DOMESTIC COURTS DECLINING TO RECOGNIZE AND ENFORCE FOREIGN ARBITRAL AWARDS: A COMPARATIVE REFLECTION

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Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection

by

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Abstract:

This article examines the "public policy exception" by which domestic judges decline to recognize and enforce international arbitration awards, primarily under Article V (2) (b) of the New York Convention (1958). It explores litigation in China and New York, to identify reasons invoked by domestic courts to decline to enforce foreign arbitration awards on localized public policy grounds. It also examines due process grounds invoked by a Dutch court in refusing to enforce Russian judicial decisions annulling arbitration awards. The article considers the difficulties faced by domestic courts in delineating the concept of substantive and procedural justice clearly and reliably. It concludes by examining how states and their courts can develop shared conceptions of substantive and procedural due process that transcend national boundaries.

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I. Introduction

An underlying theme of this article is to evaluate controversy over the meaning and application of public policy as a ground to deny recognition and enforcement of arbitration awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention). It considers the manner in and extent to which domestic courts such as in China and the United States confine public policy to purely domestic as distinct from transnational interests. It considers, too, how a Dutch court confines procedural public policy to domestic due process in declining to recognize Russian judgements. It examines how courts can construe substantive and procedural conceptions of public policy expansively to encompass the shared interests of states consistent with transnational interests they share, such as substantive policies directed at promoting international commerce and procedural policies directed at natural justice.

Importantly, the article explores differences in the historical and comparative development of the substantive and procedural conceptions of public policy, not limited to the NY Convention, including divergence among jurists over their meaning and application. Some jurists envisage public policy as exceptional,[1] not least of all because "it seems impossible to define 'public policy'".[2] Others stress the difficulty in establishing a uniform procedure by which to determine and apply it transparently and fairly.[3] Yet others adopt an evolutionary view that, while public policy under the NY Convention is imprecise, it is "a dynamic concept that develops continually

[1] *See infra* notes 21 & 161 (on Australian courts differing over the scope of transnational public policy); BURKHARD HESS & THOMAS PFEIFFER, INTERPRETATION OF THE PUBLIC POLICY EXCEPTION AS REFERRED TO IN EU INSTRUMENTS OF PRIVATE INTERNATIONAL AND PROCEDURAL LAW 453 (2011) (on the 'multi-dimensional character' of public policy across the EU. *See also* Joost Blom, *Public Policy in Private International Law and Its Evolution in Time*, 50(3) NETH. INT'L. L. REV. 373 (2003).

[2] Farshad Ghodoosi, *The Concept of Public Policy in Law:Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 720 (2015); Jacob Dolinger, *World Public Policy: Real International Public Policy in the Conflict Of Laws*, 17 TEX. INT'L. L.J. 167 (1982).

[3] *See* Sameer Sattar, *Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?*, 8(5) TRANSNAT'L DISP. MGMT. 4-5 (2011). *See also* T. L. Harris, *The 'Public Policy' Exception to Enforcement of International Arbitration Awards under the New York Convention*. 24 J. INT'L. ARB. 9, at 10 (2007) (asserting that Article V(2)(b) of the NY Convention is 'probably the most misused ground of non-enforcement of all').

to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions".[4]

In examining these divergent views, the article explores the tension between three conceptions of public policy. The first is a mono-local theory identified with purely domestic public policy and absent comparison with the public policies of other states. The second is a pluralist theory that identifies public policy with transnational policy across a plurality of nation states. The third is a globalist conception of public policy that is ascribed to an autonomous international public order that states share comparatively.[5] The article argues for domestic conception of public policy that include transnational components on grounds that it is most viable means of reconciling these three theories.

Section II of the article evaluates the meaning and scope of substantive and procedural public policy, including but not limited to the NY Convention. Section III examines the scope of the public policy exception. Section IV explores key Chinese cases that have enforced or declined to enforce foreign and foreign-related arbitration awards on public policy grounds. Section V identifies efforts to deny extra-territorial effect to a foreign arbitral award by a New York court. Section VI explores the reaction of a Dutch court to a series of Russian decisions declining to

[4] Loukas Mistelis, *Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards*, INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL, 248, 252 (2000). *See also* Saad U. Rizwan, *Foreseeable Issues and Hard Questions: The Implications of US Courts Recognizing and Rnforcing Foreign Arbitral Awards Applying Islamic law under the New York Convention*, 98 CORNELL L. REV. 494 (2012).

