courts did not recognise any intermediate state between peace and war. In the event of there being an armed conflict which did not give rise to a state of war, a state of peace would still be considered to subsist. Moreover, they will determine the state of war in light of all the circumstances as the word “war” may vary according to the context. See in England Sadiqa Ahmed Amin v Irving Brown [2006] I.L.Pr. 5 and in the United States, Campbell v. Clinton, 203 F 2d 19 (2000).
by the legislature or executive. This has been remarkably shown in the area of sale of public offices.

Although this is an area where judges emphasize the interest of the State, they have also taken in account private interests in some circumstances, i.e. suspension of contracts trading with the enemy instead of dissolution. In this regard, they have attempted to find a balance between public and private interests.

Finally, contracts injurious to good government provide interesting examples which demonstrate some differences between the Anglo-American courts in applying public policies. For example, the criterion of general undesirability is applied by the English courts in order to determine the enforcement of a lobbying agreement. Conversely, their American counterparts consider right granted by the Constitution, such as freedom of speech, as the starting point of their reasoning and have therefore enforced lobbying agreements.

6. Contracts to commit an unlawful act

6.1. Public policy

A typical area where the maxim ex dolo malo non oritur actio is to contracts to commit an unlawful act. Contracts to commit a crime, a tort or a fraud on a third party are naturally illegal and therefore unenforceable. However, some English legal authors argued that this head of public policy is nowadays questionable. On the one hand, they consider that because some wrongs and most crimes are statutory, many of these cases could be classified as being in breach of statute law.¹

On the other, some legal authors argued that a distinction should be made between a common illegality and public policy since they are conceptually distinct. Situations in which a decision is based upon criminal or tortious behaviour by the parties may legitimately be regarded as being conceptually distinct "from these involving issues such as morality or restraint of trade in which the law of contracts has developed policies of its own".² For these reasons, this section will briefly focus on contracts which involve the carrying out of an unlawful act.

6.2. Doctrine

Contracts to commit a crime, a tort or a fraud on a third are unenforceable due to the fact that they would lead to criminal conspiracy.³

¹ See e.g. R. Youngs, English, French & German Comparative Law, 3rd Edition, p. 597.
A contract to commit a crime is naturally illegal on the ground that it is contrary to public policy. An allied rule of public policy is that no person shall be allowed to benefit from his own crime. Moreover, contracts involving the commission of a tort are also unenforceable on grounds of public policy. Where neither party knows that the performance of the contract involves the commission of a tort, then the contract is not illegal. Moreover, a contract to indemnify a person against criminal liability is illegal. Note that in England, such illegality appears if the crime is one which can only be, or in fact is, committed with guilty intent. The position is however unclear when the crime is committed with no guilty intent. Finally, a contract to fraud on a third party is illegal and therefore unenforceable on grounds of public policy.

7. Contracts in restraint of trade

7.1. Introduction

All covenants in restraint of trade are prima facie unenforceable at common law unless they are reasonable to the interests of the parties concerned and of the public. This principle is called the doctrine of public policy in restraint of trade. Its application has been peculiarly influenced by changing views of what is desirable in the public interest. The particular flexibility of policies in this area is due to the ongoing commercial evolution. For this reason, the doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason.

Nevertheless, the legislature is nowadays partly preeminent in this area of law. In the United States, federal and state antitrust laws have diminished the importance of the common law rules. In England, the statutory controls are contained in Articles 101 and 102 of the Treaty...

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1 In the United States, see Pettit Grain & Potato Co. v. Northern Pac. Ry. Co., 227 Minn. 225, (1948) at 227 where it was stated that "A bargain which involves the commission of a crime, either as a consideration therefore or in the performance thereof, is invalid as against public policy." In England, see e.g. Bigos v Bousted [1951] 1 All ER 92.
2 FURMSTON, M.P., Cheshire, fifoot and furmston's on Law of contract, Fifteenth Edition, Oxford: University Press, 2007, p. 474. See also Cleaver v Mutual Reserve Fund Life Association [1892] 1 QB 147 at 156. "The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person". In the United States, see 17A Am. Jur., Contracts III D Refs, 2nd, 1964, Section 272, database updated May 2014 (Westlaw US).
3 Restatement (Second) of Contracts, 1981, §192, database updated June 2014 (Westlaw US) states that: A promise to commit a tort or to induce the commission of a tort is unenforceable on grounds of public policy. See also 17A Am. Jur., Contracts III D Refs, 2nd, 1964, Section 274, database updated May 2014 (Westlaw US).
4 E. Mckendrick, op. cit., p. 276.
6 E. Mckendrick, op. cit., p. 276.
on European Union\(^1\) and in very similar provisions introduced by the Competition Act 1998. The purpose of this section being especially the analysis of the policies developed by the courts, it does not deal with these aspects of the subject that are largely from the legislation and will only focus on rules concerning the law of contract.

The area of restraint of trade is widespread. There are indeed numbers of types of agreements and any attempt of categorization is very complex. Moreover, courts did not hesitate to change policies in order to accommodate them to the economic evolution. The scheme of this section is thus different from the previous contracts and is based on two steps. First, it is important to analyze in general the public policy and its doctrine in restraint of trade. The second part of this section will focus on the application of the doctrine to specific restraints related to the employment contract and sale of a business.

### 7.2. General application in restraint of trade

#### 7.2.1. Public policy

The classical contract theory brings in fact two principles into direct conflict. On the one hand, it endeavours to promote freedom of contract because it is in the public interest to grant broad powers to the parties in order to facilitate their transactions. On the other hand, the classical contract theory promotes the freedom of trade since the acceptance that the free market is the ideal economic framework for the operation of exchange of transactions.\(^2\) These two competing common law principles are at the heart of any examination in restraint of trade. The key question is whether a covenant in restraint of trade is reasonable, in the interest of the parties concerned and in the public interest. This will be determined by Anglo-American courts in light of all the facts and circumstances.

