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THE ROLE OF PUBLIC POLICY IN INTERNATIONAL COMMERCIAL ARBITRATION²⁶⁴

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Review Paper

Abstract: Public policy plays a dual role in resolving disputes through international commercial arbitration. At different stages of the arbitral process, it can function either as a shield or as a sword. As a shield, public policy sets the boundaries within which the parties' freedom to conclude an arbitration agreement may operate, thereby protecting the fundamental values of the state where the arbitral tribunal is seated i.e., national public policy. Conversely, as a sword, public policy comes into play during the recognition and enforcement of arbitral awards, limiting such recognition when it conflicts with the broadly accepted values of the international community i.e., international public policy.

The concept of public policy is neither precisely nor universally defined. Broadly, it encompasses a state's fundamental economic, legal, moral, political, religious, and social values, which constitute the core norms shaping the legal and social order of that state. However, values deemed part of public policy in one jurisdiction may not hold the same status in another, complicating the establishment of a uniform, universal definition.

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²⁶⁴This work is a result of research within the project "Adapting the Legal Framework to Social and Technological Changes with a Special Focus on Artificial Intelligence," carried out in 2025 by the Institute of Comparative Law with financial support from the Ministry of Science, Technological Development and Innovation (contract number 451-03-136/2025-03/200049)

Given the complexity of public policy and its diverse application in both national and international contexts, this paper seeks to examine how national courts and arbitral tribunals interpret public policy values at various stages of the arbitration process.

Keywords: national public policy, international public policy, setting aside of arbitral awards, recognition of arbitral awards

INTRODUCTION

Arbitration as a method of dispute resolution rests upon the arbitration agreement, through which the parties exercise their autonomy by excluding a particular dispute from the jurisdiction of state courts and conferring it upon a designated arbitral tribunal.

Irrespective of its form whether embedded as an arbitration clause or executed as a separate agreement the arbitration agreement produces legal effect only if it satisfies the conditions prescribed by law, which may be substantive or procedural in nature.

From a substantive perspective, an arbitration agreement is valid if it meets, among other things, the legal requirements concerning the parties' consent and capacity, as well as the written form of the agreement²⁶⁵. Furthermore, the agreement will only have legal effect if the subject matter of the dispute is arbitrable and does not contravene the public policy of the state where the tribunal is seated. In this way, public policy first becomes relevant at the outset of the arbitration process, when the tribunal examines its jurisdiction.

Yet, the role of public policy extends beyond this initial phase. Its influence permeates the arbitration proceedings and continues even after their conclusion, particularly in relation to the annulment, recognition, and enforcement of arbitral awards. Consequently, public policy may be invoked in two interconnected but distinct contexts.²⁶⁶

²⁶⁵ For more details see J. Perović, *Ugovor o međunarodnoj trgovinskoj arbitraži*, Službeni glasnik, 2002, p. 41 ff.

²⁶⁶ T. Varadi, *Međunarodno privatno pravo*, Novi Sad, 1990, p. 81

The first context concerns the assessment of an arbitration agreement's compatibility with the public policy of the state in which the arbitral seat is situated, with the objective of determining whether the agreement conforms to the domestic public policy framework. The second context arises post-award, when a court evaluates whether the award sought to be recognized and enforced is consistent with international public policy.

To fully grasp the distinction between domestic and international public policy, it is essential first to define the concept of public policy itself.

THE CONCEPT OF PUBLIC POLICY

The concept of public policy is inherently complex and multifaceted²⁶⁷, having been examined extensively by both domestic²⁶⁸ and

²⁶⁷ J-F. Poudret, S. Besson, *Comparative Law of International Arbitration*, Sweet & Maxwell, 2007, p. 292

²⁶⁸ S. Perović, "Javni poredak i arbitraža", *Međunarodna privredna arbitraža – stanje i perspektive*, Beograd, 1997, p. 275–307. M. Pak, *Međunarodno privatno pravo*, treće izdanje, Beograd 1985, p. 596–617; T. Varadi, *Međunarodno privatno pravo*, Novi Sad 1990, p.78–89.

According to Professor Perović, four approaches or theories can be distinguished when defining public policy, based on their underlying principles and basic ideas.

The first approach does not provide a definition of public policy, leaving it to the discretion of the courts to determine the scope of the concept in each specific case. The second approach holds that it is sufficient to establish basic guidelines and instructions for courts when defining public policy. As in the first approach, the court acts as the driving force, ultimately shaping the concept of public policy.

