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Limitations and Development of IPP Rules

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Abstract: This article explores the complexity and evolving nature of applying public policy (PP) rules in the recognition and enforcement of international contracts and arbitral awards. It emphasizes the limitations of domestic PP in private international law and proposes a shift toward international public policy (IPP) to resolve legal conflicts arising in transnational disputes. The discussion highlights challenges faced by arbitral tribunals in the absence of a lex fori and the need for a balanced approach between domestic and foreign PP norms. The concept of IPP is examined as a "minimum standard of protection" derived from universally accepted principles of justice, equity, and global cooperation. By analyzing comparative scenarios, case-based limitations, and scholarly views, the paper argues for the recognition of IPP as an emerging and necessary legal tool in international commercial arbitration.

Key words: public policy, international public policy, private international law, arbitral awards, recognition and enforcement, international commercial arbitration, legal conflicts, comparative law

Domestic PP rules are always developed in such a way that these have applicability, as part of legal system, by the courts. A domestic court may apply domestic PP rules to all cases with accordance to its jurisdiction. Similarly, in case of contradiction with national PP rules, foreign contract or any foreign award may be considered invalid or nullified by a national court. The ambiguity and complexity about the norms of PP has already been discussed.[1] The limitations of applicability of domestic policy rules in private international law are hard to understand because of this adaptable nature of PP term.

In this part the applicability of national PP rules by courts to contractual relations that involve a foreign element, has been demonstrated using various possible scenarios.[2] The decision about validation of a foreign contract, by striking a balance between their national PP and the foreign PP rules, consider a difficult task for national courts.

Furthermore, the previously stated notion that courts are not expected to have knowledge of all PP rules of different legal systems, make it more complicated. While deciding an international commercial dispute, arbitral tribunals cannot apply conflict of law rules which make it difficult for them because arbitrators do not have a *lex fori* as national judges do.[3] Moreover, arbitrators cannot establish a decision on the degree of disparity between the possible injurious effect of applying an international law and PP of the country.[4] Clearly this situation is unacceptable and therefore it has been proposed that in certain cases that involve a conflict between PP rules of several legal systems, courts and arbitral tribunals could resort to a new notion of PP.[5] This notion is intended to assure a "minimum standard of protection" by applying IPP rules that have been developed in the domain of international commercial relations.[6] Different limitations of PP that influence the foreign law and developments of these rules have been discussed in next section.

The basic point of constructing limitations for applicability of PP in foreign law is about functionality and impact of that policy in concerned context. The application of constrains is defined according to case situation.[7] PP can be optimized with accordance to three main factors as shown in Figure 4: (a) proximity; (b) relativity; (c) seriousness of breach. All these elements are helpful to optimize the limitations of the policy.

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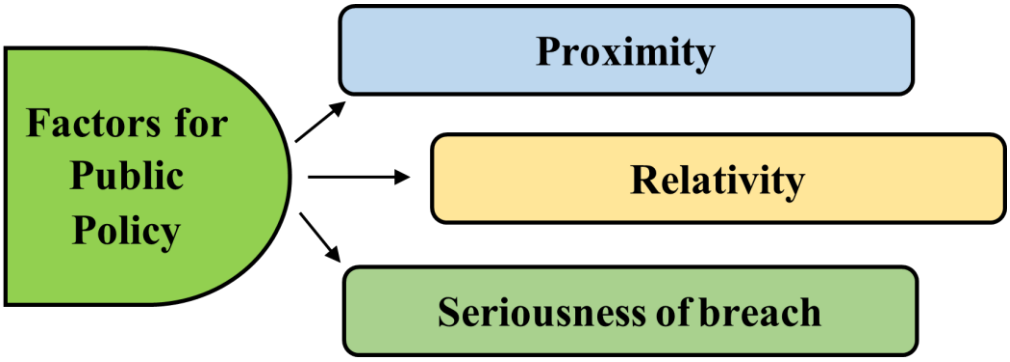


Figure 1. Factors effecting the limitations of PP

The basic norm of foreign PP rules is highly contentious. Many researchers wholly deny the existence of IPP rules unless such rules exist within the context of national law.[8] However, by acknowledging the recent developments of international commerce and the wide adherence of states to international commercial treaties, one should recognize that an international commercial community has emerged and must be distinguished from the plurality of different communities. The notion of foreign PP is thus constituted upon a collection of fundamental legal principles related to all or at least which covers the most fundamental notions of equity and justice. This is mainly due to the development of international commerce, which has led to a degree of co-operation between members of the international community.[9] To develop a modern environment for international commercial relationships it was necessary to establish PP rules suiting the demands of the international business circle and thereby avoid the confusion caused by the existence of variable national PP rules such as different trade prohibitions.

Achieving such harmony is possible by reducing the applicability of national PP rules in international transactions, as compared to their wider use in domestic relations. Also, this is achievable by seeking to find mutual principles of justice and morality common to many countries. It could be argued in this respect, that if there will be a contradiction between the domestic PP rule and foreign PP rules, then foreign PP should prevail.[10] However, despite these propositions, the notion remains at heart problematic due to the sheer diversity of fundamental issues between states, such as the different beliefs, traditions, economic policies, and political trends, which may interrupt the approach towards establishing a new concept of international PP. Alan Redfern and Martin Hunter, while explaining this issue stated that in case of bounds of contrary practices which are acceptable for some states but not for other states having conflict with the foreign PP interest, the agreements in restraint of competition, for example, which are the subject of punitive regulation in some parts of the world (for instance, in the U.S and the European Community) are treated with indifference elsewhere.[11]

It is widely recognized that IPP serves the international community by its potential to play the same role as domestic PP in national relations, although the difficulties that may arise in developing such rules have also been recognized most notably by Okezie Chukwumerije. He demonstrated that as PP of a state presents public interests and morality of a specific community, similarly foreign PP embodies the same role for foreign community. Van den Berg, referred to “the fundamental rules of natural law, essence of global justice, in public international law and the general principles of morality accepted by civilized nations.” Klaus Berger, mentioned that “IPP rules have been developed within the general principles of law and that these international principles are agreed by many states reminding us to keep in our mind that while there may be difficulties, this must not frustrate the acceptance and the existence of such rules.”

Alan Redfern and Martin Hunter also put description that foreign PP would not concern like domestic policy nature, it deals with issues in broader scenario of public interest, morality, and safety concerns.

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Finally, through different observations it can be argued that norm of foreign PP becoming acceptable with exponential rate, developing into a true IPP rule. This can also be viewed through the development of international conventions and statutes that relate to the recognition of international arbitral awards.

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