#### 7.2.2. Doctrine of public policy in restraint of trade

##### A. Origins and general principles

In England, the origins of the doctrine of restraint of trade is probably one of the oldest applications of public policy. Its first application is to be found in 1711 in *Mitchel v Reynolds*\(^3\) and until the nineteenth-century freedom of contract was considered as the most important

\(^1\) As amended and consolidated by the Treaty of Lisbon, in force from 1 December 2009.


\(^3\) *Mitchel v Reynolds* [1711] 1 P Wms 181, at 182 Lord Macclesfield stated that: "the general question upon this record is, whether this bond, being made in restraint of trade, be good. [...] Wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive".
policy to pursue.\(^1\) However, the law had to catch up with economic and social changes. In this respect, the modern rules of restraint of trade can be traced in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. Ltd*, where Lord McNaghten stated that:

"The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is \([a]\) reasonable, that is, in reference to the interests of the parties concerned and \([b]\) reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.\(^2\)

All covenants in restraint of trade are thus *prima facie* unenforceable at common law *unless* parties have a legitimate interest in the restraint and the restraint does not harm the public interest. English courts apply the test of reasonableness to assess these interests.

The **American** approach is similar to its English counterpart. It was stated that restrictive covenants have historically been frowned upon as is evidenced by the discussion in *Mitchel v Reynolds*.\(^3\) The English test of reasonableness has indeed been frequently quoted amongst the American courts. They referred to cases such as *Nordenfelt*\(^4\) or *Horner v Graves*.\(^5\) The American approach related to the restraint of trade has been summarised, amongst other, in *United States v. Addyston Pipe & Steel Co.* where the Court stated that:

"No contractual restraint of trade is enforceable at common law *unless* the covenant embodying it is \([a]\) merely ancillary to some lawful contract (involving some such relations as vendor and vendee, partnership, employer and employee), and \([b]\) necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of these fruits by the other party. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard for determining the reasonableness and validity of the restraints. But where the sole object of both parties in making the contract is \([c]\) merely to restrain competition, and enhance and maintain prices, the contract is void.\(^6\)

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\(^1\) Printing and Numerical Registering Co. v Sampson [1875] LR 19 Eq 462, at 465 per Lord Jessel: "Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract".

\(^2\) Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. Ltd [1894] AC 535, at 565 per Lord Macnaghten.


\(^4\) See e.g. Cropper v. Davis 243 F. 310 (1917).

\(^5\) In U.S. v. Addyston Pipe & Steel Co., 85 F. 271 (1898), the court cited at 282 the case Horner v Graves [1831] 7 Bingham 735 at 743, where the Court of Common Pleas stated that: "And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy".

\(^6\) U.S. v. Addyston Pipe & Steel Co., 85 F. 271 (1898) at 282.
Therefore, in line with the English approach, all covenants in restraint of trade are *prima facie* unenforceable at common law *unless* parties have a legitimate interest in the restraint and the restraint does not harm the public interest, i.e. limiting competition. However, the test of reasonableness will only be applied by American courts if the restraint is ancillary to a lawful transaction.

The test of reasonableness explained above in *United States v. Addyston Pipe & Steel Co.* is dealt in §§186 to 188 of the Restatement (Second) of Contracts. §186 indeed treats in general terms of promises in restraint of trade and is intended to complement federal and state legislation in these instances in which recourse to a common law rule may be useful.¹ The other two sections, *i.e.* §§187 and 188, are concerned with the one type of promise in restraint of trade that has traditionally been left to be dealt with under judicially developed rules, *i.e.* restraint in competition.²

These three sections deal also with the determination by American courts of the restraint through the mechanism called the rule of reason or test of reasonableness. In order for a promise to refrain from competition to be reasonable, the promisee must have an interest worthy of protection that can be balanced against the hardship on the promisor and the likely injury to the public.³ The restraint must, therefore, be subsidiary, *i.e.* ancillary, to an otherwise valid transaction or relationship that gives rise to such an interest.

**B. The test of reasonableness**

Anglo-American courts have thus broadly adopted a similar approach. All covenants in restraint of trade are *prima facie* unenforceable at common law. There are however exceptions. In this respect, Anglo-American courts use the test of reasonableness. These contracts are enforceable if they are reasonable in reference to the (1) interest of the parties and to the (2) public interest. As already mentioned, another condition for American courts is that the restraint must be (3) ancillary to the lawful transaction. The test of reasonableness is naturally a question of facts which is analyzed through all the particular circumstances. Finally, Anglo-American courts balance the legitimate interests of the parties and the harm to the public interest and therefore consider whether the restraint is reasonable and thus enforceable.

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² Idem.
³ See *e.g.* Restatement (Second) of Contracts, 1981, §187, comment b, database updated June 2014 (Westlaw US).
1. **Reasonableness in the interests of the parties**

The application of this test will depend on the answers to two questions. First, what is it that the covenantee is entitled to protect? Second, how far can such protection extend? A covenant cannot be considered reasonable unless it is designed to protect the legitimate interests of the covenantee. Therefore, several criterions are applied by Anglo-American courts in order to assess the reasonableness of a restraint.

- **Nature of the agreement**

When applying the common law doctrine of restraint of trade courts find it necessary to consider first what types of restraints are covered, e.g. a non-compete clause in employment contract, in a sale of a business or in an exclusive dealing agreement. The type of restraint has a substantial impact on the legitimate interest. For example, restraints in employment contracts are regarded with more scrutiny by the courts than these in a sale of business agreement. The formers are indeed more likely to be the product of unequal bargaining power as the relation between the employer and the employee is unequal.

- **Extent of the protection**

Courts will consider three specific factors to determine the scope of the restriction: the geographical area covered, the length of time involved and the nature of the activities. For example, it is logical that the extent of the protection is bigger for a managing partner than for a temporary employer.

- **Restraint must be reasonable for both parties**

The restraint must not only be reasonable in the interests of the covenantee but of both parties. At first sight it might appear that any restraint, since it protects the covenantee alone, must be opposed to the interest of the covenantor. However, if the transaction is regarded as a whole this is clearly not so.