The third approach, which has relatively few supporters, defines public policy by listing the laws that protect public interests. Typically, laws considered part of public policy include constitutional, administrative and criminal laws, as well as those governing family relations and statutes regulating the personal status of individuals. This approach assumes that relationships arising under these laws are of a public nature, established between the state and individuals.

The fourth approach advocates a synthetic formulation of public policy to arrive at a universally accepted definition. Numerous definitions are proposed in this sense; however, it cannot be asserted with certainty that a universally accepted definition exists at an international level.

international scholars.²⁶⁹ Its complexity stems from the fact that public policy is not confined solely to arbitration law or domestic legal systems, but also plays a significant role in international and private international law.²⁷⁰ Despite considerable scholarly effort and debate, no single, universally accepted definition of this concept has yet been established. Moreover, what qualifies as public policy in one legal system may not carry the same weight or status in another, further complicating attempts to articulate a universally applicable understanding of this concept in international law.

Regardless of the various approaches to its definition, it can be generally concluded that the concept of public policy encompasses the fundamental economic, legal, moral, political, religious, and social values that constitute the identity of a state. The elements of public policy can also be analyzed in terms of the relationship between public authorities and societal values. In this context, according to Debbasch²⁷¹, public policy reflects the concern of public authorities for the “totality of economic and social equilibria.” In other words, public authorities are responsible for ensuring the economic and social security of citizens, addressing their societal needs in the modern era, and promoting their overall well-being at a macro level. Drawing on the core values of a given society, states articulate the specifics of domestic, or internal, public policy through legislation.

Although approaches to its definition differ, all states share the objective of safeguarding their fundamental values through the interpretation and application of public policy. Accordingly, states will not permit the enforcement of judicial or arbitral decisions that would compromise or threaten these values. This illustrates the two fundamental

²⁶⁹ S. Schwebel, S. Lahne, "Public policy and Arbitral Procedure", *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series No. 3, (P. Sanders, eds.), Kluwer Law International, 1987, p. 205.

²⁷⁰ G. Knežević, V. Pavić, *Arbitraža i adr*, Pravni fakultet u Beogradu, 2010, p.45 ff.

²⁷¹ C. Debbasch, *Institutions et droit administratif, 2 – L'action et le contrôle de l'administration*, Paris 1978, p.75-76, navedeno prema Z. Tomić, “Javni poredak : Pojam i struktura”, *Anali Pravnog fakulteta*, 2019, p. 37

legal dimensions of public policy, corresponding to its dual functions: protective and corrective.²⁷²

The protective, or “shield,” function signifies that public policy comprises a set of rules intended to preserve a state’s value system, which must be respected without exception. The corrective, or “sword,” function, by contrast, represents an instrument of private international law that modifies the ordinary application of foreign law or permits the non-recognition of foreign judicial or arbitral decisions,²⁷³ as well as the evidentiary effect of foreign public documents, in order to uphold core accepted legal values.²⁷⁴ Consequently, the norms and principles of public policy, grounded in fundamental societal values, differ from one state to another.²⁷⁵

Despite the differences among states, the common elements of public policy can be summarized as follows: it comprises a set of fundamental societal values, principles, institutions, norms, and measures grounded in public interests. These elements aim to ensure the exercise and protection of citizens’ freedoms and rights, maintain the normal course of social life, and guarantee the proper functioning of public services. Ultimately, these interests may be enforced through state coercion that is, through legally prescribed measures of public authority while observing the principle of proportionality.²⁷⁶

In legal theory, alongside domestic public policy, the concept of international or supranational public policy is also recognized. However, there is no full consensus regarding the precise definition of these concepts or whether they constitute two distinct categories of public policy. Initially, it is necessary to outline the notion of international public policy.²⁷⁷

²⁷²M. Pak, *op.cit.*, p. 596.

²⁷³Z. Tomić, *op.cit.*, p. 39.

²⁷⁴A. Jakšić, *Međunarodno privatno pravo*, Beograd, 2017, p. 623, 629

²⁷⁵J. Lew, *Applicable Law in International Commercial Arbitration*, New York 1978, p. 532

²⁷⁶Z. Tomić, *op.cit.*, p.40.