[5] *See* JAN PAULSSON, THE IDEA OF ARBITRATION 29-50 (2013) (arguing against a mono-local theory of arbitration, and in favor of a pluralist theory that, when conceived vertically, supports an autonomous international order); Jan Paulsson, *Arbitration in Three Dimensions*, 60 INT'L. COMP. L. Q. 291 (2011) (evaluating territorial, plural and autonomous transnational dimensions of arbitration law); JULIAN D. M. LEW, *Achieving the Dream: Autonomous Arbitration*, 22 ARB. INT'L 179 180 (2006) ('dreaming' of an autonomous regime of international commercial arbitration); Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L. 249, 251-2 (2003) (on incorporating transnational public policy into domestic law); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure* 36 VANDERBILT J. TRANSNAT'L. L. 1313 (2003) (proposing the globalization of due process in international arbitration); William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L. COMP. L. Q. 21 (1983) (arguing for the delocalization of international commercial arbitration).

enforce arbitration awards. Section VII examines the prospect of extending the public policy defense to include both localized conceptions of domestic interests and delocalized conception of transnational public policy, on grounds that they are potentially complementary rather than mutually exclusive.

II. The Uncertain Boundaries of Public Policy

Domestic courts often conceive of public policy as, not only variable in nature,[6] but uncertain in its comparative application.[7] The result is that public policy is depicted as tempestuous in nature, [8] exemplifying "a very unruly horse, and when once you get astride it you never know where it will carry you".[9] To this observation the House of Lords added, that "[p]ublic policy is a vague and unsatisfactory term...[I]t is capable of being understood in different senses."[10]

Still, judicial resort to public policy has its defenders, with the late Lord Denning asserting that "with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles".[11]

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[6] *See* Veena Anusornsena, *Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: the United States, Europe, Africa, Middle East and Asia,* GGU L. DIGITAL COMMONS 33 (2012) (On the complex conceptualization of public policy across legal system). *See also* FRANK FISCHER & GERALD J. MILLER, HANDBOOK OF PUBLIC POLICY ANALYSIS: THEORY, POLITICS, AND METHODS (2006).

[7] On the unpredictable application of public policy generally, *see* JAMES E. ANDERSON, PUBLIC POLICYMAKING (6-19) (2011); DEVIN BRAY & HEATHER L. BRAY, INTERNATIONAL ARBITRATION AND PUBLIC POLICY (2014); FARSHAD GHODOOSI, INTERNATIONAL DISPUTE RESOLUTION AND THE PUBLIC POLICY EXCEPTION (2016).

[8] On applying transnational public policy in a complex transnational order, *see* Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and Some of its Consequences,* 2 J. INT'L. DISPUTE SETTLEMENT 59 (2011); YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1998); RICHARD H. KREINDLER, TRANSNATIONAL LITIGATION: A BASIC PRIMER 239 (1998).

[9] *See* Richardson v Mellish (1824) 2 Bing 228, 252; 130 ER 294. ('[C]onsiderations of public policy can never be exhaustively defined, but they should be approached with extreme caution.' *per* Justice Burrough). *See also* Deutsche Schachtbau v. Shell International Petroleum, [1990] 1 A.C. 295 (England); Fender v St John-Mildmay, (1938) AC 10; Janson v Driefontein Consolidated Mines, (1902) AC 484.

[10] Egerton v. Brownlow, 4 HLC 1, 123 (1853).

[11] Enderby Town Football Club v The Football Association, [1971] Ch 591, 606.

Some courts also conceive of public policy under the NY Convention as preserving fundamental morally, exemplifying "basic notions of morality and justice" as conceived by forum courts. As the Second Circuit of the United States Court of Appeals declared in the widely cited Parsons case, "[e]nforcement of foreign arbitral awards may be denied on [the basis of public policy] only where enforcement would violate the forum state's *most basic notions* of morality and justice".[12] The Federal Court of Australia, too, has orated that, "it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in [the] jurisdiction [in which enforcement is sought] which enliven this particular statutory exception to enforcement."[13] The Hong Kong Court of Final Appeal has held, to similar effect, that an award violates public policy if it is "so fundamentally offensive to [the enforcing jurisdiction's] notions of justice that, despite its being party to the [NY] Convention, it cannot reasonably be expected to overlook the objection".[14] This emphasis on public policy and procedural justice as protecting domestic interests is also reflected in Chinese Law.[15]