2. **Reasonableness in the interests of the public**

The second condition concerns the interests of the public in determining the enforceability of a restraint in trade. This area is peculiarly interesting because courts are confronted with competing principles grounded on public policy. For example, a non-compete clause in an

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employment agreement jeopardizes two conflicting interests. On the one hand the interest for the employer to protect his trade or business and, on the other, to encourage the employee to acquire skills and be able to apply them and pass them to others.

Even where cases are decided on the basis of reasonableness between the parties, it is ultimately on the ground of public policy that the court will decline to enforce an unreasonable restraint. In England, in Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd, it was stated that:

"There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable as between the parties. There is one broad question: is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?"\(^2\)

In the same approach, American courts have held that where a contract in restraint of trade is injurious to the public interest it will not be sustained, although it is reasonable as between the parties. As it was indeed stated in Buckalew v. Niehuss:

"Every contract, however, which at all restrains or restricts trade, is not void; it must injuriously affect the public weal; that it may affect a few or several individuals engaged in a like business does not render it void. Every contract of purchase and sale to some extent injures other parties; that is, it necessarily prevents others from making the sale or sales consummated by such contract".\(^3\)

3. The ancillary condition in the United States

American courts will only enforce covenants if the restraint is reasonable and ancillary to a lawful transaction. A covenant must thus be incidental to a contract or sale involving some interest requiring protection. The unenforceability of the ancillary requirement of a covenant in restraint of trade is determined through "the balance between the restraint and the need to protect the promisee's legitimate interest, or, the oughtweighing of the promisee's need by the hardship to the promisor and the likely injury to the public".\(^6\)

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4. See Restatement (Second) of Contracts, 1981, §187, database updated June 2014 (Westlaw US): A promise of refrain from competition that imposes a restraint that is not ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade.  
5. See e.g. Henderson v. Jacobs 239 P.2d 1082 (1952) at 1086, it was stated that: "the Validity of agreement in restraint of trade is to be tested by its reasonableness with respect to protection of covenantee and public interest involved, and in all cases it is essential that restrictive covenant be incidental to another lawful contract or sale involving some interest requiring protection of restraint."  
7.3. Specific applications in restraint of trade

7.3.1. Restraint in a contract of employment

A. Public policy

A restraint of trade in a contract of employment is *prima facie* void. This principle is based on the policy that any term in a contract of employment which seeks to restrict an individual's freedom to work for others or to follow his or her trade or business is not in the interest of the public. On the other hand, it is in the public interest that employees acquire skills and are able to use them to pass them to others. These two competing interests are at the heart of the determination whether a covenant in an employment agreement is reasonable.

B. Doctrine

In determining the enforceability of a covenant in restraint of trade, Anglo-American courts apply the reasonable test. This means they will examine whether the covenant is reasonable in reference to the (1) interest of the parties and to the (2) public interest. Moreover, as already mentioned, another condition for American courts is that the restraint must be (3) ancillary to the lawful transaction.

1. Reasonableness in the interests of the parties

Covenants in contracts of employment are scrutinized with great care by the courts. In deciding whether the restraint clause is reasonable as between the parties, two factors are particularly relevant.

The first is that the covenant must seek to protect some legitimate interest of the employer. In this regard, the employer is entitled to legitimately restrain an employee who has come into contact with customers of the employer in such a way as to acquire influence over them or to protect informations which are confidential.

The second factor concerns the extent of the covenant as to area, time and nature of employment. The restraint must not be more expensive in area than necessary to protect the employer's interest and therefore not be unlimited in space. A restraint will generally not be

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enforced if the latter is too expensive in time or contain no limitation of duration. Finally, the nature of the employment does matter as well. The scope of the restrain varies for example through the status of the employee.

2. Reasonableness in the interests of the public

From the analysis above, it clearly appears that the determinant factor for courts is the harm that can be suffered by an employee as a result of restrictive covenants. Anglo-American courts therefore seem to not grant the same impact of the public interest in an employment contract. Although in this area modern cases still find more determinative the legitimate interests of the parties, the interests of the public have been regarded with more importance by the courts.

For instance, in the United States, courts noted that the bases varied from freedom of contract to an awareness of the economic circumstances prevailing at the time of the decisions. They have suggested that these decisions reflect the effect on the public interest as well as the effect on the particular covenantor. In this regard, it was stated that:

"Some of our older cases seem to rest in part on the assumption that a former employee should be held to the dimensions of his bargain, however uneven the bargaining power of the parties, without a substantial analysis of the employer's need for protection. Other decisions may be explained in relation to each other by the economic circumstances prevailing at the time of the exercise of the court's equity power. Compare pare a wartime decision imposing a broad restraint with decisions during an economic depression where no restraint was imposed or a narrow restraint was imposed. These latter decisions reflect the effect of considerations of the public interest and of the impact of the decision on the former employee."

In England, the rule that a covenant is unenforceable, even though the requirement of legitimate interest is fulfilled, has still little direct authority to support it. This can be demonstrated through the case Wyatt v Kreglinger and Fernau. The Court of appeal took the view that a restraint imposed on an elderly wool broker at the time of his retirement was likely to injure the public. This decision was nevertheless regarded with some scepticism, especially in view of the countervailing public interest encouraging young recruits to the profession. Therefore, although the impact of the interests of the public has increased the last

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4 Peel, E., The law of contract, 13th Edition, Sweet & Maxwell, 2011, p. 513. See e.g. in Hebert Morris Ltd v Saxelby [1916] A.C. 688 at 700, it was stated that: "the individual, as well as the public, have an interest in freedom of trading".
6 Peel, E., op. cit., p. 513. See also Bridge v Deacons [1984] A.C. 705.
decades, courts will seldom invalidate covenants in a contract of employment which are reasonable between the parties on the ground that they are contrary to the public interest.²

3. Ancillary condition in the United States

American courts will enforce the covenant in restraint of trade if it is ancillary to a lawful transaction. In other words, the covenant must be incidental to a contract. Because the question of whether a covenant is ancillary to an otherwise enforceable agreement is such a fact intensive inquiry, each case will be decided differently.³

7.3.2. Sale of a business

A. Public policy

Unlike the case of the employer and employee, the seller and purchaser of a business are usually negotiating on an equal footing.⁴ For this reason, Anglo-American courts intervened less to redress the balance of bargaining power. There are two interests that judges take in account when determining the reasonableness of a covenant in sale of business.⁵

On the one hand, it is in the public interest that the person who has built up a business should be able to sell it and to preclude himself from entering into competition with the purchaser.⁶ On the other hand, there is an interest in competition itself and therefore the freedom of trade should not be infringed to some extent. Unlike in the area of the employer and employee, the rules about what kind of restriction a purchaser of a business is entitled to require are thus based more on the public interest than on protecting the parties to the agreement.