²⁷⁷Some scholars argue that, apart from domestic public policy, there is no distinct concept of international public policy. On this view, the so-called norms of international public policy are merely domestic public policy norms applied in the context of the recognition and enforcement of foreign arbitral awards. Others, however, contend that international public policy is a separate concept, distinct from domestic public policy, and operates alongside the national legal order. Nevertheless, its precise scope and

In civil law jurisdictions, the term *ordre public international* refers to the application of public policy within the framework of private international law. It essentially designates the limited segment of a state's public policy that may act as a barrier to the application of foreign law by domestic courts or to the recognition of foreign judicial or arbitral decisions by those courts.²⁷⁸

In another sense, international public policy denotes that part of public policy which falls within the domain of public international law. Professor Tomić refers to this as *external public policy*, encompassing primarily the general rules and principles of international law. Accepted by the international community of states, these norms form part of *ius cogens* and comprise two core components: (1) respect for human rights, and (2) the performance of international obligations in good faith (*bona fide*).²⁷⁹

The invocation of public policy principles is a feature of various branches of law. However, since this paper focuses on the role of public policy in international commercial arbitration proceedings, the analysis will be confined to this specific area.

The term *international public policy (ordre public international)* was first introduced in the French Code of Civil Procedure and was later incorporated into other arbitration laws.²⁸⁰ Pursuant to Articles 1504 and 1502 of the French Code of Civil Procedure, an arbitral award rendered in France may be annulled if it is contrary to international public policy. In the landmark *Lautour* case, the French Court of Cassation likewise referred to *ordre public international* as “universal principles of justice regarded in France as possessing absolute international value.”²⁸¹

content remain unclear. See more: Rubino-Sammartano, *International Arbitration Law and Practice*, Juris 2014, p. 731

²⁷⁸ P. Mayer, “Chapter 2: Effect of International Public Policy International Arbitration” , *Pervasive Problems in International Arbitration*, Julian D. M. Lew and Loukas A. Mistelis (eds), International Arbitration Law Library, Volume 15, Kluwer Law International; Kluwer Law International, 2006, p. 61

²⁷⁹ Z. Tomić, *op.cit.*, p. 43.

²⁸⁰ See, for instance, Article 1502(5) of the French Code of Civil Procedure of 12 May 1981 (*French Decree Law No. 81-500 of 12 May 1981*); Articles 458 to 23(h) of Algerian Decree No. 83-09 (1993).

²⁸¹ Court of Cassation, Civ. 1, 25 May 1948, Bull. civ. 1948, I, No. 163, RCDIP, p. 89

Similarly, Italian courts have held that public policy encompasses “a set of universal principles shared by nations belonging to the same civilisation, aimed at safeguarding fundamental human rights, which are often enshrined in international declarations or conventions.”²⁸² This understanding closely aligns with what is commonly referred to as *transnational public policy*.

The distinction between international and domestic public policy has likewise been endorsed by the Committee on International Commercial Arbitration of the International Law Association, which has issued a dedicated Interim Report on the matter. French and Italian courts have similarly acknowledged the necessity of such a distinction.²⁸³

For instance, in interpreting Article V(2)(b) of the New York Convention, the Milan Court of Appeal held that a breach of public policy should be construed as a breach of *international* public policy. In its reasoning, the Court defined public policy as a body of universal principles shared by peoples of similar civilisations, intended to protect fundamental human rights frequently enshrined in international declarations and conventions. Public policy so conceived may more appropriately be characterised as *transnational* or *supranational public policy*.²⁸⁴

Building upon the diverse national approaches to the notion of international public policy, it is important to note that international conventions in this field have refrained from defining the term public policy. The texts of international conventions governing the recognition and enforcement of arbitral awards (New York Convention) do not define or elaborate on the concept of international or transnational public policy. Nevertheless, both the New York Convention²⁸⁵ and the Geneva Convention²⁸⁶ provide that recognition and enforcement of a foreign arbitral award may be refused on public policy grounds in the state where

²⁸² *Allsop Automatic Inc. v. Tecnoski snc*, Court of Appeal of Milan, 4 December 1992

²⁸³ Ph. Fouchard, E. Gaillard, B. Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International, The Hague, 1999, p. 954

²⁸⁴ See *W. V. F. and V*, Decision from 30.12. 1994, (1995) Bull. ASA 217

²⁸⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 UNTS 38, entered into force 7 June 195

²⁸⁶ Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927) 92 LNTS 301, entered into force 12 June 1929.

enforcement is sought. Specifically, Article V(2)(b) of the New York Convention authorises the competent authority to refuse recognition or enforcement of an arbitral award if it determines that doing so would be contrary to the public policy of that country.

The UNCITRAL Model Law²⁸⁷ likewise refrains from defining public policy. However, unlike the aforementioned conventions, it explicitly provides that a violation of public policy may constitute not only grounds for refusing recognition and enforcement of a foreign arbitral award²⁸⁸, but also grounds for setting aside an award rendered within the jurisdiction.²⁸⁹

It is therefore necessary to draw a distinction between domestic and international public policy, while recognising that both represent two facets of the same underlying concept. The divergence between them mirrors the difference between states as self-contained, legally defined socio-political entities endowed with all corresponding attributes and the international community, which remains a collective yet insufficiently defined construct.

