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PUBLIC POLICY: AN AMORPHOUS CONCEPT IN THE ENFORCEMENT OF ARBITRAL AWARDS

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Abstract: *Public policy permeates the legal principles of a state and its ruling government. The justification of public policy is topical to the ethics and canons acknowledged by that state. These values are determined by the applicable political, social, economic, religious, and legal systems, which differ among states. As public policy usually best illuminates the broad area of government laws, regulations, provincial ordinances, and court decisions, the standards creating public policy alter as states develop. The motif of public policy is critical when the question of enforcement of arbitral awards suffice. There is no definite meaning of the term in the famous Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Arbitration Convention) to enforce foreign arbitral awards. Hence, this paper explores and traces some contemporary trends in defense of public policy as an exception to the enforcement of arbitral awards worldwide.*

Keywords: *Public Policy; Conflict of Laws; International Arbitration; Enforcement of Arbitrary Awards*

INTRODUCTION

The notion of public policy is a frequent component in the issue of arbitration in International Commercial Law. It is prominent among scholars and judges, although it is not susceptible to a commonly recognized definition. Nevertheless, theories agree that public policy reveals some moral, social, economic, or legal principles (Berger 1993). Although heavily criticized as a nebulous and ambiguous concept, public policy's role is nevertheless a fundamental one from many legal systems' viewpoints (Moran, Rein, and Goodin 2008).

For Private International Law (Conflict of Laws or Choice of Law), public policy impedes the exercise of a foreign law that would otherwise be designated by the 'conflict of laws' rules. The rationale for the effect of a public policy is to protect society's essential principles and the state as a whole. Thus, a public policy rule is construed as a "mechanism that corrects the 'choice of law' designation for substantive reasons, namely, the defense of the forum's fundamental legal principles and moral values" (Gruson 2003). However, complexities evolve in defining the principles and values signifying the state's public policy (Dye 1992). The question about the degree of the constitutionality of stated legislation inexorably tends its head when the outcomes of applying the governing foreign law oppose a principle of another legal system that may apply to the legal relationship.

Likewise, since public policy stands within the framework of implementing a specific state's legal principles, the interpretation of the public policy is susceptible to the values and standards accepted by that state. These standards are determined by the applicable economic, political, religious, social, and legal systems, which vary among societies. Therefore, the measures constituting public policy change as these societies develop (Sheppard 2003). Hence it is relevant to investigate the concept and trace some contemporary trends in defense of public policy as an exception to the enforcement of arbitral awards worldwide.

MEANING AND SUBJECT MATTER OF PUBLIC POLICY RULE IN PRIVATE INTERNATIONAL LAW

It is appropriate to explain from the inception the idea of public policy in this discourse, and in detail, to differentiate the layers of public policy's exposition in international arbitration. It is therefore pertinent to define the key terms concerning it, and these are as follows.

Public Policy

The conflict of laws doctrines of public policy and '*l'ordre public'* is shaped by crucial local morality and social order forces (Nussbaum 1943). In practice, public policy shows a common-law origin while '*l'ordre public*' is associated with civil law and has a statutory source (Banu 2018). Public policy is defined by the House of Lords, England, in 1853 as "that principle of law which holds that no subject can lawfully do that which tends to be injurious to the public or against public good". In French courts, the concept of public policy or '*l'ordre public*' denotes "the system of principles that reinforce the function of legal systems in each state" (Husserl 1938). This focuses on the economic, social, and moral values that bind a society together. In a nutshell, public policy means those ethical, social, or economic considerations exercised by courts as justifications for repudiating enforcement of an arbitral award being domestic or foreign.

International Public Policy

The term 'international public policy' denotes the principles which state courts apply to foreign awards rather than domestic awards (Ghodoosi 2016). International public policy is recognized to be limited to national public policy because not every domestic public policy rule is automatically part of the international public policy. Nonetheless, international public policy is thorough and subjective to each state. A state's international public policy tends to be interpreted more narrowly than its domestic public policy. A foreign arbitral award is less likely than a domestic one to be refused enforcement.

Substantive and Procedural International Public Policy

Substantive public policy (*l'ordre public au fond*) covers the recognition of rights and obligations by a court or enforcement in a court about the merits of the decision, in contrast to procedural public policy; the process by which a dispute is decided (Howlett 2017). An example of the objective and fundamental principle is good faith and prohibition of abuse of rights, especially in civil law states. Other examples cited by courts and commentators are *pacta sunt servanda*, prohibiting confiscation without charge, and prohibiting discrimination (Martinez 1990). There is a debate whether and to what extent the award of unlawful relief, for instance, if punitory or exemplary damages, constitutes a violation of international public policy. The category of fundamental principles also includes the proscription against actions that are *contra bonos mores*, such as genocide, piracy, drug trafficking, terrorism, pedophilia, slavery, and smuggling.