European courts, too, have circumscribed public policy to "essential and widely recognized values" adopted by the applicable state, again, subject to state policy. For example, a Swiss court held that an arbitration award contravenes public policy "if it disregards essential and widely recognized values which, according to the conceptions prevailing in Switzerland, should form the basis of any legal order".[16] A Swiss Federal Tribunal concluded that an award violates

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[12] Emphasis added. Parsons & Whittemore Overseas v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 974 (Ct. App. 2d Cir. 1974). *See also* Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración Y Producción, 832 F.3d 92 (2d Cir. 2016) (enforcing an arbitration award annulled in Mexico on grounds that Mexican annulment proceedings were so 'extraordinary' that failure to enforce the award would be 'repugnant to fundamental notions of what is decent and just' under US public policy). *See also* National Oil. v. Libyan Sun Oil., 733 F. Supp. 800 (Dist. Ct. Del. 1990); Ameropa v. Havi Ocean, 2011 WL 570130 (Dist. Ct. S.D.N.Y. 2011).

[13] Emphasis added. Traxys Europe v. Balaji Coke Industry, [2012] FCA 276 (Australia).

[14] Emphasis added. *Hebei Import & Export v. Polytek Engineering*, [1999] 2 H.K.C. 205. (C.F.A.) (H.K.).

[15] See Article 63 of the Arbitration Law and Article 237 of the CPL, including to protect domestic interests.

[16] 132 Federal Supreme Court, III 389, 392, Mar. 8, (Switzerland). *See also* Paolo Michele Patocchi, *The 1958 New York Convention: The Swiss Practice*, ASA BULL. 145, 188-96 (1996).

public policy if it offends Swiss conceptions of justice in an "intolerable manner".[17] Similarly, the Court of Appeal in Paris defined international public policy as "the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character".[18] German courts, too, have stipulated that an arbitration award violates public policy when it derogates from German public and economic life or contradicts German perceptions of justice in an irreconcilable manner.[19] Japanese courts have declined to enforce an arbitration award if its content is in "conflict with the public policy or good morals of Japan."[20]

However, despite national courts localizing "fundamental" public policy, it is debatable whether and to what extent states share fundamental, as distinct from lesser conceptions of justice.[21] Typically, states adopt localized conceptions of public policy, based on domestic values that may, but need not be comparatively informed. For example, under Chinese law, domestic courts are empowered to decline to recognize and enforce foreign arbitral awards and judicial decisions that offend fundamental principles of Chinese law, national sovereignty and security, for being otherwise contrary to China's social and public interests and for violating procedural justice.[22]

Localizing fundamental principles of public policy and justice is not peculiar to China. States generally decline to recognize arbitral awards that offend their fundamental due process requirements, embodying their national sovereignty and territorial autonomy, for being otherwise

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[17] *See* Decision 4A_233/2010, Federal Supreme Court, July 28. 2010 (Switzerland). *See also* OGH, 26 Jan. 2005, 3 Ob221/04b, in XXX Y.B. Com. Arb. 421 (2005) (Austria).
[18] *See* Regional Court of Appeal, Paris, Oct. 16, 1997, 96/84842 (France).
[19] *See* Oberlandesgericht, 28 Nov. 2005, 34 Sch. 019/05 (Germany); Oberlandesgericht, 21 July 2004, VI Sch (Kart) 1/02 (Germany); Oberlandesgericht, 30 September 1999, (2) Sch. 04/99 (Germany); *BGH*, 18 January 1990, III ZR 269/88 (Germany). *See also* Wolfgang Kuhn, *Current Issues on the Application of the New York Convention-A German Perspective*, 25 J. INT'L ARB. 743 (2008).
[20] *See* Articles 44(1)(viii), 45(2)(ix), and 46(8) of the Japanese Arbitration Law.
[21] *See* Justice James Allsop, *The Authority of the Arbitrator*, 30 ARB. INT'L. 639, 644 (2014) (on Australian judges differing over the nature of public policy, but preferring plural and transnational to mono-local public policy in recognizing international arbitration awards). *But see* Gujarat NRE Coke Limited v Coeclerici Asia (2013) FCA 109, [65] (criticizing pluralist and transnational conceptions of arbitration law and policy). *See further* Richard Garnett, *International Arbitration but subject to National Law: The Rejection of Delocalisation in Australia. (American Diagnostica. v. Gradipore* 28 AUST. BUS. L. REV.351 (2000).
[22] See Article 282, Civil Procedure Law.

