International Hellenic University

Dissertation

Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Commercial Arbitration

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Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Commercial Arbitration

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ABSTRACT

Party autonomy in international arbitration is the most compelling reason for the contracting parties to enter into arbitration agreement, rather than opting for litigation. However, arbitration functionalities may be hindered by several factors, one of which is public policy. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides public policy as the ground for refusing the recognition and enforcement of foreign arbitral award for signatory states, thus allowing national courts to use their own discretion when determining the scope of this issue.
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Chapter 1

Introduction

Each nation has its own legal, social, and cultural historical development. When business negotiations occur between international parties, they may encounter dissimilarity. Litigation may get involved to help parties resolve the conflict if the parties cannot agree with an accord. Litigation can be an obstacle to parties due to
the unique and different rules and procedures of each country. In this case, litigation may not be a good choice for dispute settlement and arbitration to be a preferred method. In addition, arbitration is better than litigation due to its private, neutral, independent, confidential and cost effective nature.

The globalization of commerce and investment has led to the development of international commercial arbitration and the expansion of its acceptance in worldwide transactions. In the past, every country set up its own laws unfavorable to foreign trade and investment, because they attached the weight to their own national sovereigns. Nowadays not only developed countries have become aware of the essential nature of arbitration, but also developing countries. By the 1980s, the economies of many developing countries had become anemic, and one after the other, they began to sheathe their economic nationalism. These countries began to provide a friendlier environment to foreign investment and international trade in the belief that it would support foreign investments, increase the number of international transactions, and promote its economies. As a result, they limited the power of the national courts and accepted arbitration as a dispute settlement method in international transactions. Furthermore, a foreign arbitral award is more easily to enforce, due to the existence of many successful international Conventions.

Judicial recognition and enforcement of an arbitral award is necessary when one of the parties to arbitration fails to execute voluntarily the award. In this situation, parties leave the “private sphere” of arbitration and turn to the public courts where one party seeks the coercive power to enforce the award, and the other may request to resist enforcement. The public policy usually intervenes to defend a public interest. Different legal systems have different approach on this intervention and this creates some inconsistency, uncertainty and unpredictability on international commercial arbitration.¹ Even if the national legislation have specific provision considering public policy as a limit to the enforcement of international awards,

international conventions and especially the New York Convention has served as an international instrument that contributed to the harmonization of the enforcement procedure for foreign arbitral awards.

Chapter two examines the concept of public policy. Chapter three examines the types of public policy. Chapter four examines the attributes of public policy such as relativity, fundamentality and extraterritoriality. Chapter five examines the International conventions provisions on public policy. To this end article V of the NYC will be analyzed. Chapter six examines the judicial application of the public policy exception in the process of enforcement. In this chapter cases from jurisdictions such as the US, England, France, Germany, Greece, China, Egypt, Saudi Arabia, India, Russia would be examined. It is described how different nations define and apply public policy as a safeguard for their national legal system. Chapter seven examines how public policy becomes a potential means of control by national courts over international arbitration mainly because of their effort to provide local protectionism. Chapter eight finally refers to the inconsistencies in the application of the public policy exception and the need for harmonization.
**Definition and Concept of Public Policy**

The controversy surrounding the public policy exception is that it is incapable of being precisely determined and it varies from one state to another.²

According to the editors of the “Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards” published by the International Law Association in connection with its London Conference 2000, it is “notoriously difficult” to provide a precise definition of public policy. Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution.

At this point it is worth referring to the different approach of UAE legal system. In the UAE civil code we can find a precise definition of public policy as a ground of refusing recognition and enforcement of awards in the UAE. **Public policy is defined in Article 3 of the UAE Civil Code [Federal Law No. (5) of 1985] as follows: “Are considered of Public Policy, rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Shari’ a”.

A striking feature of this definition is that it is wide enough to encompass almost anything that goes into “trading in wealth” and “foundations on which the society is based”, depending on the total discretion of UAE Courts.³

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³ “Public Policy in the UAE as a Ground for Refusing Recognition and Enforcement of Awards” By Khalil Mechantaf, Baker & McKenzie 06Jul2012 at kluwerarbitration.com
In addition, the meaning and interpretation of public policy in the enforcement stage of the arbitral award can be broad or narrow. This situation can lead to an award not being contrary to the public policy of the state of the seat but may be contrary to the public policy of the enforcement state. The International Law Association (ILA) \(^4\) in its Public Policy report favors a narrow approach to interpret the public policy exception and refers to international public policy as a yardstick for determining whether an international award is enforceable. In reality even though public policy is often used as a defense, it has had little success in the courts, because in the majority of cases in various legal systems it is given a restrictive interpretation.