Some fundamental principles, such as the prohibition against corruption, may also fall into one or more of the other categories. For example, permitting corruption may also be contrary to the 1997 OECD Convention on Combating the Bribery of Foreign Officials in International Transactions. Procedural principles include the requirement that the courts be impartial, issuing the award as induced or influenced by corruption, fraud, infringements of natural justice rules, and the equality in appointing the Court by parties. Notably, procedural public policy should not include mistakes regarding the law or the tribunal's facts unaccompanied by some extreme bureaucratic irregularity.

In contrast to the Supreme Court of Zimbabwe's decision in *Zimbabwe Electricity Supply Authority v. Maposa* (Oppong 2013), the arbitrator stipulated the wrong start date in calculating the claimant's entitlement for lost salary. This led to a windfall to the claimant of approximately 13 months' salary. After reviewing the implementation policy bar of the New York Convention (the Convention) and the UNCITRAL Model Law on International Commercial Arbitration (Model Law), the Court held under Article 34 or 36 of the Model Law, "the Court does not exercise an appealing power either to uphold or set aside or decline to recognize and enforce an award by having regard to what it considers should have been the correct decision". However, the deliberation in an award is beyond mere faultiness or incorrectness. Creating intense discrimination in its defiance of logic or accepted moral standards, a sensible and fair-minded person would consider that the theory of justice in Zimbabwe to be unpopular since it is not in defense of the public policy. The same result applies when the arbitrator does not hold his opinion to the question, or the issue is misunderstood, and the resulting injustice extends the point cited above.

Other examples often cited are currency controls, price-fixing rules, environmental protection laws, prohibitions, blockades, or boycotts, tax laws, laws to protect the parties are supposed to be in a lower negotiating position than consumer protection laws. An example of an international commitment is the United Nations Security Council resolution to impose sanctions. These decisions immediately bind UN member states under Article 25 of Chapter V of the UN Charter.

A state is also bound to meet the terms with the treaties it has ratified. In *Parsons & Whittemore* (Evans 1975), the United States Court of Appeals held that public policy did not equate with 'national policy' in the diplomatic or foreign policy sense and enforce an award in favor of the Egyptian party simply because of tensions at that time between the United States and Egypt. Would the outcome in *National Oil Corp. v. Libyan Sun Oil Corp* (Kuner 1990) be different today? The Delaware court denied a challenge to an award at the enforcement phase because it favored Libya, "a state is known to sponsor international terrorism". The court noted that the United States still recognized Libya's government had not declared war on it and had expressly permitted it to bring an action to confirm the award. The Court said: "To read the public policy

defense as a parochial device protective of national political interests would seriously undermine the Convention's utility". This provision was not intended to perpetuate international politics' vicissitudes under the heading of public policy. In *Baker Marine (Nigeria) Limited v. Chevron (Nigeria) Limited*, Baker Marine has sought to enforce two arbitral awards by a Nigerian court. The defeated party requested the evacuation prizes. After the Nigerian court overturned both cases, Baker Marine attempted to enforce the arbitration award in the United States following the New York Agreement, arguing that the Nigerian court's logic for revoking the awards was invalid under the Federal Aviation Administration (FAA) criteria. The district court rejected the argument because Baker Marine agreed that disputes should be arbitrated under Nigerian law. There was no claim that the Nigerian Supreme Court was an incompetent authority in that country. Drawing on the principles of courtesy within the agreement, the second US Court of Appeals confirmed.

Transnational or Truly International Public Policy

Transnational public policy refers to those principles that represent a universal accord as to collective norms and putative standards of conduct that must always be applied (Pryles 2007). The concept comprises indispensable rules of natural law, universal justice principles*, jus cogens* in public international law, and the generally accepted principles of morality occasionally referred to as civilized nations (Stone 2008). Transnational public policy differs from public policy of any state, though it includes a public policy beyond state boundaries. Such public policy is well-defined as evolving out of an international consensus involving universal standards as to norms of conduct that are primarily recognized and approved as unacceptable in most civilized countries, such as bribery, corruption, slavery, religious discrimination, murder and, terrorism. It is widely established that transnational public policy has an even more restrictive scope than international public policy (Ryabinin and Varady 2018).

Public Policy in the Arbitration Process

Public policy evolves from two phases in the arbitration process: a) the arbitration process itself: where the arbitration resolves the conceivable conflict concerning the pertinent legal systems; and b) arbitral award: in the enforcement of the arbitral award before the national courts, the judge is possibly required to protect fundamental policies of the Forum. In deciding the recognition and enforcement of arbitral awards, national judges have conventionally been apprehensive with the public policy of the Forum. It has become a norm for reference to be made to a state's public policy in recognition and enforcement (Fei 2010).

Public Policy and Mandatory Rules

An arbitral forum must discern between public policy and mandatory legal provisions known as '*normes d'application immediate ou necessaire'* or '*lois de police'* (Hood 2009).In defining mandatory rules, Article 9 of the Rome I Regulation states that:

> overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social, or economic organization, to such an extent that they apply to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

Temporarily used as synonymous, these provisions illustrate an analogous concept in various jurisdictions. They are commonly described as mandatory provisions set out in public interest. Under duress, it applies to all relationships connected with that legal system and may abound on any intractable conflict of law rules.