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¹ See Esso Petroleum v Harper's Garage, Lord Hodson expressly stated in the important Esso case that: “I would rest my decision on the public interest rather than that of the parties, public interest being a surer foundation than the interest of private persons or corporations when widespread commercial activities such as these are concerned”. ² J. Beaton, A. Burrows, and J. Cartwright, op. cit., p. 405. ³ See e.g. 17A C.J.S. Contracts IX C, 1955, Section 328, database updated June 2014 (Westlaw US). ⁴ H.G., Beale, Chitty on contracts, 31st Edition, Vol. I General Principles, Sweet & Maxwell, London, 2012, p. 1298. In the United States, Klass, G., Contract Law in the United States, 2nd edition, 2012, p. 183. ⁵ In this regard, an American court Day Companies v. Patat, 403 F.2d 792 (1968), at 795 stated that "Public Policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill, or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case, the same public policy that enables him to do this does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation which, in the judgment of the court, is not unreasonable, having regard to the subjectmatter of the contract". ⁶ Leather Cloth Co. v Lorsont [1869] LR 9 Eq 345, at 354 per James V-C, cited by J.B. Bell, J.B., Policy Arguments in Judicial Decisions, Oxford: The Clarendon Press, 1985, p. 253. In the United States, see 5 Williston on Contracts Ch. 13, 4th Edition, 2011, Section 8, database updated May 2014 (Westlaw US).
B. Doctrine

1. Reasonableness in the interests of the parties

In the case of covenants in the sale of a business, equality of bargaining power is more likely to exist between parties and so fairness between them might be perceived as less crucial. Nevertheless, Anglo-American courts generally take into account two relevant factors.

The first is that the buyer must establish a proprietary interest which the clause is seeking to protect. That is to say, when a buyer purchases a business and pays for the goodwill of the business, he is entitled to take reasonable steps to protect that interest.

The second factor is that the extent of the covenant as to area, time and subject matter must be reasonable. The reasonableness of a clause depends upon all the facts of each case. Restraints may be unreasonable because they purport to cover too long a period or too wide an area. The restraint must not be too wide in its scope. For example, the restraint will not be valid if it purports to confer protection that goes beyond the actual business sold by the vendor.

2. Reasonableness in the interests of the public

The public interest is an important consideration in the area of sale of a business, especially in England. The reasons are twofold. First, the relation between two sellers is more equal than between an employer and an employee. Second, the interest that courts tend to discourage any restriction of competition as in such a case, would result in the public suffering and thus necessitates control by the courts in the public interest is essential.

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4 E.A. Farnsworth, *op. cit.*, p. 34. In England, see E. Mckendrick, *op. cit.*, p. 278. In this regard, there is a debate about the authority of the decision in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894]. The Court indeed considered that a worldwide restriction was not wider than necessary to protect the purchaser of the business given the limited number of customers worldwide, and it was not injurious to the public interest. See *a contrario Goldsoll v Goldman* [1915] 1 Ch 292.
6 See e.g. the case *Texaco v. Murlberry Filling Stations* [1972] 1 W.L.R. 814, at 827 it was stated that "what is meant by "reasonableness with reference to the interests of the public"? It is part of the doctrine of restraint of trade which is based on and directed to securing the liberty of the subject and not the utmost economic advantage. It is part of a doctrine of the common law and not of economics. So it must, of course, refer to interests as recognisable and recognised by law. But if it refers to interests of the public at large, it might not only involve balancing a mass of conflicting economic, social and other interests which a court of law might be ill-adapted to achieve; but, more important, interests of the public at large would lack sufficiently specific formulation to be capable of judicial as contrasted with unregulated personal decision and application — a decision varying, as Lord Eldon put it, like the length of the Chancellor's foot".
The emphasis placed on public interest seems to be clear amongst English courts. It has indeed been stated that: "Although the decided cases are almost invariably based on unreasonableness between the parties, it is ultimately on the ground of public policy that the court will decline to enforce a restraint as being unreasonable between the parties". Conversely, American courts do not seem to emphasize the interests of the public over these of the parties. The test advocated by the Restatement (Second) of Contracts advocates the test whether the purchaser's need to protect that goodwill outweighs the hardship to the seller and likely causes injury to the public. This test has been adopted in "numerous jurisdictions".

3. Ancillary condition in the United States

American courts will only enforce the covenant in restraint of trade if it is ancillary to a lawful transaction. It is difficult however to outline any principle as this condition requires an intensive inquiry of facts. Nevertheless, American courts have insisted on a "need for ancillarity in order to enforce a covenant in a sale of business".

7.4. Conclusion

Although the legislature nowadays plays a prominent role in restraint of trade, especially in the area of exclusive dealings, common law rules are still largely applied by Anglo-American courts for covenants in sale of a business or in contracts of employment. From the analysis of the doctrine in restraint of trade, it can be said that the law has changed from time to time, both in form and in spirit, in response to changes in conditions of trade.

Anglo-American courts generally recognize that the public has an interest in promoting the freedom of contract and the freedom of trade. In this regard, the application of the doctrine on employment contracts and on covenants in the sale of a business has demonstrated that courts grants more or less importance to the public interest according to the relations between the concerned parties. In an employment agreement, parties, i.e. the employer and the employee, are more likely to be unequal in negotiating. Therefore, courts are more willing to protect the weakest party, the employee, over the freedom of contract and the freedom of trade. Conversely, in the sale of a business, the seller and purchaser of a business are usually negotiating on an equal footing. Consequently, the public interest is considered as a much more important consideration.