Generally, public policy is used to describe the imperative or mandatory rules that parties cannot exploit.\(^5\)

In order to identify which rules are forming the public policy of any State, the ILA Recommendations provided that the international public policy of any State includes: Fundamental principles, pertaining to justice or morality that the State wishes to protect even it is not directly concerned. The fundamental principles are distinguished to substantive and procedural principles.

The examples of substantive principles are the principle of good faith and prohibition of abuse of rights, pacta sunt servanda, prohibition against discrimination, and against uncompensated expropriation. Into this category comes also the prohibition of activities that are contra bona mores: piracy, slavery, terrorism, drug trafficking, genocide, smuggling and pedophilia. There is an ongoing debate whether and to what extent the award of unlawful relief (for example, punitive damages) constitutes or not a violation of public policy. In courts’ practice a fundamental principle is

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\(^4\) ILA Public Policy Report

considered also the so-called principle of "appropriateness and proportionality of punishment."

As examples of fundamental procedural principles are the requirement that arbitral tribunal be impartial, making of the award shouldn’t be affected by corruption or fraud, the parties were on unequal footing in the appointment of the tribunal, no breaches of the rules of natural justice.

The ILA further concluded that a party may be considered to have waived its right to raise fundamental principles as a ground for refusing enforcement, if that party could have raised relied on any such principle before the tribunal but failed to do so. A public policy rule also known as “Lois de police” of the enforcement State cannot, however, be waived - intentionally or not since it is designed to serve the essential political, social or economic interests of the State.

The ILA Report seeks to distinguish a "mere mandatory rule" from a rule that forms part of a State's international public policy. A mandatory rule is an "imperative rule of law that cannot be excluded by agreement of the parties," yet inconsistency with such a rule should not, per se, be a ground for refusing enforcement of an arbitral award. The Report states that only those mandatory rules which are at the same time Lois de police may be grounds for refusing enforcement.

Other examples that are often cited are: currency controls; price fixing rules; environmental protection laws; measures on embargo, blockade, or boycott; tax laws; and laws to protect parties presumed to be in an inferior bargaining position (e.g. consumer protection laws).
Chapter 3

Types of public policy

Public policy has three distinct levels: domestic, international, and transnational. **Domestic** public policy is when only one country is involved in arbitration, the parties come from the same country, and thus the laws and standards of that country's domestic public policy apply. Domestic public policy generally is seen as being the fundamental notions of morality and justice determined by a national government to apply to purely domestic disputes within their jurisdiction. Domestic public policy is expressed by legislative enactments, constitutional constraints or judicial practice within individual states.

**International** public policy is when an international element gets involved, either from the underlying transaction's nature or from the nationality of the parties. According to the distinction, the number of matters considered as falling under public policy in international cases is smaller than in domestic ones. The distinction is justified by the differing purposes of domestic and international relations. In cases falling under the Convention, the distinction is gaining increasing acceptance by the courts.\(^6\)

In other word, we can say that international public policy normally is more liberal than domestic public policy. International public policy is an application of a country's domestic public policy in an international context, but the court tends to consider several factors other than public interest internationally. It is not necessary that a country's international public policy has to be the same as its domestic public policy. The court will balance the interests of its own domestic public policy with the needs of international commerce. Each state has its own limitation level and

\(^6\) The New York Convention of 1958: An Overview Albert Jan van den Berg and icca
occasionally might feel that the need to control and limit the arbitral process may conflict with the importance of international commerce.

**Regional public policy** captures public policy considerations that are shared within regions (making them more than just national notions of public policy) but not necessarily shared more generally between States of the international community. A regional public policy could be considered the European Public policy which is constituted by the common European fundamental principles as protected by the European Constitution and resulted by the common national constitutions.⁷

Within the European Union, the European Court of Justice’s decision in the Eco Swiss case illustrates that a mandatory rule which is "of a fundamental character" may be part of multinational public policy and thereby pertains to the public policy of the member States, within the meaning of the New York Convention.

The expression **Transnational public policy** was first used by Pierre Lalivë⁸ in an article published in the Revenue de l’ arbitrage, he felt compelled to add that he equated transnational public policy with a “truly international” public policy.⁹ Additionally to this expression public policy has been given a lot of definitions and meanings.