Two characteristics of mandatory provisions follow from this definition: first, these rules are introduced to protect some policy essential to the state, and secondly, their application is demanded irrespective of and even before the designation of the substantive law governing the dispute (Dickinson 2012). Necessarily, all public policy rules are mandatory because they reflect the rudimentary beliefs of morality and justice. However, not all mandatory rules rise to public policy because the interests protected may not concern the societies' fundamental values.

The Application of Mandatory of Rules

Mandatory rules exist principally in four situations. These comprise *force majeure*, mandatory rules of the *lex contractus*, transnational public policy, and rules of the seat (Bermann 2019).

Force Majeure

The tenets of *force majeure* permit arbitrators to review mandatory rules, making the execution of contractual obligations burdensome, given they were neither conceivable nor evident in the parties' contract. However, the mandatory rule is deemed under the *lex contractus* as an element of fact (International Council for Commercial Arbitration 1987). The arbitrator needs to pinpoint the applicable *force majeure* rules and then decide whether the provisions and practices of the mandatory rule in question satisfy that test. Therefore, the category of *force majeure* is not controversial since it requires that the arbitrators do nothing more than applying the parties' chosen law. For example, suppose trade sanctions from the African Union disrupted a contract governed

by English law to ship goods from the United Kingdom to Ghana. In that case, the sanctions may be tantamount to *force majeure* under the *lex contractus.* Nevertheless, they would not apply precisely. Also, not all cases will deal with *force majeure* in the same way, as their scope and implications will differ in the country's national legal history and politics, whose law regulates the dispute.

Transnational Public Policy

Homogenously, it is acknowledged that arbitrators must apply any mandatory rule that signifies transnational public policy to preserve minimum standards of conduct and behavior in international commercial relations (Kossuth and Sanders 1987). As transnational public policy symbolizes values that supersede those of distinct national systems, arbitrators have an utmost duty to the international community, which means they need to decline to apply any mandatory rules that conflict with transnational public policy. They should also turn down the parties' requests to apply chosen laws that conflict with such policies. The International Law Institute's Resolution on the Autonomy of Parties confirms this stance, affirming that "in no case shall an arbitrator violate international public policy principles as to which a broad consensus has emerged in the international community"(International Law Institute 1991). This statement clarifies that this approach's explanation rests not in the doctrine of the mandatory rule but in that of international public policy, justifying why this kind is undebatable.

The obstacles with a transnational public policy are, primarily, for parties, the evidentiary hurdle in determining a given principle's universality; and second, for arbitrators, ambiguity as to the extent of universal acceptance required before the principle turn out to be truly international. Arbitrators' response if an express choice by the party conflicts with an established international public policy poses is a concern. Ideally, arbitrators are permitted to ignore the latter, but there are bottlenecks to uphold the jurisdiction if the express choice is overlooked.

Mandatory Rules of the Lex Contractus

Distinguishing between the *lex contractus* adopted by parties and those chosen by arbitrators is needful. The *parties have selected the lex contractu*s on the one hand, and the *lex contractus* has been opted by the arbitrators on the other hand. The *lex Contractus* adopted by the parties is recognized if parties favor the *lex contractus*. Its mandatory rules must be applied, provided they are not divergent to transnational public policy. Arguably, suppose the parties had no anticipation for a mandatory rule of the *lex contractus* to be ignored. The arbitrator is obliged to respect their will as they could have opted for a law that did not cover the applicable mandatory provision (Bernardini 2008). This is valid if the only limit to the parties' control over the applicable

law is transnational public policy. It is putative that mandatory rules can be applied even when the parties do not want them; such resolution will be the admissible but not decisive factor in the arbitrators' verdict (Derains 1987). According to how it balances competing private interests, it is espoused that parties do not choose a law according to its public policy provisions (Voser 1998). Therefore, the impulsive application of mandatory rules of the *lex contractus* is futile to party expectations, giving unjustifiable benefit to the state's public policy goals that afford the *lex contractus* (Park, Craig, and Paulsson 2000).

The Lex Contractus Chosen by the Arbitrators

There is often a failure on the part of parties to opt for a law to apply to their relations, either because they cannot agree on a rule, they had inept lawyers who overlooked a choice of law clause, or because they are more involved with making a deal than planning for its undoing (Mistelis 2009). When this ensues, arbitrators can typically either opt for the conflict of law rules or hastily prefer the substantive law they deem suitable. Either way, arbitrators must endorse the law that best concurs with the parties' legitimate expectations, even though differences between expectations regarding ultimate substantive law and expectations as to applicable conflict principles. Upon determining the substantive law, the conventional procedure is for arbitrators to employ applicable mandatory rules inevitably. Besides, mandatory rules are applied more swiftly than where an express choice of law exists (Chukwumerije 1994).