Note that it is nevertheless difficult to stress a general line of

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4 Shakey's Inc. v. Martin, 91 Idaho 758, 430 P.2d 504 (1967) at 762.
5 In England, see for example A. Schroeder Music Publishing Co. Ltd. v Macaulay [1974] 1 W.L.R. 1308 at 1313, where it was stated that "the public interest requires in the interests both of the public and of the individual that everyone should be free so far as practicable to earn a livelihood and to give to the public the fruits of his particular abilities." In the United States, it was stated in American Federal Group, Ltd. v. Rothenberg, 136 F.3d 897, (1998), at 909 that: "New York courts take "a strict approach to enforcement of restrictive covenants because their enforcement conflicts with the general public policy favoring robust and uninhibited competition and powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood."
balance of interests in restraint of trade as it is a typical area where facts play a fundamental role in determining the enforceability of public policy. In this regard, an English court said that: "It would be mistaken, even if it were possible, to try to crystallise the rules of this, or any, aspect of public policy into neat propositions. The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason".¹

8. Conclusion

Five considerations may be inferred from the application of the public policy doctrine in England and in the United States.

First, Anglo-American courts have generally adopted a consensual and cautious approach when applying public policy rules. This was clearly evidenced in the area of sexual morality. For example, in determining the enforceability of cohabitation agreements, they were indeed faced between a public interest which tend to encourage sex outside the marriage and at the same time recognized that such contract represents a clear consensus as to today's views of living in a couple.

Secondly, courts recognize that the determination of public policy rules resides first in the legislature. In this regard, the interventions of the latter are generally considered with favour by the judiciary. Nevertheless, courts have been sometimes reluctant to apply legislative alterations in the traditional common law rules. For instance, this happened in England in the area of contingent fee agreements and in arbitration agreements in the United States.

Thirdly, Anglo-American court have had prominent role in changing public policy rules. This happened notably with respect to the executive and legislature, and how far they are involved in re-examining the policy choices and decisions made by the latter. They do not indeed hesitate to take a broader view of the public interest in the area of administration of justice or good government in order to refuse the enforcement of contracts made by the legislature or executive.

Fourthly, the local variations of public policy rules in the United States give rise to an imprecise application of these rules to some extent. The reasons for these local variations are twofold. On the one hand, the conditions of lawmaking are different. The United States is a federation of fifty states, each with its own legislature in addition to the federal legislature. Conversely, there is only one Parliament in England. It is therefore not surprising that, in the United States, the legislature declares more often public policy.² On the other hand, there are cultural, economic and social variations within the United States. Take for example the case in the cohabitation agreement, when the Marvin case has not found universal favour since

some "conservative" states, a minority, still preferred to refuse the enforcement of such contract.

*Fifthly,* cultural factors occasionally create a different application of public policy rules. The typical example is in the area of lobbying agreement. English courts indeed depart from the criteria of general undesirability and the enforcement of such contract is unclear. Conversely, their American counterparts consider right granted by the Constitution, such as freedom of speech, as the starting point and therefore consider as enforceable the lobbying contract.

The doctrine, in English and American law, remarkably evidences the need of finding a balance in a common law system between two judicial positions. On the one hand, the courts must be free to ascertain the social conditions and the changes thereof. One the other, they should ensure that they do not unduly extend the reach of public policy. Therefore, it is not surprising that the application of public policy rules is not fundamentally different since the finding of this balance is the purpose of the common law itself.
IV. Remedies

1. Introduction

Public policy has, likewise all common law concepts, developed through the crucible of litigation. The key question for Anglo-American courts is whether the remedy applied to a contract best serve public policy. The area of remedies is characterized by its widespread application and some confusion amongst the decisions rendered by the judges. Varying penalties handed down by the Anglo-American courts is due to the fact that in each case, they will consider the law to be applied to the facts.

The general rule is that Anglo-American courts will refuse the enforcement of any contract contrary to public policy. However, in some cases, the courts can adopt a very severe attitude and refuse to assist a person implicated in the illegality in any way whatsoever. In others, public policy does require that such a person should be so completely denied a remedy. In this regard, Anglo-American courts have provided some mechanisms to mitigate the effect of illegality on grounds of public policy, i.e. the (2) restitution and the (3) doctrine of severance. Moreover, the question of the (4) related transactions and (5) practice and procedure are also of importance in determining the illegality of a contract. The determination of these remedies strongly varies, depending on the circumstances and the facts of each case.

2. Restitution

2.1. General rule

The general rule is that money paid or property transferred under an illegal contract cannot be recovered back when the parties are equally wrong, i.e. in pari delicto. The situation considered in this context is when a party, although the court refuses to enforce a contract on grounds of public policy, may claim restitution in respect of money paid, property transferred or services rendered by him under the contract.¹ The English application of the principle that parties cannot recover in a case of unenforceable contract on grounds of public policy is based on the judgment in Parkinson v College of Ambulance² and has further been discussed in Bowmakers Ltd v Barnet Instruments Ltd.³ In the United States, §197 of the Restatement (Second) of Contracts clearly states that a party has no claim in restitution for performance that he or she has rendered under or in return for a promise that is unenforceable on grounds of public policy.

¹ E.A. Farnsworth, op. cit., p. 67.
² Parkinson v College of Ambulance [1925] 2 K.B. 1, at 5: "money paid under an illegal contract cannot be recovered back where the property in it has passed; nor can it be recovered in a case where the illegal contract has been partly performed. Any performance by the party receiving the money is sufficient to prevent the party paying the money from recovering it."
However, two competing policies are at the heart of the non-restitution principle. On the one hand, there is a need to deter entry into illegal contracts. On the other, the non-restitution of the money paid or property transferred can lead to an unjust enrichment.\(^1\) Anglo-American courts are thus faced with a dilemma. Exceptions were therefore developed by the courts in which a party can recover benefits conferred under an illegal contract, \textit{i.e.} (1) not \textit{in pari delicto} and (2) \textit{locus poenitentia}.