The justification for recognising an international public policy can only rest upon values shared by all states. Accordingly, its scope must be narrow and strictly construed, limited to fundamental moral or legal principles acknowledged by all civilised nations. Conversely, if the concept of international public policy were interpreted broadly and applied expansively, it could effectively result in the revision of domestic legal orders under the pretext of enforcing international standards through judicial review. Moreover, since the invocation of international public policy ultimately falls within the jurisdiction of national courts, a legitimate concern arises regarding the extent to which these courts may generate legal uncertainty, and, in effect, create new law, by applying an ill-defined notion of international public policy in proceedings concerning the recognition and enforcement of foreign arbitral awards.

²⁸⁷ UNCITRAL Model Law on International Commercial Arbitration, UN Doc. A/40/17 (1985), with amendments as adopted in 2006

²⁸⁸ Art 36. UNCITRAL Model Law

²⁸⁹ Art. 34. UNCITRAL Model Law

THE ROLE OF PUBLIC POLICY IN ARBITRATION PROCEEDINGS

Constituting the Jurisdiction of the Arbitral Tribunal

Issues of compliance with public policy in arbitration, as well as in related proceedings, may arise before both arbitral tribunals and national courts. Arbitral tribunals are obliged to take public policy into account *ex officio* when determining their jurisdiction and throughout the arbitral process.²⁹⁰ By contrast, before national courts, such issues typically arise at stages preceding the establishment of arbitral jurisdiction or in proceedings concerning the recognition and enforcement of arbitral awards.

An arbitral tribunal may exercise jurisdiction solely on the basis of a valid arbitration agreement. In assessing jurisdiction, the tribunal evaluates the validity of the agreement in accordance with the law of the state in which the arbitral seat is situated (*lex arbitri*). This principle is reflected in Article 58 of the Serbian Arbitration Act²⁹¹, which provides that a court shall set aside an arbitral award if it is found to be contrary to the public policy of the Republic of Serbia (*lex fori*).

In international commercial arbitration, there is no classical *lex fori*. Accordingly, when assessing the validity of an arbitration agreement, arbitrators must take into account compliance with the mandatory rules and public policy of the state in which the arbitral seat is situated. Failure to do so exposes the award to the risk of being set aside. The grounds for annulling a domestic arbitral award are generally formal or legal in nature; aside from public policy considerations, they do not allow for a substantive review of the award's legal or factual foundation.²⁹²

Beyond the general obligation of state authorities to uphold public policy, the justification for respecting public policy in arbitration can also be traced to the very nature of arbitral proceedings.²⁹³ One of the

²⁹⁰M. Stanivuković, *Međunarodna arbitraža*, Službeni glasnik, 2013, p. 274.

²⁹¹Zakon o arbitraži, *Službeni glasnik RS*, br. 46/2006.

²⁹²M. Stanivuković, *op.cit.*, p. 266.

²⁹³J. Vukadinović Marković, *Postupak rešavanja sporova pred međunarodnim trgovisnkim arbitražama*, Institut za uporedno pravo, 2022, p. 113 ff.

fundamental features of arbitration is confidentiality, which serves to protect the parties' reputations. Unlike court proceedings, which are conducted publicly and whose decisions are published, arbitration hearings are held behind closed doors, awards are typically not published, and the identities of the parties are not disclosed. Were disputes arising from violations of public interests to remain private and unpublished, there would be a risk of recurrent breaches of the same principles. In contrast, the publication of court decisions enables lower courts to follow precedents set by higher courts, thereby preventing the repetition of violations of fundamental values, as the public becomes aware of the consequences of such breaches.

Public Policy in the Recognition and Enforcement of Arbitral Awards

In addition to arbitral tribunals, which *ex officio* consider whether an arbitration agreement complies with the public policy of the state in which the tribunal is seated, it should be noted that objections based on violations of public policy are often raised by the parties during proceedings to set aside an arbitral award or to oppose its recognition or enforcement. For a foreign arbitral award to be recognised and enforced, it must comply with the public policy norms of the state where enforcement is sought. A breach of a state's public policy constitutes a valid ground for refusal of recognition and enforcement, in accordance with Article V(2)(b) of the New York Convention and Article 36 of the UNCITRAL Model Law. These provisions confirm that national courts retain ultimate control over the arbitration process under their domestic law.²⁹⁴