By not unequivocally acquiescing to the arbitrators deciding the applicable law, the parties may have expected no more than the arbitrators' choice to be treated as if it were the parties' own. This would make it difficult to rationalize applying foreign mandatory rules more readily than situations where a choice of law clause is present. Conversely, by leaving it up to the arbitrators to choose the applicable law, it may be that the parties do not care as much about which law applies. This method fits cogently with and even supports the 'parties' expectations' category as argued. Adopting such a type makes the variance between a party and arbitrator choice of the *lex contractus* redundant.

Rules of the Seat

Jurisdictional purists suppose that arbitrators' powers originate from the law of the seat and so will inevitably employ its mandatory rules (Ogunranti 2019). On the contrary, contractualist purists deny the importance of the seat and so would, in theory, be hesitant to apply its mandatory rules at least where they correlate to substantive, as opposed to procedural, issues (Naón 1992). In procedural matters, designating the seat ought to at least involve acceptance of the *lex arbiteri*. Regarding the substantive rules,

the assessment may be influenced by the selected procedural rules. For example, the International Chamber of Commerce (ICC) Rules reveals that when the ICC International Court of Arbitration scrutinizes arbitrations under its jurisdiction, it considers, to the extent practicable, the requirements of mandatory rules at the place of arbitration. While this does not require mandatory rules to be applied, the Court is generally reluctant to interfere in the awards' substantive parts. Article 27 of ICC Rules states (ICC Rules of Arbitration 1998) that:

> Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.

It is worthy to note that most national arbitration statutes provide another basis for setting aside awards made within their territory. The New York Convention consents non-enforcement if an award has been put aside or barred by an adept authority of the country it was made, Article V (1) (e) stipulates: "The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made". Therefore, enforceability matters should provide mandatory rules of the seat a solid assertion to be employed, at least in as much as they signify the pertinent public policy. The New York Convention is only non-mandatory; preference is given to party autonomy should there be a conflict. With the prevalent acceptance of the Model Law (United Nations Commission on International Trade Law 1995), several states may have identical mandatory procedural rules for arbitrations. If an award contravenes such a provision at the seat, jurisdictions that have ratified the Model Law are not likely to approve enforcement.

Where substantive mandatory rules entail, the issue is indistinct. Provided that there are some, even though not numerous jurisdictions seen to implement awards that have been set aside at the seat, Austria, Belgium, France, and the US have recognized and enforced awards set aside at the seat of arbitration. However, this has often been done under local law, not the New York Convention (Redfern and Hunter 2004). Enforceability concerns will not be vast if such cases are plausible. For instance, where there is no relevant substantive mandatory rule issue from either party's home country or the enforcement country. Still, a case may arise if the seat fails to stipulate the contract's applicable law and the plausible place of enforcement in a, particularly pro-enforcement country. To admit, contractualist arguments in this circumstance are challenging because an arbitrator is under strict obligation by a sovereign state to do their bidding. As the direction is intended at the parties and the arbitrator is assigned

with giving force to it utilizing a mandatory rule, the same would be true. If not, the arbitrator would be aiding the stalling of the state's direction (Beatson 2017). In fact, by law, this is not sanctioned.

One exception may be substantive rules that are expressed as mandatory and not intended to apply to the dispute's specific fact situation. For example, if the mandatory competition or anti-trust rules, designed to protect a state's domestic market, are expressed broadly enough to prohibit a relationship which has only a fragile connection to that market, and the parties are foreign and have chosen the seat purely for convenience, then it is arguable that the law need not be applied.

Following this exception and the well-known opinions advocating against the critical application of all relevant mandatory rules of the seat, it would be going too far to consider their application entirely uncontroversial (Petrochilos 2004).

Arbitrability and Public Policy

The issue of arbitrability of a dispute is critical in discussing public policy. The rules on arbitrability may limit parties' freedom to substitute arbitration for the jurisdiction of the national courts by excluding specific subject matter from arbitration, so-called objective arbitrability, or restricting certain parties' ability to participate in arbitral proceedings subjective arbitrability.

A precondition for determining the arbitrators' competence, arbitrability may arise as soon as the parties submit the dispute to arbitration. At this initial stage, one of the parties may assert a lack of arbitrability either before the arbitral tribunal or directly before a national court. The question may be raised in proceedings before national courts at the time of recognition and enforcement of arbitral awards. According to Article V (2) (a) of the New York Convention, arbitrability constitutes a separate ground for the refusal to enforce arbitral awards.

According to some opinions (Sattar 2011), this text may be excessive because arbitrability is part of public policy and included in Article V (2) (b). Others (Dar 2015) argue that rules regarding the arbitrability of disputes do not always rise to the level of public policy. Although legal provisions determining arbitration are always mandatory, some commentators argue that restrictions on certain disputes' arbitrability may not reflect national policies of such a fundamental character to qualify them as public policy issues. In the area of objective arbitrability, issues regarding consumer protection, anti-trust and competition, industrial and intellectual property rights, restrictions on foreign trade, foreign exchange restrictions, and securities transactions are among the subject matters most commonly proposed for exclusion from the jurisdiction of arbitrators.