\section*{2.2. Exceptions}

\subsection*{2.2.1. Not \textit{in pari delicto}}

Anglo-American courts have based a first exception on the concept of \textit{in pari delicto}, \textit{i.e.} parties are equally at fault. In applying this doctrine, courts focus on the injurious acts of the parties. In this respect, they generally consider three situations where parties are not \textit{in pari delicto}.

First, parties are not \textit{in pari delicto} when the claimant was under a mistake of fact which rendered him unaware of the illegal nature of the act. In \textit{England}, this principle was for instance expressed in the case \textit{Oom v Bruce} where it was stated that "no blame attaches to the plaintiffs, who were ignorant of the fact at the time, and therefore they are entitled to a return of premium".\(^2\) In England, it seems moreover that there is at the moment no authority supporting the view that an ignorance of law, even minor, could give a party the right to enforce a contract which is affected by illegality.\(^3\) Conversely, in the \textit{United States}, there is the view that a party has a claim in restitution if he was excusably ignorant of the facts or of legislation of a \textit{minor} character.\(^4\)

Secondly, a person can recover back his money paid or property transferred either by oppression, \textit{i.e.} when the party was forced by the other party to enter into the contract, or misrepresentation, \textit{i.e.} if he entered into the contract as a result of the party's fraudulent that the contract was lawful.

\footnotesize
\begin{itemize}
\item \(^1\) Restatement (Second) of Contracts, 1981, Introductory note Chapter 8, database updated June 2014 (Westlaw US). In \textit{England}, see McKendrick, E., \textit{op. cit.}, p. 281. Moreover, in English law, there is a strong expression of the prevention of unjust enrichment in \textit{Taylor v Bhail} [1996] CLC 377 at 380: "The refusal of the court to enforce illegal contracts often leads to injustice and the unjust enrichment of a defendant".
\item \(^2\) \textit{Oom v Bruce} [1810] 12 East 225 at 227.
\item \(^4\) Restatement (Second) of Contracts, 1981, §178(a), database updated June 2014 (Westlaw US).
\item \(^5\) In \textit{England}, for instance, the application of the oppression exception was held for example in \textit{Smith v Cuff} [1817] 105 E.R. 1203 at 1205, where it was clearly stated that "this is not a case of par delictum: it is oppression on one side, and submission on the other: it never can be predicated as par delictum, when one holds the rod, and the other bows to it."
\item \(^6\) \textit{Hughes v Liverpool Victoria Legal Friendly Society} [1916] 2 K.B. 482 at 495 "In a case where fraud is proved the authorities are, in my opinion, clear that the case cannot be considered as one of par delictum, and that an innocent plaintiff is entitled to recover."
\end{itemize}
Finally, when a contract is made illegal by a statute passed for the protection of a class of persons, a member of that class can recover back money paid or property transferred by him under the contract. The reason for such an exception is that, when legislation was enacted to protect a class of persons to which the party belongs in transactions of the kind involved, frustration of the contract has taken place. Consequently, there is no policy against the enforcement of the party by one who belongs to that class. In England, for example, in Kearley v Thomson it was stated: "there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of that protected class. [...] In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract." The same view prevails in the United States, where it has been held that: "a party, even though technically in pari delicto, may be permitted to recover on an illegal contract if the law in question was passed for that party's protection and it appears that the purposes of the law would be better effectuated by granting relief than by denying it".

2.2.2. Locus poenitentia

A. Principle

A claimant is entitled to recover a benefit conferred under an illegal contract if he or she repudiates the illegal purpose in time. The payer has a locus poenitentia, i.e. a space or time of repentance, and may withdraw from the illegal contract and recover his payment. The justification for this exception deters the performance of an illegal contract by giving an incentive to the parties. In other words, the granting of relief may not be regarded as a misuse of official authority if the wrongdoer who asks for relief has withdrawn in time.

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6 In England, see McKendrick., E., op. cit., p. 282. and Taylor v Bowers [1876] 2 KB 482 at 300 “If money is paid, or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out.” In the United States, Restatement (Second) of Contracts, 1981, §199, database updated June 2014 (Westlaw US) clearly states that "A party has a claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy if he did not engage in serious misconduct and"
8 Restatement (Second) of Contracts, 1981, §199, comment a, database updated June 2014 (Westlaw US). See for example in Town of Meredith v. Fullerton, 83 N.H. 124, 139 A. 359 (1927) at 1212 where it was stated that “The underlying reason therefore is to protect society from the influence of contracts made in disregard of the public weal by reducing the number of such transactions to a minimum, and by interrupting the progress of illegal undertakings before the evil purpose has been fully consummated. To hold that the hand of the court is stayed merely because of the pernicious character of the illegal promise, or solely because its performance was not sooner arrested seems like a perversion of the real purpose of the doctrine. The spirit and intent, rather than the letter, of the maxim and of its qualifying rule should control.”
Two requirements must be fulfilled in order to confer on the party the right to a claim in restitution. First, the repudiation must be made in time, i.e. the claimant must withdraw from the transaction by refusing any further participation or benefits.\(^1\) In other words, the illegal contract must not have been substantially performed.\(^2\) As for the second requirement, there is a slight divergence between the English and the American approach. The former requires that the party must genuinely repent and not merely seek recovery because the illegal purpose of the contract has been frustrated.\(^3\) The American approach does not fundamentally differ from its English counterpart as it focuses on the fact the claimant must not be engaged in serious misconducts.\(^4\)

**B. Time consideration**

The requirement concerning the repudiation of the contract in time raised the obvious question whether the repentance has taken place at an early enough stage to allow recovery. This is naturally a difficult question that is determined by courts in light of all the circumstances.