Some commentators have said that public policy occurs when the countries step forward and make an effort to make unification or share legal doctrines. This notion

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⁸ Pierre Lalivë” ordre public transnational ou reellement international et arbitrage international”, rev.arb.(1986) p.239

essentially refers to a system of rules and principles, including standard, norms and custom that are accepted and commonly followed by the world community. 10

Others comment that transnational public policy is the body of customary legal rules that are not part of a State and that do not belong to international law or to national law per se, but includes such bodies of law as lex mercatoria. These commentators also argue for the existence of a “Transnational public policy” that finds application any time an arbitral tribunal applies the principles of lex mercatoria as the governing law of the dispute. It is not clear how the application of such public policy is related to the public policy of the place of enforcement nor seems to be possible to ask a national court to “apply fundamental general principles of law without inquiring whether the dispute has any relationship to a particular state” including the enforcing one.

A difference between international public policy and transnational public policy is that international public policy relies on the laws and standards of specific countries, while the latter represents the international consensus on accepted norm of conduct.

Chapter 4
Attributes of public policy

Relativity
There are two ways in which the public policy exception is relative. The first is when it is restricted to the public policy of the enforcement state. In this sense, public policy is geographically relative. The second is when it is restricted to the applicable

10 "International arbitration 2006: back to basics?", icca international arbitration congress, general editor Albert Jan van den Berg, with the assistance of the permanent court of arbitration the Hagues, congress series no 13, Kluwer Law International, page 858-861.
public policy at the time of enforcement proceedings. In this sense, public policy is chronologically relative\textsuperscript{11}

**Extra-Territoriality**

Public policies that are extra-territorial are those that an enforcement state has in common with other states. An inherent feature of extraterritoriality is that there must be an adequate link between the enforcement state and the arbitral award in order to defend applying the enforcement state’s public policy to the award. For example it would be out of place to apply French public policy to an award that has no link with France, especially when such a public policy does not regard other nation’s interests. At this juncture, a pertinent question is how does an enforcement court establish if an alleged public policy is extra-territorial\textsuperscript{12} it depends on the starting point of the public policy that has been alleged. If the public policy is derived from national legislation, then it is a question of interpreting the applicable national law. Thus it will be the job of the enforcement court to determine what the legislature intended when enacting that law. If the public policy is derived from international law in the form of a treaty, then it is a question of establishing if the alleged public policy has become a part of customary international law.

**Fundamentality**

Public policy possesses the attribute of fundamentality when it is restricted to the fundamental public policies of the enforcement state.

**Dynamic**

\textsuperscript{11} Athanasios Kaisis applications of public policy in recognition and enforcement of foreign court decisions and arbitral awards. Sakoulas publications. 2003,page 63-64.

\textsuperscript{12} Athanasios Kaisis applications of public policy in recognition and enforcement of foreign court decisions and arbitral awards. Sakoulas publications. 2003,page 60
Public policy is a concept that is adapted periodically in order to meet the changing societal needs, including political, social, cultural, moral and economic dimensions. Public policy, by nature, "is a dynamic concept that develops continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions. When society or the situation of a state changes, public policy adapts".

Chapter 5

International conventions provisions on public policy

The universal international legal mechanisms managing the enforcement of international award are treaties or conventions.

The main international multilateral treaty on enforcement arbitral awards is, of course, the New York Convention on recognition and enforcement of foreign arbitral awards of 1958.

It is the most widely acceptable among states. The Convention replaces the Geneva Protocol 1923 and the Geneva Convention 1927 as between states which are parties to both Conventions. It provides a substantial improvement since it offers a more simple and effective method of obtaining recognition and enforcement of foreign awards and purports to unify the standards by which agreements to arbitrate are observed and arbitrate awards are enforced in the signatory nations. The purpose of this Convention is to facilitate the recognition and enforcement of foreign arbitral awards. The arbitral award will bind and be enforceable in the countries that recognize the convention in accordance with the rules of procedure of the country where the award is relied upon. This is because states which are the parties to the

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13 Loukas Mistelis, Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of Foreign Arbitral Awards, 2 Int'l Law Forum Du Droit Int'l248, 252 (2000).

New York Convention accept to lower their sovereignty to recognize and enforce arbitral awards based on the arbitration agreement rendered between parties. However, the arbitral award has a chance to be challenged by the party.

Article V (1) of New York Convention contains various grounds authorizing the party to resist enforcement, and Article V (2) provides that a party may invoke or the enforcing court may deny enforcement because the underlying dispute is not arbitrable or because the enforcement of the award would violate the public policy of the enforcing state. Unlike the other grounds, public policy can be invoked by the enforcement court on its own motion. The state courts may refuse an award ex officio, but aren’t required to.