The concept of subjective arbitrability refers to certain entities' capacity, such as the state and state institutions, to conclude arbitral agreements. The limitations are usually related to one of the parties' particular relationships to the state, such as state-

controlled enterprises. Two questions arise in this respect. The first one is whether the responsible government official or other authority had lawfully bound the respective entity to arbitrate. This issue is to be solved by the applicable law as determined by the choice-of-law rules. The second question relates to the principle of sovereign immunity. It is a generally accepted principle of international public policy that a state party to an arbitral agreement may not claim exemption from arbitral proceedings to which it has acceded by a previous contract. However, suppose the state party's contractual obligations conflict with what would be considered a significant national interest by the National Forum. In that case, the public policy defense might prevent the award's enforcement against that party in its home state.

The Interpretation of Public Policy by Diverse Courts

The various terminologies used in national legislation, case law, and commentaries suggest that courts of multiple countries apply a constricted public policy concept (Sheppard 2004). France and Portugal's legislations recommend the application of international public policy (Graffi 2006). The courts of several other European civil law countries like Germany, Italy, and Switzerland (Rowley, Gaillard, and Kaiser 2019) expressly apply international public policy. Commentators from other countries like the Netherlands, Denmark, Spain, Norway, and Sweden state that their courts apply public policy restrictively (Beatson 2017). However, the international public policy's application is generally the country's public policy in question, which applies to international awards and not transnational public policy. When remarking on the French approach Fouchard and Goldman (1999) noted: "The international public policy to which Article 1502.5 refers can only mean the French conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the French legal order, even in international cases".

Some courts have approved the application of transnational public policy, but this has not received widespread acceptance. The Milan Court of Appeals (1992) may have considered a more transnational concept in re-counting the international public policy as a "body of universal principles shared by nations of like civilization, pointing to protect fundamental human rights, often personified in international conventions". Swiss Federal Court at *WV. F. and V.* (1994) supported considering a "universal comprehension of public policy, in which an award will be contradictory with the public policy if it is divergent to the underlying moral or legal principle admitted in all civilized countries".

Yet, in *Les Emirats Arabes Unis v. Westland Helicopters* (1994), after a long academic dialogue, rebuffed their stance, preferring instead pragmatic approach. In France, the Paris Court of Appeal demonstrated uncertainty about applying this theory in *Fougerolle v Procofrance* (1990). It is noteworthy that certain activities, such as corruption, violate both French public policy and international business ethics.

Common law states also restrict the scope of public policy but neglect the transnational policy. The United States applies a restrictive concept of public policy. For example, public policy definition often cited in international arbitration is Judge Joseph Smith's description at *Parsons & Whitmore* (Evans 1975). He considers the enforcement of a foreign arbitral award might be refuted for policy reasons "only where enforcement would violate the forum state's most basic notions of morality and justice". The same year, the Supreme Court, in *Scherk v. Alberto-Culver Co.* (Deason 2005), recognized the difference between domestic and international public policy. It had implemented an arbitration agreement on an emerging claim in international trade. However, arbitration on a similar claim would have been prohibited if it had arisen from a domestic transaction.

English courts are yet to explicitly incorporate the concept of international public policy though their emphasis is on the importance of the final nature of the awards when considering an objection to enforcement based on illegality and have endorsed a restrictive concept of public policy. For example, the English Court of Appeal Sir John Donaldson MR, in *D.S.T. v. Rakoil* (1987) and the Supreme Court, in *Renusagar Power Co. Ltd v. General Electric Co.1994* (Aragaki 2018) in India. Public policy has been interpreted more restrictively than previously. The Court held that to attract the policy bar, it is required to enforce the decision more than violating India's law in consideration that the term 'public policy' should be interpreted in the sense in which the principle of public policy is applied in the area of private international law and that the enforcement of a foreign decision contradicts with the public policy if it conflicts with (a) the fundamental policy of Indian law; (b) India's interests; or (c) Justice and ethics. A Singaporean judge (Ho 1996) reiterated: "The principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist". A 1999 decision of the Hong Kong Court of Final Appeal highlights the issues faced by many courts the world over and how the International Law Association (ILA) sought to give guidance. The Court addressed whether the applicable public policy was that of Hong Kong or some shared public policy and to what extent a national court could or should look at the practice of other courts.

The Court overruled the idea that public policy under the New York Agreement concerned some "standard common to all civilized nations". However, public policy has been narrowly interpreted. It stated that the refusal to implement a decision of the New York Convention for policy reasons, "the award must be so fundamentally offensive to that jurisdiction's notion of justice that, despite it being a party to the Convention, it cannot reasonably be expected to overlook the objection". The Court accepted that, in numerous cases, the relevant policy of the Forum was consistent with the policy of other countries and that it would be appropriate to examine the willingness of other state courts to proceed with the enforcement of the Convention's decisions made in conditions that did not meet their domestic standards.