In **England**, this question led to changes between the early and late cases, and has been examined in the two Law Commission Reports.\(^5\) First, it was suggested that withdrawal would be allowed up *until a late stage* in the performance of the contact, provided that the illegal purpose had not been fully achieved and it did not matter that the claimant had performed the whole of his or her side of the bargain.\(^6\) Secondly, in a later case, it was held that the withdrawal had to be made at *an earlier stage* for the unjust enrichment claim to succeed.\(^7\) Thirdly, an English legal case has adopted a very *liberal approach* towards the time by which withdrawal must occur. *Tribe v Tribe* was a case concerning a transfer of shares from father to son in order to protect them against the possible claims of his creditors.\(^8\) The court held that the illegal purpose has not been carried into effect since no deception had been practiced on the father's creditors, the father could recover the shares.\(^9\)

Nevertheless, there has been much criticism levelled at the outcome of the case. On one hand, it is argued that it is hard to see how one could say that the illegal purpose of the claimant had not been carried out, unless one adopts a particularly restrictive view of what that purpose

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\(^1\) E.A. Farnsworth, *op. cit.*, p. 79. Restatement (Second) of Contracts, 1981, §179, comments a and b, database updated June 2014 (Westlaw US) which state that "a party has a claim in restitution if (a) he withdraws from the transaction before the improper purpose has been achieved, or (b) allowance of the claim would put an end to a continuing situation that is contrary to the public interest".


\(^3\) H.G. Beale, *op. cit.*, p. 1344.


\(^6\) Law Com. No 189, at para. 4.47 and see *Taylor v Browsers* [1876] 1 QBD 291.

\(^7\) Law Com. No 189, at para. 4.48.

\(^8\) *Tribe v Tribe* [1996] Ch. 107.

\(^9\) *Tribe v Tribe*, *op. cit.*, at 121. See H.G. BEALE, *op. cit.*, p. 1339
was. On the other hand, by allowing the claim without the need for repentance but simply once the risk has passed, it is no longer possible to justify the policy on which this ground for the unjust enrichment claim is based as being the encouragement of withdrawal from illegal transactions. A legislative intervention was suggested by the Law Commission Report CP54 in order to clarify the time of withdrawal. However, rejecting any legislative intervention, the Law Commission Report 2009 advocated that the claim should be allowed where the claimant can show that his or her withdrawal will reduce the likelihood of the illegal conduct taking place.

In the United States, such a Law Commission has not been created and it is more difficult to analyze the approach and problems raised by the repudiation of time requirement. However, it could be said that American courts generally allow withdrawal until a late stage in the performance of the contact. Indeed, they have sometimes been tolerant in determining when the improper purpose has been so substantially achieved that it is too late to repent. This is evidenced from the case of Woel v. Griffith where although contract for sale of real estate had been made on Sunday in violation of law, purchasers could recover their deposit since contract was still executory.

3. Severance - Doctrine of divisibility

Severance, in England, or the doctrine of divisibility, in the United States, means that Anglo-American courts may, where possible, sever the injurious part of the contract and enforce the remainder.

In England, severance will first be affected if it does not involve the rewriting of the contract. In other words, courts cannot write a new contract for the parties. Examples of this limitation are provided by the courts' refusal to rewrite contracts which contain provisions in restraint of trade. The severance of the unreasonable part of the covenants in these cases is affected only where it is possible to do so by merely running a blue pencil through the offending part. This principle called the blue pencil test means that the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains, i.e. the illegal portion of the contract must be capable of being verbally and grammatically separated from the rest. Although the courts will never affect a

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1 Law Com. No 189, op. cit., at para 4.54.
2 *Idem*, para. 4.55.
6 See e.g. *Goldsoll v Goldman* [1915] 1 Ch 292.
severance unless the illegal part can be "blue pencilled", severance will not be affected if the result is "completely to alter the overall nature of the agreement".

Secondly, severance is allowed only if it is consistent with the public policy which made the contract containing the offending part illegal. The illegal part of the contract can be so grave that it taints the whole contract and could not therefore be enforceable. Consider cases where there has been an agreement to defraud the revenue or an agreement which involve trading with the enemy. Such cases have been held to be incapable of severance while the latter can be applied in agreements in restraint of trade.

The starting point of the American courts is that they will save the contract from total invalidity by severing the offending part. On the one hand, it means that it must be possible to apportion the parties' performances. On the other, it means that the offending part cannot injure the rest of the contract. In other words, the illegality cannot affect the entire agreement. Finally, the party seeking enforcement of the contract must have engaged in serious misconduct.

Moreover, the enforcement of a part of a term raises some questions in the field of covenants not to compete. American courts have indeed applied the blue-pencil test as originally accepted by English courts. However, this solution has been criticized as being too mechanical, in that it values the wording of the contract over the substance. Therefore, some courts have abandoned the blue pencil test in favour of a rule of reasonableness, which permits courts to determine on the basis of all available evidence what restrictions would be reasonable between the parties. As it was clearly stated in Raimonde v. Van Vlerah:

"The 'reasonableness' test differs from the "blue pencil" test only in the manner of modification allowed. It permits courts to fashion a contract reasonable between the parties, in accord with their intention at the time of contracting, and enables them to evaluate all the factors comprising "reasonableness" in the context of employee covenants."

Therefore, although the severance or the doctrine of divisibility pursue the same purpose, i.e. sever the illegal part of the contract and enforce the remainder, the criterion used by the courts are different in England and in the United States.
4. Related transactions

The parties to an illegal contract may also enter into a subsequent agreement. If the latter is based on the injurious transaction. In this case, the later agreement will be tainted by the illegal purpose of the injurious transaction.¹

Moreover, note that in England, and in very limited circumstances, the courts provide one party a remedy against the other, despite the illegality of their contract, under a 'collateral' contract.² It is generally accepted that collateral transactions may be infected with the illegality of a principal contract if they help a person to perform an illegal contract, or if they would, if valid, make possible the indirect enforcement of an illegal contract.³ For example, in Strongman Ltd v Sincock, the Court of appeal held that, despite the illegality of the main transaction, the builders could succeed on the basis of the collateral promise made by the defendant that he would obtain the necessary licenses for he work.⁴

5. Practice and procedure

In England and in the United States, there is a presumption of legality since the party alleging the illegality of the contracts bears the legal burden of proving this fact.⁵ In this regard, an English court stated in Hire-Purchase Furnishing Co v Richens, that "there is a broad principle that where a defendant is attempting to set aside a transaction for illegality, and the facts connected with it are equally consistent with the transaction being legal or illegal, it lies on the defendant to prove the illegality. The law presumes against illegality".⁶ In line with this approach, American courts generally held that "a contract that appears innocent on its face is presumed to be legal" as "contracting parties are assumed to want their contract to be valid and enforceable".⁷ Note that there is no presumption of legality in the area of contracts in restraint of trade as all covenants in restraint of trade are prima facie unenforceable at common law unless they are reasonable to the interests of the concerned parties and of the public.