However, Article V2 (b) does not explicitly state any specific type of public policy. Some commentators sustain that the simple wording of the Convention purports that national courts have to apply some domestic public policy, the one inherent to the forum where the enforcing court seats. This interpretation is consistent with the intentions of the Drafting Committee. The drafters of the New York Convention did not seek overtly to attempt to harmonize public policy by establishing an international standard and the Convention refers to the “public policy of that country”. It is noted in the Committee’s report that it intended to limit the application of the public policy provision to cases in which recognition and enforcement of the award would be “distinctly contrary to the basic principles of the legal system of the country where the award is invoked”. ¹⁵To this extent, the Convention does not seem to aim to promote a uniform definition of public policy, leaving national courts free to shape the boundaries of the effectiveness of such exception and enhancing its usefulness as a national policy tool¹⁶


It is still believed by many academics that article V (2) (b) is referred to “the public policy” in its common sense, other consider that the New York Convention refers to the international public policy and not to the domestic ones. The starting point in considering application of public policy is that the test for refusing enforcement of foreign arbitral awards should be that of “international public policy”. Even if “the public policy” referred to in the New-York Convention is the public policy of the enforcement state; it is to be understood as the international public policy of the enforcement state. This distinction is gaining acceptance by courts in various legal systems.

It is also argued that art.V.2 of the Convention reduces the application of the public policy in two ways: firstly, in the introductory sentence, by the word “may”, permits, but does not mandate refusal and thus gives the court discretion in this regard; and secondly, the paragraph (b) requires that not only the award, but the recognition and enforcement itself would be contrary to public policy.

Even if the art.V(2)b) of the New York Convention provides an exhaustive list of challenges to the award, that list doesn't include mistakes in fact or in law by arbitrators, these latter cannot therefore be relied on for a challenge, let alone for one under public policy.

Nevertheless, the courts may, in some exceptional cases look into the substance of the case and find the recognition and enforcement to be contrary to the public policy. Such cases may be when the fulfillment of the award would constitute a criminal offence or would protect prohibited actions, such as drug trafficking, money laundering, terrorism, etc. However, the court should undertake a reassessment of the facts only where there is a strong prima facie argument of violation of international public policy.

Public policy exception is referred to in most other enforcement conventions. The 1927 Geneva Convention on enforcement of foreign arbitral awards stated that an
award would be enforceable unless “contrary to the public policy to the principles of the law the country in which it is sought to be relied upon”.

The 1975 Inter-American Panama Convention on international commercial arbitration makes reference to the “public policy of that State”.

The 1979 Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards requires that the award be “manifestly contrary to the principles and laws of the public policy of the Exequatur State”.

While the 1983 Riyadh Convention for judicial cooperation stipulates that enforcement may be refused if the award is “contrary to the Moslem Shari’a, public policy and good morals” the 1987 Amman Convention on commercial arbitration refers simply to the “public policy” of the state where the enforcement is sought.

The 1965 Washington Convention on the Settlement of Investment Disputes between the States and Nationals of other States (ICSID) doesn’t refer to the “public policy”. Even if it provides grounds for annulment of the award, grounds that usually are included in public policy concept, it was stated that “public policy (international or otherwise) was not an issue that the judge should consider when dealing with enforcement of ICSID awards”.

The European Convention on International Commercial Arbitration of 1961 does not deal with the recognition and enforcement of awards, leaving this to be dealt by other treaties, including the New-York Convention, to which the European Convention is a supplement.

The OHADA 1999 Uniform Arbitration Law provides in article 31 that an arbitral award shall be refused if the “award is manifestly contrary to a rule of international public policy of the member State”. This is the first attempt to harmonize public policy concept, by giving the more specific notion of “international public policy”.

The UNCITRAL Model Law is designed to harmonize the law of arbitration of the states by supporting the states to reform and modernize their arbitration laws to be
consistent with the UNCITRAL Model Law. The UNCITRAL Model Law on international commercial arbitration of 1985 includes “public policy” as a ground for setting aside an award by the courts in the seat of arbitration (Art. 34) and as a ground for refusing recognition and enforcement of a foreign award (Art. 36), in essence echoing Article V2(b) of the New York Convention. The provision in Article 34 (2) (i) (ii), 36 (1) (b) (i) (ii) of the UNCITRAL Model Law and Article V (2) (a) (b) of the New York Convention are almost identical. The Model Law and New York Convention does not define “public policy nor does provide any guidance on the interpretation of public policy.

The study of the public policy law provisions shows that the legislatures and courts are, understandably, reluctant to define public policy exhaustively, given the 'great diversity in the vocabulary and ambiguities' when defining "public policy".