International Law Association (ILA) Recommendations on Public Policy

The ILA was founded in Brussels in 1873, its current headquarters in London. The ILA comprises 20 Committees and 8 study groups ranging between public, private, and commercial law, with 52 members in the Arbitration Committee covering different continents. The ILA International Commercial Arbitration Committee conducted a six-year study into public policy application by enforcement courts (Mayer and Sheppard 2003) and concluded in 2002. Despite the distinctive legal and cultural traditions of state courts, public policy seldom precludes international awards enforcement. The Committee resolved that greater harmonization of approach would pilot significant uniformity and predictability, which would dissuade unmeritorious disputes to awards. The ILA recommended the application of 'international public policy', namely, that element of a state's public policy that would avert a party from citing a foreign law or foreign judgment or foreign award if breached. It did, however, identify various categories of international public policy by observing that the international public policy of any state includes:

- Fundamental principles, on justice or morality that the state wishes to protect even when it is not directly concerned.
- Rules designed to serve the essential political, social, or economic interests of the state, known as '*lois de police*' or 'public policy rules'; and
- The duty of the state to respect its obligations towards other states or international organizations.

CONCLUSION

The public policy omission to recognition and enforcement of international arbitral awards establishes ambiguity concerning enforcement of these awards, mainly because the contracting states have diverse approaches to public policy issues. For instance, on the subject of transnational law, Jessup (1940) defined it as "the law which regulates actions or events that transcend national frontier including both public/private law distinctions". In recent times, the term 'transnational law' is used to describe law creation in the broad context by governments, international organizations, and non-state actors, for example, commercial organizations. While this theory was developed for public international law, it has long since been advocated in private international law and commercial arbitration.

Besides, this paper incorporates a different definition of the term 'transnational law'. Transnational law depicts legal principles generally recognized by a significant number of national laws. These universal law principles differ from private entities' standard rules because they derive their binding force from national laws. However, they are also inconsistent with the regulations laid down by the state because they are more

general principles on which these laws are based. The general principles theory of law is that there are basic ideas of justice found in a wide range of national laws and directly applied to legal disputes. It is a slightly platonic notion that one can see pure pictures of justice through national laws' shadows.

The elemental stage of arbitration is the question of arbitrability. Arbitrability delineates arbitral issues and non-arbitral ones. Arbitrability hence extends to the arbitral tribunal's jurisdiction over a dispute. Arbitration premises on the parties' contractual agreement. There are two reasons why the arbitral tribunal may lack jurisdiction; either the parties have not reached a settlement to submit the specific dispute to arbitration, or the dispute cannot be submitted arbitration at all. The former is a question of contract interpretation, while the latter pertains to complex considerations of public policy. It is the latter question that has created most problems in arbitral practice.

Article V (2) (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Article 36 (1) (b) (ii) of UNCITRAL's Model Law both stipulate that a state may fail to enforce an award if it is contrary to the public policy of the state in which may fail to enforce an award if it is contrary to the public policy of the state in which the enforcement is intended.

Unfortunately, neither defines 'public policy'. The International Bar Association declared the Public Policy Exception in the New York Convention in October 2015, reaffirming that public policy is an elusive and evolving concept deficient in precise definitions. While the New York Convention has been hailed by many, it is deemed by some that the public policy exception would weaken the purposes of the Convention. There have been concerns it granted a fruitless defendant and the state a 'second bite' at frustrating enforcement. While others perceived it as an essential 'safety-valve'. The New York Convention architects sought to restrict the public policy clause's scope as far as possible.

The cases reviewed in this paper show that Article V (2) (b) of the Convention has not generated any significant disruption. Attempts to withstand enforcement on justifications of arbitrability and public policy have rarely been successful. A more feasible way forward towards accomplishing better predictability would be for the international arbitration community to reach a comprehensive agreement as to which 'exceptional circumstances' would justify a national court denying enforcement of a foreign arbitral award and for the courts to have regard to any such consensus. The time has come for there to be a comprehensive model of 'arbitrability'. It is anticipated that the ILA Recommendations embody a broad consensus. This would provide more clarity in understanding and implementing public policy as a bar to the enforcement of international arbitral awards if implemented. Most major arbitral jurisdictions define public policy or '*l'ordre public*' narrowly and utilize it remarkably when an award infringes fundamental and largely international legal norms.

Undeniably, the public policy violation must attain a precise upper limit to justify declining enforcement, such as 'blatant', 'flagrant', or 'intolerable'. The exclusion can legally apply, for instance, to awards concerning contracts that would be illegal under national laws, such as those concerning crime.

There is a reassuring tendency toward the pervasive approval of a narrow analysis of the public policy exception. For example, the Indian Supreme Court was once infamous for a string of decisions endorsing an ever-expanding definition of public policy to include the mere error of law, an approach rejected by the US and all leading European jurisdictions. The Indian Arbitration Act 2015 now explicitly precludes refusal of enforcement of foreign awards based on 'patent illegality' or law error. The High Court of Delhi asserted that the amendments 'brought about a material change' and that the public policy defense must be interpreted 'extremely narrowly', for example, in *Cruz City 1 Mauritius Holdings v Unitech Limited*.

