



INTERNATIONAL PUBLIC POLICY, TRANSNATIONAL PUBLIC POLICY: DEFINING THE CONCEPT

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*“Public policy
is an
unruly horse.”*

[Public policy is] “a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail”. (English Judge Burrough, 1824)

Public Policy within International Arbitration and Related Court Proceedings

Public policy maybe applied:

- by the arbitral tribunal as an exception to the application of foreign law
- as a ground for a state court to set aside the arbitral award
- as a ground for a state court to refuse recognition and enforcement of a foreign arbitral award

Public Policy – Definition

(1)

- Each state has its own concept of what is required by its “public policy”.
- In the Anglo-Saxon legal tradition, the meaning of “public policy” is relatively narrow, referring to “matters of *public morals, health, safety, welfare and the like*”, and is distinguishable from matters related to due process.
- In the continental European tradition public policy refers to a wider range of judicial concerns, a range that “*encompasses breaches of procedural justice*”. For example, Switzerland: public policy denotes fundamental legal principles, a departure from which would be incompatible with the Swiss legal and economic system; Germany: public policy refers to fundamental notions of justice, *bonos mores* or conflicts with principles which are fundamental national or economic values.

- Under the Civil Code of **Ukraine** a contract would be against public policy if it violates constitutional rights and freedoms of a person and a citizen, envisages destruction, damage, unlawful seizure of property, owned by a natural or legal person, state, the Autonomous Republic of Crimea, municipal authorities.
- The fact that different states have different concepts of their own public policy means that **there is a risk that one state may set aside an award that other states would regard as valid.**
- Under such circumstances existence of “international public policy” would provide an effective way of preventing an award in an international arbitration from being set aside for purely domestic policy considerations. International public policy would not concern itself with matters of form, or of a purely domestic nature. It would look to the **broader public interest of honesty and fair dealing.** (*Redfern and Hunter on International Arbitration, Redfern, Hunter, et al. (2009)*)

ILA Reports on Public Policy

- In 2000 and 2002 the Committee on International Commercial Arbitration of the International Law Association (“ILA”) issued the Interim and Final Reports on Public Policy as a Bar to Enforcement of Arbitral Awards, where ILA reviewed the development of the concept of public policy during the latter part of the 20th century.
- It was concluded that, generally, **public policy reflects**: “... the *fundamental economic, legal, moral, political, religious and social standards* of every state or extra-national community. Naturally public policy differs according to the character and structure of the state or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception.” (Lew, *Applicable Law in International Commercial Arbitration* (Oceana 1978), 532)

ILA Reports on Public Policy – Types of Public Policy

- It was concluded that public policy by its very nature is dynamic and may change with the development of the society. Therefore, it is problematic to introduce a constant definition of “public policy”.
- ILA observed that beyond purely domestic public policy, there exists a narrower category of international public policy, which is confined to the violation of really fundamental conceptions of the legal order in the country concerned.
- Additionally, the ILA identified a further category, namely “**truly international**” or “**transnational**” public policy, which it found to be of “universal application—comprising fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as ‘civilised nations’”.

ILA Reports on Public Policy – Elements of International Public Policy (1)

- The international public policy of any State includes:
 - (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned.

Examples of **fundamental substantive principles**: the principle of good faith and prohibition of abuse of rights; *pacta sunt servanda*; prohibition against uncompensated expropriation and prohibition against discrimination; activities that are *contra bonos mores*, e.g. proscription against piracy, terrorism, genocide, slavery, smuggling, drug trafficking and paedophilia.

Examples of **procedural public policy violations**: non-impartial tribunal; making of the award was induced or affected by fraud or corruption; breach of the rules of natural justice; and the parties were on an unequal footing in the appointment of the tribunal; enforcement of an award that is inconsistent with a court decision or arbitral award that has *res judicata* effect in the enforcement forum.

ILA Reports on Public Policy – Elements of International Public Policy (2)

- The international public policy of any State includes:
 - (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “*lois de police*” or “public policy rules”, e.g. anti-trust law; currency controls; price fixing rules; environmental protection laws; measures of embargo, blockade or boycott, tax laws, consumer protection laws; and
 - (iii) the duty of the State to respect its obligations towards other States or international organizations, e.g. UN Security Council resolution imposing sanctions; commitments under OECD anti-bribery convention.