contrary to their social and public interests.[23] Adopting mono-local conceptions of public policy grounded in state sovereignty, they identify the applicable law and policy with the seat of arbitration. In the English case of *Czarnikow v Roth, Schmidt & Co*, Justice Scrutton adopted such a sovereigntist view, insisting that "there must be no Alsatia in England where the King's writ does not run.'[24] In *Bank Mellat v. Helleniki Techniki S.A.*, Justice Kerr declined to support arbitral procedures relating to the rules of natural justice "floating in the transnational firmament'.[25] In addressing interim measures in the House of Lords in *Coppee Lavalin SA NV v Ken-Ren Chemicals & Fertilisers Ltd (In Liquidation in Kenya)*, Justice Mustill insisted that only national courts at the seat determine the scope of transnational law and the power of arbitrators.[26] Comparably, the Singapore Court of Appeal in.*T. Garuda Indonesia v Birgen Air SLR*, [27] insisted on the territorial thesis, that law and policy at the place of arbitration is ultimately determinative, not in principles or policies that transcend that law and policy that place.[28]

Indeed, the law at the seat of arbitration is considered as being so determinative that it prevails over the intention of the parties. As Francis Mann elucidated:

> 'No country other than that of the seat has such complete and effective control over the arbitration tribunal.… It would be intolerable if the country of the seat could not override whatever arrangements the parties may have made. The local sovereign does not yield to them except as a result of freedoms granted by himself.'[29]

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[23] For illustrations, of NY and Dutch courts so deciding, see s*upra* Section VI & VII. respectively.
[24] *Czarnikow v Roth, Schmidt & Co* (1922) 2 KB 478 (Court of Appeal). 488.
[25] *Bank Mellat v. Helleniki Techniki S.A.* (1983) Law Reports, Queen's Bench Division 291 (Court of appeal). 301; Francis A. Mann, 'England rejects delocalised contracts and arbitration' (1984) 33(1) *International and Comparative Law Quarterly* 193.ff.
[26] *Coppee Lavalin SA NV v Ken-Ren Chemicals & Fertilisers Ltd (In Liquidation in Kenya)* (1995) AC 38 38 (House of Lords)., 54, 63.
[27] Singapore Parliament, *Singapore Parliamentary Debates Official Report* (5 October 2001). col 2215., cited in Alastair Henderson, 'Lex arbitri, procedural law and the seat of arbitration: Unravelling the laws of the arbitration process' (2014) 26 *Singapore Academy of Law Journal* 886., 895.
[28] *P.T. Garuda Indonesia v Birgen Air* (2002) 1 SLR 393 (Court of Appeal) [24]ff.
[29] Francis A. Mann, 'Lex Facit Arbitrum' in Pieter Sanders and Martin Domke (eds), *International Arbitration Liber Amicorum for Martin Domke* (Nijhoff,1967)159,160-161. *See too* NIGEL BLACKABY ET AL, REDFERN & HUNTER,R ON INTERNATIONAL ARBITRATION (OXFORD UNIVERSITY PRESS, 6TH ED., 2015), para 3.63.

Nor are mono-local conceptions of public policy at the seat readily countered by seemingly transcending fundamental principles of morality that extend beyond state sovereignty. For example, even if domestic courts seek to protect minimal standards of justice, as harmonized by states, these standards must often comply with domestic interests, such as with "the interests of India".[30] Domestic courts may also need to determine when delocalized public policy is applicable, when that determination itself depends on domestic law, and when such delocalization would unjustifiably trammel the interests of national sovereignty. As the Brazilian Superior Court asserted, "the issue [in dispute] does not have a public policy character and … does not relate to the concept of national sovereignty".[31]

However, overemphatic reliance on global principles of justice are perceptibly ill-advised, not least of all on account of the vastly different normative attributes that states and their courts ascribe to so-called "universal justice". In contention is not only divergent accounts of "universal justice" based on disparate cultural, religious and economic values that vary, comparatively, from state to state. In disputation is also the tendency of states and their courts to attribute "universal justice" selectively to those other states they consider to be comparably (and usually profoundly) "civilized". For example, it is contentious for a court in Milan to identify public policy with "a body of universal principles shared by nations of the same civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions".[32] Precisely which nations are "of the same civilization" and adopt "civilized" views of fundamental human rights invites endless debate on the modern history of humankind, and its reflection in the changing mirror of ideological, political and cultural differences in the protection of those rights adopted by states. Nor do norms of universal justice define global peace any more than the global security is prefaced upon nation states according like treatment to each other in the interests of universal equality of treatment. Indeed, the very glue that unifies "fundamental justice" such as in nation states collectively pursuing global peace, amity and