Therefore, the UNCITRAL Secretariat has recommended further study on how the Convention countries interpret the public policy exception.

These vague national law provisions and the variety of terms and interpretations indicate the relativity of the very concept of public policy. However, there is no integrated standard of public policy. The concept of public policy has been interpreted and applied differently from country to country. It all depends on the political, religious, social, cultural, and economic systems. Generally, the public policy exception in accordance with New York Convention Article V has been construed narrowly, as seen in the most reported cases. However, there are certainly many cases enforcing international arbitration awards despite a claim that doing so would violate the public policy of the enforcing state.
Chapter 6

Interpretation of public policy, in various jurisdictions. Cases

United States.

In the U.S. the leading case is Parsons & Whittemore Overseas Co. v. Societe Generale de l’Industrie du Papier. In Parsons & Whittemore case, the United States Court of Appeals held that public policy did not equate with "national policy" (in the diplomatic or foreign policy sense), and it would not refuse to enforce an award in favor of the Egyptian party simply because of tensions at that time between the United States and Egypt. In this case the Court of Appeals ruled in favor of a very narrow interpretation of public policy, deciding that “Enforcement of foreign arbitral awards may be denied on public policy basis only where enforcement would violate the forum state’s most basic notions of morality and justice.” The Court then raised an interesting point with regard to the difference between the scope of public policy as a tool for promoting national interests and its scope in relation to the aim of the Convention: such narrow approach is the one really functional to the promotion and enhancement of international commercial arbitration. The Parsons case is the landmark of the U.S. public policy case, showing that public policy should be construed narrowly. Even Parsons did not present any explicit guideline regarding what considered the most basic notions of morality and justice, and U.S. courts now use Parsons as the standard to practice in later cases.

England

The main case regarding public policy in England is Deutsche Schachtbau-und Tiefbohrgesellschaft MB.H (D.S.T.) v. Ras Al Khaimah Nat’l Oil Co. (Rakoil). In this

case, it was determined that in order for an English court to set aside the award on the public policy defense, the claiming party must prove that there is "some element of illegality or that the enforcement of the award would be clearly injurious to the public good or possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised. In addition, it was not contrary to public policy of England if the arbitrator used common principles underlying the laws of the various nations to govern contractual relations, especially when the parties failed to specify which system of law would apply. In this case, the English court confirmed that it had to violate a particular existing justified interest of the English public to be a public policy exception. “The court must see that such recognition and enforcement of award may endanger the interest of the state's citizens by executing its public authority. Thus, any public policy exception that cannot show clearly how the recognition and enforcement could damage the interest of state's public will not be considered as a bar to recognize or enforce the award.”

Similar to the important American case of Parson & Whittemore, the D.S. T. case is the crucial landmark English case of public policy in relation to the recognition and enforcement of foreign arbitral award. Still, it is not defined specifically what situation would fall in the meaning of "clearly injurious" or "wholly offensive." Importantly, the D.S. T. case clarified that the English courts do distinguish between English international public policy and English domestic public policy.

**France**

In France, the Code Civil makes a distinction between national and international public policy. Article 1498 and Article 1502 (5) of NCCP describe the public policy concept. According to Article 1498, the French court will recognize or enforce the foreign arbitral award if such recognition or enforcement is not contrary to
international public policy. Article 1502 also provides that "an appeal against a
decision which grants recognition or enforcement is available only in the following
cases ... (5) where the recognition or enforcement is contrary to international public
policy." An arbitration award made abroad may be appealed only if French courts
find circumstances matching Article 1502. Article 1504 of NCCP also emphasizes that
an arbitral award made in France may be subject to be set aside if it is contrary to
international public policy. The 'international public policy' to which Article 1502 (5)
and 1504 refer has been interpreted to mean the French conception of international
public policy and not a "truly international public policy."\(^{18}\)

In French courts a very narrow view of public policy is implemented, which is well
demonstrated by the Cour d'appel de Paris's decision in the well known SNF SAS v
Cytec Industries BV case. In its decision granting enforcement of an award rendered
in Belgium, the Court of Appeal ruled that enforcement would only be refused on
public policy grounds if the violation was "flagrant, actual, and concrete". The term
"flagrant" has been defined as meaning that the award must "contain the
ingredients of the breach" of public policy. The Cour d'appel de Paris has used the
term "Flagrant, effective and concrete" in a number of cases where public policy
defenses have been raised.