A Chinese court in 2016 rejected to enforce an ICC award on the foundation that it breached Chinese law obliging that all arbitrations must be institutional, and the Court found that the ICC arbitration was not unequivocally institutional. This decision amalgamates Chinese domestic law with public policy and is hence open to criticism. Given that developments have been observed any decision of the Chinese court refusing to enforce a foreign award since 2000 is subjected to the Supreme People's Court's mandatory review on a more pro-enforcement basis, the decision may yet be repealed.
In *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd*, 2017, the United Kingdom reiterated its 'pro-enforcement bias', stressing that enforcement of awards about legal contracts and awards would not be 'ruined' by fraud or bribery. Thus, English courts are not adamant about enforcing a contract procured by bribery. Some jurisdictions do still retain an unsophisticated methodology to the public policy omission. For example, Egyptian courts have considered the ensuing fall under the public policy exception: the absence of perceptive for damages awarded by the tribunal, late payment interest exceeding the maximum ceiling set out in the Egyptian Civil Code, and mandatory approval of the competent minister to arbitrate a dispute arising out of an administrative contract. Russian courts usually refuse enforcement of awards where the number of damages is deemed punitive or disproportionate to the breach. Other jurisdictions such as Poland, Finland, Italy, Greece, and, currently, Portugal have objected to enforcing awards on the same footing.

New tendencies in the analysis of the public policy exception by legislators and national courts encourage prudent confidence that leading jurisdictions have come together in the tradition of embracing a narrow interpretation of the public policy exception.

REFERENCES

1. Aragaki, Hiro Naraindas. 2018. "Arbitration Reform in India: Challenges and Opportunities." *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific. Hart Publishing, Oxford, Portland, Oregon*, 221–50.
2. Banu, Roxana. 2018. "Nineteenth-Century Perspectives on Private International Law." Oxford University Press. 2018.
3. Beatson, Jack. 2017. "International Arbitration, Public Policy Considerations, and Conflicts of Law: The Perspectives of Reviewing and Enforcing Courts." *Arbitration International* 33 (2): 175–96.
4. Berger, Klaus Peter. 1993. "International Economic Arbitration," 10.
5. Bermann, George A. 2019. "Private International Law in International Arbitration." In *Private International Law*. Edward Elgar Publishing.
6. Bernardini, Piero. 2008. "The Problem of Arbitrability in General." In.
7. Chukwumerije, Okezie. 1994. "Choice of Law in International Commercial Arbitration."
8. Dar, Wasiq Abass. 2015. "Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards: A South-Asian Perspective." *European Journal of Comparative Law and Governance* 2 (4): 316–50.
9. Deason, Ellen E. 2005. "Perspectives on Decisionmaking from the Blackmun Papers: The Cases on Arbitrability of Statutory Claims." *Mo. L. REv.* 70: 1133.
10. Derains, Yves. 1987. "Public Policy and the Law Applicable to the Dispute in International Arbitration." *Comparative Arbitration Practice and Public Policy in Arbitration* 227.
11. Dickinson, Andrew. 2012. "The Role of Public Policy and Mandatory Rules within the Proposed Hague Principles on the Law Applicable to International Commercial Contracts." *Sydney Law School Research Paper*, no. 12/81.
12. Dye, Thomas R. 1992. "Understanding Public Policy" Englewood Cliffs, N.J.: Prentice Hall.
13. Evans, Alona E. 1975. "Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie Du Papier (RAKTA). 508 F. 2d 969." *American Journal of International Law*, 897–99.
14. Fei, Lanfang. 2010. "Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach." *Arbitration International* 26 (2): 301–12.
15. Fouchard, Philippe, and Berthold Goldman. 1999. *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. Kluwer Law International BV.
16. Ghodoosi, Farshad. 2016. "Arbitrating Public Policy: Why the Buck Should Not Stop at National Courts." *Lewis & Clark L. Rev.* 20: 237.