In exercising control over proceedings following the issuance of an arbitral award, states seek to balance the parties' right to autonomy with the state's interest in safeguarding and protecting the fundamental principles embodied in public policy.²⁹⁵ To both preserve the core values

²⁹⁴ L. Mistelis, "Is Arbitrability a National or an International Law Issue?", *Arbitrability: International and Comparative Perspectives* L. Mistelis & S. Brekoulakis (eds.), Kluwer Law International, 2009, p. .2. fn. 6

²⁹⁵ Z. Prodromou, "The Public Policy Exception in International Commercial Arbitration" ,*The Public Order Exception in International Trade, Investment, Human*

of their legal systems and respect the finality of arbitral awards, courts in many jurisdictions apply international public policy standards when deciding on recognition and enforcement. As there is no universally accepted definition of this concept, judicial practice emphasises that public policy must be approached with particular caution. Refusal of recognition is justified only where enforcement would be illegal, contravene the public good, or offend “a reasonable and fully informed member of the public on whose behalf the state acts.”

Analysis of arbitral practice indicates that invoking public policy seldom leads to the refusal of recognition or enforcement of an arbitral award. This can be explained by the narrow interpretation of public policy norms in recognition proceedings, as well as by the distinction between domestic and international public policy.²⁹⁶

In this context, public policy in international commercial arbitration serves both negative and positive functions in protecting the fundamental values of the international community. In its negative function, public policy acts as a shield, safeguarding the international community from acts that could contravene its core principles.²⁹⁷ Accordingly, the law applicable to a particular dispute will not be applied if it conflicts with fundamental, generally accepted principles. In its positive function, public policy functions as a sword for the international community.²⁹⁸ Through norms of direct applicability, it ensures the protection of essential legal values even where another body of law governs the dispute. The positive function is realized through these directly applicable norms, whose observance and enforcement serve to uphold the

Rights and Commercial Disputes, International Arbitration Law Library, Vol. 56, Kluwer, 2020, p. 169

²⁹⁶ A. J. van den Berg, “Refusal of Enforcement under the New York Convention of 1958: The Unfortunate Few” (1999) 10(2) *ICC Int’l Court of Arbitration Bulletin* 75

²⁹⁷ J. D. M. Lew, L. A. Mistelis, S. M. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 422.

²⁹⁸ P. Lagarde, “Public Policy”, *International Encyclopedia of Comparative Law* (J. C. B. Mohr and Martinus eds.) Nijhoff Publishers 1994, p. 9

community's fundamental principles.²⁹⁹ Nevertheless, norms of direct applicability should not be equated with public policy itself.³⁰⁰

In other words, public policy performs a dual role: it delineates the boundaries within which contractual freedom and party autonomy may operate when concluding an arbitration agreement and it sets limits on the recognition and enforcement of arbitral awards, essentially defining the permissible content of an award. Distinguishing between these functions is crucial, as the sanctions and consequences applied in each case differ.³⁰¹ Firstly, public policy constitutes a direct prerequisite for the arbitral tribunal's jurisdiction. Secondly, the recognition and enforcement of an arbitral award may be contested on public policy grounds, thereby challenging the fundamental purpose of arbitration: to resolve disputes conclusively through an enforceable award.

CONCLUSION

In arbitration proceedings, public policy performs a complex dual function: it safeguards the fundamental values of both the state and the international community, while also imposing limits on the autonomy of the parties involved. In its 'negative' function, public policy serves as a shield, preventing the application of rules or the issuance of decisions that would contravene the core principles of the legal system. In its 'positive' function, public policy acts as a sword, ensuring adherence to mandatory norms and fundamental values, even when foreign law governs the dispute.

While domestic public policy protects the values of a specific legal system, international public policy has a narrower scope, relating only to universally accepted principles. It is therefore essential to distinguish between these two concepts, particularly in proceedings concerning the recognition and enforcement of arbitral awards, where public policy must

²⁹⁹ See J. Vukadinović, "Dejstvo normi neposredne primene u međunarodnoj trgovinskoj arbitraži", *Pravna riječ*, 2016, pp. 139-152

³⁰⁰ Ph. Fouchard, E. Gaillard, B. Goldman, *op.cit.*, p. 852.

³⁰¹ J-F. Poudret, S. Besson, *op.cit.*, p. 293.

be interpreted restrictively to preserve legal certainty and maintain the autonomy of the arbitration process.

Ultimately, public policy functions as a vital corrective mechanism, balancing the autonomy of arbitration with the protection of fundamental legal principles in both national and international contexts.