The decision rendered by the Court Appeal of Paris in 2004 on Thales v. Euromissile
\(^{19}\) supports also the limitation of public policy theory. The court refused to set aside
an award and ruled the arbitral award as stipulated in NCCP Article 1502 (5).

**Germany**

Germany, as well, adopted a narrow interpretation of international public policy,
that must consist in an "a violation of essential principles of German law"
contravening the basic rules of public and commercial life or the "German idea of


justice in a fundamental way”. In Germany, the courts have repeatedly held that, in the case of a foreign award, not every infringement of mandatory provisions of German law constitutes a violation of public policy; what is required is an infringement of international public policy.  

**Greece**

Public policy is described at article 33 of civil code. Under article 33 «a provision of foreign of a foreign legal order is not applied if its application is contrary to the social interests or general to the public policy». Public policy under article 33 of civil code is distinguished to mandatory rules (jus cogens) under article 3 of civil code. The meaning of public policy under article 33 is narrower than the meaning of mandatory rules of article 3 of civil code but this narrower view is taken into consideration by courts when they examine whether an arbitral award will be enforced in Greece. The fundamental principles of public policy are either substantial or procedural. Greek courts refer repeatedly to the public policy as having an international character and not a domestic one. Greek academics consider that the purpose of the New convention is to abolish any burden on the circulation of arbitral awards and this poses the essentiality for a narrow interpretation of public policy. This view is followed also in court practice.

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It is worth referring to the controversial subject of punitive damages to give a characteristic example of greek court practice. Regarding this matter it has been pointed by the academics that what has to be examined is the degree of the compensation and the non application of the principle of proportionality, I order public policy to be applied. This view was followed in court practice in the decision of high court of Arios Pagos (17/1999, nomiko vima, 461-464 and 1260/2002, XrID 2002, 922).

**China**

Under Article 260 (2) of the 1991 Civil Procedure Law, if the Chinese Court determines that execution of the arbitral award would be against the social and public interest of China, the court has the discretion to disallow the execution of the award. It can be seen that the grounds set forth in Article 260 of the 1991 Civil Procedure law echo Art V of the New York Convention. In Chinese law there is no such phrase as “public policy”. Instead, Chinese law uses “public and social interest”. China interprets the concept of “public and social interest” using its domestic standard, which always means the fundamental public and social interest in China, i.e., the basic legal and moral rule of China. There is no such notion as an “international public interest”.

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In the Dongfeng Garments Factory of Kai Feng City and Taichun International Trade (HK) Co. Ltd., v. Henan Garments Import & Export (Group) Co. (1992) case we can examine an example of the “Chinese public policy” The court held that enforcing an arbitral award requiring the local party to pay ascertain amount of money for damages would bring a negative impact on the local economy. Generally, public policy seems to be a ground not often being accepted by courts as a ground for refusal of enforcement of an arbitral award. It is interesting to refer to the report of Dr. Lu at the ICCA International arbitration congress that "he knew of no award having been denied enforcement on the ground of public policy in China".

**Egypt**

Since the Egyptian law does not distinguish between international and domestic public policy, 'Egyptian public policy' accordingly cannot be seen to imply international public policy. When public policy is violated, Egyptian court will set aside the arbitral award on its own motion even if there is no party to raise the issue. Generally, Egyptian public policy violation will be considered if it contradicts the social, political, economic and moral values that relate to higher interest.

**Saudi Arabia**

The definition of public policy under arbitration law in Saudi Arabia is still unclear, as there is no official or formal interpretation from the courts knowledge. Public policy under Shari' a law differs from that applicable in Western world because the Shari' a

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25 *“New horizons in international commercial arbitration and beyond” ICCA international arbitration congress no 12, general editor Albert Jan van den berg, kluwer law arbitration. , page 288

26 * Cairo Court of Appeals, 91 Commercial, Cases No. 108 and 1111121, 30/5/2005.
is more complex and has more dimensions than public policy anywhere else in the world.  

The notion of public policy in Shari’a is different from the Western countries since “Shari’a focus on collective while the West focus on individual rights. An interesting example if the provision of Shari’a which determines that any contract containing speculation, or contract clauses subject to an occurrence of a specified, yet uncertain event, is void. Pursuant to this doctrine, “insurance contracts as we know them in the West would be void under the Shari’a.

In conclusion it is understandable why Public policy is of great importance to arbitration in Saudi Arabia, especially when it comes to the enforcement of an arbitral award, regardless of whether it is domestic or foreign.