17. Graffi, Leonard D. 2006. "Securing Harmonized Effects of Arbitration Agreements Under the New York Convention." *Hous. J. Int'l L.* 28: 663.
18. Gruson, Michael. 2003. "Governing Law Clauses Excluding Principles of Conflict of Laws." In, 37:1023.
19. Ho, Hock Lai. 1996. "Enforcement of Foreign Arbitral Award." *Sing. J. Legal Stud.*, 241.
20. Hood, Kirsty J. 2009. "James Fawcett and Janeen M Carruthers, Cheshire, North & Fawcett: Private International Law Oxford: Oxford University Press,14th Edn, 2008.
21. Howlett, Michael. 2017. "Policy Tools and Their Role in Policy Formulation: Dealing with Procedural and Substantive Instruments." In *Handbook of Policy Formulation*. Edward Elgar Publishing.
22. Husserl, Gerhart. 1938. "Public Policy and Ordre Public." *Virginia Law Review*.
23. International Council for Commercial Arbitration. 1987. *Comparative Arbitration Practice and Public Policy in Arbitration*. Vol. 3. Kluwer Law International.
24. International Law Institute. 1991. "International Law Institute's Resolution, The Autonomy of the Parties in International Contracts Between Private Persons or Entities (Resolution on the Autonomy of Parties) Article 2, 1991." 1991.
25. Jessup, Philip C. 1940. "The Reality of International Law." *Foreign Affairs* 18 (2).
26. Kossuth, Louis, and P Sanders. 1987. "Transnational (or Truly International) Public Policy and International Arbitration." *Comparative Arbitration Practice and Public Policy in Arbitration, Kluwer Law International*.
27. Kuner, Christopher B. 1990. "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany under the New York Convention." *J. INTL. ARB.* 7: 71.
28. Martinez, Ramona. 1990. "Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The" Refusal" Provisions." *The International Lawyer*, 487–518.
29. Mayer, Pierre, and Audley Sheppard. 2003. "Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards." *Arbitration International* 19 (2): 249–63.
30. Mistelis, Loukas A. 2009. *Arbitrability: International & Comparative Perspectives*. Vol. 19. Kluwer Law International BV.
31. Moran, Michael, Martin Rein, and Robert E Goodin. 2008. *The Oxford Handbook of Public Policy*. Oxford University Press.
32. Naón, Horacio A Grigera. 1992. *Choice-of-Law Problems in International Commercial Arbitration*. Mohr Siebeck.
33. Nussbaum, Arthur. 1943. *Principles of Private International Law*. New York; London: Oxford University Press.

34. Ogunranti, Akinwumi. 2019. "Separating the Wheat from the Chaff: Delimiting Public Policy Influence on the Arbitrability of Disputes in Africa." *Journal of Sustainable Development Law and Policy (The)* 10 (1): 104–32.
35. Oppong, Richard Frimpong. 2013. *Private International Law in Commonwealth Africa*. Cambridge University Press.
36. Park, William, W Laurence Craig, and Jan Paulsson. 2000. *International Chamber of Commerce Arbitration*.
37. Petrochilos, Georgios. 2004. *Procedural Law in International Arbitration*. Oxford University Press on Demand.
38. Pryles, Michael. 2007. "Reflections on Transnational Public Policy." *J. Int'l Arb.* 24.
39. Redfern, Alan, and Martin Hunter. 2004. *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell.
40. Rowley, J. William, Emmanuel Gaillard, and Gordon E. Kaiser. 2019. "The Guide to Challenging and Enforcing Arbitration Awards /." CLS Pegasus Library Catalog.
41. Ryabinin, Andrey, and Tibor Varady. 2018. *Procedural Public Policy: In Regard to the Enforcement and Recognition of Foreign Arbitral Awards*. Lap Lambert Academic Publishing.
42. Sattar, Sameer. 2011. "Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach." *Transitional Dispute Management Journal* 8 (5).
43. Sheppard, Audley. 2003. "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards." *Arbitration International* 19 (2): 217–48.
44. Sheppard, Audley. 2004. "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard? Transnational Dispute Management, Volume 1, Issue 01, 2004." *ALTA. L. REV* 34.
45. Stone, Diane. 2008. "Global Public Policy, Transnational Policy Communities, and Their Networks." *Policy Studies Journal* 36 (1): 19–38.
46. United Nations Commission on International Trade Law. 1995. *UNCITRAL Model Law on International Commercial Arbitration*. New York: United Nations.
47. Voser, Nathalie. 1998. "Mandatory Rules of Law as Limitation to the Law Applicable in International Commercial Arbitration." *American Review of International Arbitration* 7: 319–57.

Legal Cases

1. Baker Marine (Nig.) Ltd.v. Danos and Curole Marine Contractors, 1999.
2. Baker Marine (Nig.) v. Chevron (Nig.) Ltd.
3. Deutsche Schachtbau-und Tiefbohrgesellscaft mbh v. Ras Al Khaimah National Oil Company 1987.
4. Egerton v Earl of Brownlow, 1853.

5. Hainan Machinery Import and Export Corporation v. Donald & McArthy Pte., Ltd 1996.
6. Hebel Import and Export Corporation v. Polytek Engineering Co. Ltd, 1999.
7. National Oil Corp. v. Libyan Sun Oil Corp. 1990.
8. Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de I'industrie du Papier RAKTA and Bank of America 1974.
9. Renusagar Power Co Ltd v. General Electric Company, 1993.
10. Scherk v. Alberto-Culver Co.1974.
11. Zimbabwe Electricity Supply Authority v. Maposa.
12. Sinocore International Co Ltd v. RBRG Trading (UK) Ltd, 2017
13. Cruz City 1 Mauritius Holdings v Unitech Limited.