Definition of Transnational Public Policy

- **Transnational law** - “*all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which fit into such standard categories*”. (Judge Jessup)
- **Transnational** (“truly international” (Pierre Lalive), “supra-national” (Martin Hunter)) **public policy** is meant to reflect internationally and commonly recognized shared values of morality. (M.Hunter)

Or

- **Transnational public policy** is comprised of fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as “civilized nations”. (ILA Interim Report)

International Public Policy vs. Transnational Public Policy

Sources of international public policy	Sources of transnational public policy
<ul style="list-style-type: none">- National legislation- Effective international conventions- <i>Jus cogens</i> (a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted)	<ul style="list-style-type: none">- Fundamental principles of natural law, universal justice, <i>jus cogens</i>, the general principles of morality accepted by civilized nations, international customs, arbitral precedent and the spirit of international treaties- Norms created by governmental international organizations, which are not conventional in nature (guidelines, recommendations, best practices etc.); or, if they are conventional, they are not ratified by States

Examples of Transnational Public Policy Provisions

Substantive	Procedural
<p><u>Negative examples:</u> corruption, fictitious schemes, tax evasion, abuse of dominant position and other unfair practices; and dealing with dangerous goods.</p>	<p>Certain provisions of the IBA Rules of Evidence and the IBA Rules on Conflicts of Interest, e.g. equality of the parties, due process and etc.</p>
<p><u>Positive examples:</u> sustainable protection of the environment, human dignity, health, cultural objects and social justice.</p>	

Final Remarks

International public policy	Transnational public policy
<p>1) to be used by arbitrators as an exception for freedom of contract;</p> <p>2) to be used as a ground for setting aside of arbitral awards;</p> <p>3) to be used as a ground for refusal of recognition and enforcement of a foreign award.</p>	<p>1) in view of the arbitrators' obligation to render an enforceable award, to be used by arbitrators as an "enforceability test" of the arbitral awards they are going to issue;</p> <p>2) to be used in investment arbitration to prove wrongdoings of states.</p>

It is difficult to find awards where arbitrators expressly referred to transnational public policy, however, it is possible to find awards, especially investment arbitration awards, where there were references to certain aspects of transnational public policy.



Public policy is an unruly horse, but “with a good man in the saddle, the unruly horse can be kept in control.” (Lord Denning)

Asters: Key Facts

- Founded in 1995, Asters is now among the leading law firms in Ukraine with one of the longest track records on the country's legal market.
- With 10 partners, 70 lawyers and over 100 employees, Asters is one of the largest and most capable Ukrainian law firms.
- The name Asters is derived from the Greek and Latin word for "stars" and inspired the firm's motto: *"Reaching the stars for our clients"*.
- Asters is a long-standing member through corporate or individual membership of numerous professional associations, such as:



Dispute Resolution

Leading European law firm for dispute resolution in Ukraine

Chambers Global 2013



Successfully protected the client's interests in a series of corporate disputes against OJSC "Uralkali" with regard to shares of PJSC "Azot" (Cherkassy).

Tier 1 law firm in Ukraine for dispute resolution

Legal 500: EMEA 2013



Represented client's interests in a series of disputes re collection of large corporate debts, recovery against mortgaged property, as well as advised in respect of insolvency proceedings.

Recommended law firm for dispute resolution in Ukraine

PLC Which Lawyer? 2012



Successfully represented the client in issuing claim against AMC in relation to the highest fines for a bid rotation cartel imposed by the AMC in its history.



Acted for the client before Ukrainian courts with regard to collection of multimillion unsecured debt from the client's debtor and achieved actual enforcement of the judgment.



Represented the client before Ukrainian courts in connection with defending the company's intellectual property rights, advertising and consumer claims.



Represented the client in connection with its disputes with tax authorities as to multimillion tax penalties as well as in cases regarding collection of large corporate debts.

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Mr. Didkovskiy focuses on M&A, corporate law, litigation and arbitration, insurance, taxation, and telecommunications law.

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Oleksiy is a member of the Ukrainian Bar Association, the Kyiv City Bar Association, and the International Bar Association and is included in the list of arbitrators of the International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna International Arbitral Centre – VIAC) and the Kazakhstan International Arbitration Court (KIA) of the Chamber of Commerce of the Republic of Kazakhstan.

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