India

New York Convention is domestically applied by the Foreign Awards (Recognition and Enforcement) Act, 1961 which has been repealed and replaced by the new Indian arbitration and conciliation act in 1996. The meaning of public policy is clarified in the explanatory notes which follow sections 34(2) (b) (ii) and 48(2) (b) of the 1996 act. These notes make clear that a party seeking to set aside or recognition and enforcement of an arbitral award on grounds of public policy faces a very high threshold.

Essentially, in order to be contrary to the public policy of India, the award must rise to the level of having been induced by fraud or corruption. Furthermore, the explanation to section 34(2) (b) (ii) also specifies that a violation of public policy arises where there is a breach of the confidentiality provisions contained in section


75 of the 1996 act, or where evidence obtained in conciliation proceedings has been adduced in the arbitration. In short, pursuant to the examples specified in the explanatory notes included in the 1996 Act, only a serious violation of due process will amount to a violation of Indian public policy.

In India, there are court decisions to show that the courts interpreted the public policy narrowly. In *General Electric Co. v. Renausagar Power Co.* (Civil Appeal No. 71& 71 A of 1990 and No. 379 of 1992) (Sup.Ct.of India, Oct 7, 1992) case, the Indian Supreme Court ruled that the grounds for refusing enforcement of arbitral award should be interpreted more narrowly. The Supreme Court upheld a $ 12.3 million ICC Arbitration award to General Electric (G.E) determining that award which included compound interest is not contrary to the public policy of India.

In addition, the supreme court of India in Renusagar dispelled many of the doubts with regard to the scope of public policy and clarified the meaning of public policy when used in enforcement of foreign awards. The court said the terms should not be equated with the law of India, something more that the violation of the law of India must be established: By applying this criterion, the enforcement of foreign award would be refused, if such enforcement would be contrary to: 1) the fundamental policy of Indian law 2) the interests of India or 3) justice or morality. This decision set an extremely high standard for Indian courts to refuse to enforce a foreign arbitral award. This court also held that mere violation of a law would not lead to the conclusion that “public policy” has been infringed.

**Russia**

Public policy ground is one of the most often relied one by Russian parties opposing enforcement. The history of enforcement of foreign awards is short comparing to most of the other jurisdictions. This was due in part to the fact that parties from the former Soviet bloc almost invariably voluntarily complied with arbitral awards, and

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“the courts of the CEE states and Russia had limited opportunity to develop substantial jurisprudence regarding the proper interpretation of the public policy concept”. First cases were brought to Russian courts in the beginning of 90’s, and the concept of “contrary to public policy” was “practically unknown to Soviet legal practice and therefore new to Russian courts.” Before that, as the president of the international commercial arbitration court and the Russian federation chamber of commerce and industry Alexander S. Komarov testified, there was no single case brought to Soviet Courts to enforce foreign arbitral award, notwithstanding the ratification of New York Convention by USSR in 1960.30

More recently, in 2008, Alexander S. Komarov, observed that the concept of public policy applied by the courts is “too broad and often incorrect.”31 Perhaps the most notorious denial of enforcement involved an award that allegedly threatened a “strategically important” enterprise with bankruptcy.32

However, it is possible to demonstrate a trend of narrowing down the construction of public policy through examples of several cases. In 90’s Russian courts implemented broad interpretation of the concept of public policy. A decision in 2003 of Federal Arbitrash court for Volga-Vyatshsky Circuit has been widely criticized for its anti-arbitration and protectionist attitude. The court held that enforcement of foreign arbitral awards shall be refused on the basis of public policy because enforcement would violate the principle of equity based on the allegation that payment of damages under the award by the respondent, a large enterprise in Nizhny Novgorod, would lead to its bankruptcy and would impact in a negative way the economic situation of the country. Such an interpretation of the public policy

30 A.Komarov, the development of an arbitration culture within the state judiciary in the Russian Federation, in icca congress series no 8, 1996, page 230.
without any doubts contradicts to the international and prevailing Russian standards. 33

In the decision of the Federal Arbitrazh Court For Moscow Circuit, April 3rd of 2003* the court accepts violation of public policy and when “enforcement of the award will result in actions prohibited by the law or causing damage to sovereignty or security of the state, affecting interests of large social groups, inconsistent with fundamental principles of economic, political and legal system, affecting constitutional right and freedoms of citizens and conflicting with basic principles of civil legislation such as the equality of the parties freedom of the contract and sanctity of the property”. This determination though being still broad enough underlines that only fundamental legal values may bar enforcement of an award.

Another decision of the same court (the Federal Arbitrazh Court for Moscow Circuit, 11 October of 2006) brings an example of even more narrow interpretation “violation of Russian public policy is understood as an infringement on the basis of legal order or morality, but not as violation of legal principles of separate branch of law.”