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² Idem.
⁵ H.G. Beale, op. cit., p. 1352.
6. Conclusion

Remedies afford Anglo-American courts the opportunity to mitigate the effects of the non-enforcement of a contract injurious to public policy. In some cases, refusal to allow a party to enforce an agreement seems too harsh. In these cases, courts balance the interest of the injured party and the public interest. These remedies were indeed created by the courts because, in some cases, the merely non-enforcement of a contract does not serve public policy. For example, an improper transaction may leave property in the hands of a person whose control renders its status so uncertain as seriously to restrain its alienation.¹

Moreover, applications of remedies are complex and widespread, as each case will be decided by the courts in light of all the particular facts. In this regard, it is interesting to note that, in England, the Law Commission examined the remedies concerning the time of withdrawal for example. It is therefore difficult for the parties to predict the granting of any remedy by the courts.

¹ E.A. Farnsworth, op. cit., p. 80.
Conclusion

The general survey of the respective English and American public policy reveals the close similarity between their nature and application. This similarity naturally stems from the common legal civilization from which they are derived. The common law grants indeed a prominent power to courts in the making of public policy rules. In this regard, judges have endeavoured to recognize that changed social conditions may call for a changed of what the interest of the public demands. Public policy covers thus a variety of social, economic and cultural considerations which may have a bearing on the issue before the courts.

The essential function of public policy doctrine in the common law is to bring into judicial consideration the broader social interest of the public at large. With the growth of an elected and more democratically legislative body, questions arose surrounding the role of the judiciary in the application and the creation of public policy rules.

There are two questions about the creation of public policy rules. The first concerns the legitimacy, from a separation powers standpoint, of legislative activity on the part of the judges. The second concerns the degree of rigidity of the public policy rule and consequently, the ease for Anglo-American courts to change this rule in order to reflect the changing social attitudes. The modern doctrine of public policy has consequently attempted to find a compromise in both legal systems. From a common law point of view, there is legitimacy for a judicial intervention on behalf of the interest of the public. Since early times, courts have indeed created common law rules to protect fundamental values such as the institution of marriage and sexual morality. On the other hand, they have generally applied cautiously public policy rules and are especially reluctant to extend them when the legislature is expected to intervene. Moreover, they have recognized that the determination of public policy first resides with the people as expressed in the legislature and second in the settled judicial decisions. In this respect, Anglo-American courts recognize a certain rigidity of the public policy rule.

On the other hand, the question about the application of the doctrine concerned the factors which Anglo-American have to take in account. In this regard, the factors provided by the American courts grant them a high degree of flexibility in determining whether an agreement is enforceable. Conversely, the question of the enforceability of an agreement contrary to public policy has led to a lack of transparency and complexity in this area of English law. Three Law Commissions examined the common law rules in order to find a solution. Interesting is that, although the first Report advocated a legislative intervention, the two latter have reviewed this position and expressly stated that further developments of these rules rest on the courts.

Five considerations may be inferred from the application of the doctrine First, Anglo-American courts have generally adopted a consensual and cautious approach when applying
public policy rules. **Secondly**, courts recognize that the determination of public policy rules resides first in the legislature. **Thirdly**, Anglo-American courts have had prominent role in changing public policy rules. **Fourthly**, the local variations of public policy rules in the United States give rise to an imprecise application of these rules to some extent. **Fifthly**, cultural factors create sometimes a different application of public policy rules.

Finally, the thesis has considered the remedy applied by the doctrine to best serve the public policy. In some cases, courts indeed adopt a very severe attitude and refuse to assist a person implicated in the illegality in any way whatsoever. In others, public policy does require that such a person should be so completely denied a remedy. In this regard, Anglo-American courts have provided some mechanisms to mitigate the effect of illegality, i.e. the restitution and the doctrine of severance. The area is complex, as the determination of these remedies strongly varies through the circumstances and the particular facts of each case.

The application of the doctrine, in English and American law remarkably evidences the need of finding a balance in a common law system between two judicial positions. On the one hand, the courts must be free to ascertain the social conditions and the changes thereof. One the other, they should ensure that they do not unduly extend the reach of public policy. Therefore, one might question how the doctrine in England and in the United States managed to apply the heads of public policy. For example, the doctrine in restraint of trade finds its roots in the early eighteenth-century.¹

The reason for the remarkable sustainability of the public policy can perhaps be found in the values that it aim to protect. In the category of contracts promoting sexual morality, there is a clear public interest in discouraging the promotion of immoral mode of life. In the category of contracts in restraint of marriage and in restraint of trade, there is the desire to protect individual's freedom. In the category of contracts injurious to state, emphasize the protection of the public interest and of the citizen from any abuse from the legislature and executive. In the category of contracts involving the administration of justice, courts ensure to preserve the fundamental right of the citizen to seek the enforcement of his or her legal rights in a competent court. Finally, in the category of contracts to commit an unlawful act, Anglo-American judges seek to protect citizens from criminal conspiracy.

Each of this right or interest is necessary to permit the fair adjudication and pursuit of values having regard to the conditions of modern democracy. Therefore, although social conditions and attitudes evolve, these values are still regarded and considered by the society as fundamental. As stated by Cardozo: "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. [...] Logic and history and custom have their place. We will shape the law to conform to them when we may, but only within bounds".² This certainly explains that the area of public policy and, more generally, illegality is not a "straitjacket".³

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¹ *Mitchel v Reynolds* [1711] 1 P Wms 181.
³ *Parkingeye Ltd v Somerfield Stores Ltd* [2013] Q.B. 840 at 848 referring to Law Com. No 189, para. 3.31.
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