Another conclusion from analysis of court practice is that there is no distinction between domestic and international public policy, reflecting insufficient level of judicial knowledge of current international practice.

Yet Russian courts have also rejected the public policy defense in a number of cases, including, for instance, arguments based upon: Russian currency exchange laws, Soviet signature requirements for foreign trade contracts, failure of the arbitrators to take into account the principle of “proportionality” in determining the extent of liability, failure of the tribunal to apply mandatory provisions of the Russian Civil Code with respect to the proper performance of obligations, and numerous other situations.

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Chapter 7

Public policy as an expression of local protectionism

A trend toward delocalization of arbitral law has been underway for the last 50 years, starting with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). This shift has increased the focus on public policy as a potential means of control by national courts over international arbitration. The States’ attitude to arbitration, as liberal as it may be today, imposes by virtue of its sovereign power, one important boundary, the respect of the public policy, this being the ultimate limit to the autonomy of the international arbitration. Furthermore, in some occasions the local competent courts could be impacted by the “pressure” from the officials of the local governments, to partially protect the local parties who are subject to enforcement of the foreign awards. In brief, the recognition and enforcement of foreign award may be delayed and/or frustrated by the impacts of “local-protectionism”. So, public policy mediates between the interests of transnational business and those of the State with the closest connection to the contract. Any delimitation of the scope of the public policy exception should represent an appropriate balance between respecting arbitral finality and party autonomy on the one hand, and preventing unjust, prejudiced awards on the other hand. It should maintain a balance between protectionism and liberalism, as well as between parochialism and globalism.

Chapter 8

Conclusion

Whilst the New York Convention has been acclaimed by many, it was considered by some that the public policy exception could undermine the objectives of the Convention. A review of the cases shows that Article V.2 (b) has not created any serious mischief and the attempts to resist enforcement on grounds of public policy
have rarely been successful. Nevertheless, uncertainty and inconsistencies concerning the interpretation and application of public policy by State courts encourage the losing party to rely on public policy to resist, or at least delay, enforcement.

The desire for harmonization in application of the public policy defense is clearly a driving impetus in the civilization of arbitration. The ILA Final Report recommendations are intended to guide the exercise of discretion of the enforcement court in three ways: first, by emphasizing the exceptional nature of the public policy defense while stressing that the particular public policy principle in any given case must be sufficiently fundamental; second, by cataloging the various elements that fall within the concept of public policy; and third, by specifying the source of law (while excluding other sources) that may be considered when assessing a potential public policy violation.

Though public policy is used less and less in practice as a limit to the recognition and enforcement of foreign arbitral awards, the numerous concepts and interpretations still found in practice and legal researches produce unwarranted insecurity and lack of predictability and consistency. It is truth that there seems to be a general trend by most jurisdictions towards narrowly interpreting the public policy exception in favor of enforcement, there will still be few jurisdictions where it will be interpreted broadly.

Greater harmonization of approach will nevertheless lead to greater consistency and predictability, which would dissuade unmeritorious challenges to awards. The arbitration community has concerns for the effectiveness and legitimacy of the international arbitral system. The ILA Final Report is a helpful means for the arbitration system which is seeking to internalize its own regulatory function. The clarifications of problematical issues by the use of other means would lead to a true globalization of procedural justice by arbitration to cope with the globalization of international trade and investment.
BIBLIOGRAPHY

PRIMARY SOURCES

Treaties
UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

SECONDARY SOURCES

Books

Athanasios Kaisis professor at the Aristotle university of Thessaloniki applications of public policy in recognition and enforcement of foreign court decisions and arbitral awards. Sakoulas publications, 2003


“International arbitration 2006: back to basics?”, ICCA international arbitration congress, general editor Albert Jan van den Berg, with the assistance of the permanent court of arbitration the Hague, congress series no 13, Kluwer Law International
“New horizons in international commercial arbitration and beyond” ICCA international arbitration congress no 12, general editor Albert Jan van den berg, kluwer law arbitration.


Tracy S. Work, “India Satisfies its Jones for Arbitration: New Arbitration Law in India”, Transnational Lawyer 10 (Spring 1997)

OTHERS

Internet Sources

www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_

ILA Public Policy Report


International Commercial Arbitration and Punitive Damages, Niccolò Pietro Castagno, at kluwerarbitration.com

Public policy as a ground of non enforcement of a foreign decision. Study of Ioannis Delikostopoulos, professor at Law school of Athens, published at Memorial Edition of St.Kousoulis 2012, 103-115, Nomos database (intrakom international)