[30] *Renusagar Power. v. General Electric*, 1994 AIR 860 (India). *See also Penn Racquet Sports v. Mayor International*, (2011) 1 Arb. LR 244 (India); *Shri Lal Mahal v. Progetto Grano*, (2014) 2 SCC 433 (India).
[31] S.T.J. SEC 507, Relator: Gilson Dipp. 19.10.2006, (Brazil).
[32] *See* Court of Appeal of Milan, 4 December 1992, XXII Y.B. Com. Arb. 725 (Italy)

stability among states, is contestable, in the very intestacies of public international law.[33] As Pierre Lalive observes, "few subjects are more vague, more difficult to seize and more controversial than that of the existence, contents and function of a public policy which would be 'really' or 'truly' international".[34] At its lowest ebb, "the reason why the concept of public policy is so difficult to grasp is that the degree of fundamentality of moral conviction or policy is conceived differently for every case in the various states".[35] One need merely reflect on divergent conceptions of morality adopted by "civilized" states before and after World War II to challenge the mirror image of nations "of the same civilization" adopting comparable conceptions of natural justice and the rule of law. One need only reflect on discordant conceptions of the "just price" in international commercial law to appreciate that both the conceptualization and the application of the "just price" diverges, not only domestically, but in transnational law as well.

Viewed realistically, agreement by a plurality of states upon fundamental principles of justice does not necessarily infer their comparative agreement on the application of those principles. Domestic courts may well diverge over the perceived deleterious nature and consequential harm arising from the violation of those principles, such as when to annul arbitral awards on grounds of national security. US and Chinese courts may agree on the need to annul arbitral awards that purport to validate agreements threatening the stability of international markets. However, they may disagree over the nature, source and effect of those threats and how rules of procedural justice can redress them.

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[33] On Hugo Grotius' famous early 17th Century rules of war and peace, s*ee* HUGO GROTIUS, DE JURE BELLI AC PACIS (F.W. KELSEY, TRANS., 1964). Illustrating centuries of treaties of peace, friendship and commerce is the 1948 Treaty of Friendship, Commerce and Navigation between the US and China, Nov. 4, 1946, U.S.-China, 63 Stat. 1299, T.I.A.S. 1871, 6 Bevans 761, 25 U.N.T.S. 69. Article XVIII of that Treaty provides that: 'Any disputes regarding the terms of the Treaty that could not be resolved through diplomacy [are] to be resolved by either the International Court of Justice or other peaceful means.'

[34] *See* Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in SANDERS, supra note 2.

[35] *See* JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 360 (1981).

However, these observations fail to recognize that the functional rationale behind a plurality of states protecting "core" conceptions of public policy is not to envisage consensus across their judicial systems on precisely when to annul an award that enforces a contract threatening national peace and security. Even though their domestic courts will often concur on the kinds of conduct that offend "core" conceptions of justice, they will more often disagree on the nature of that conduct, the egregiousness of the offense, or the most judicious means of redressing it.[36]

The functional reality therefore is not that a plurality of states identifies and adheres to shared "cored" values explicated through shared public policies and due process requirements.[37] Nor do states unrelentingly pursue an elusive consensus based on Western liberal conceptions of natural rights, or a *ius cogens* that supposedly binds them and their citizens alike. Nor, indeed, do international instruments both define and delineate the ambit of such "core" values exhaustively. Rather, the "core" attributes of public policy and due process that a plurality of states share are generalized at best. Basing fundamental rights on natural rights introduces queries about the source and scope of those "rights".[38] Delocalizing public policy in submission to a law of nations to which a plurality of states adhere is similarly generalized, not least of all in distinguishing between public law attributed to that plurality, and private international law ascribed to international commerce.[39] Similarly generalized is the disjuncture between shared public policy as a determinant of domestic public policy, and that shared policy being overridden

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[36] On judicial divergence over contractual autonomy and remedies based on public policy, *see* OGH, 26 Jan. 2005, 3Ob221/04b, in XXX Y.B. Com. Arb. 421 (2005) (Austria); Laminoires-Trefileries-Cablerie de Lens v. Southwire, 484 F. Supp. 1063 (Dist. Ct. N.D. Ga. 1980); *Mahkamat al-Naqd* [Court of Cassation], 22 January 2008, 2010/64 (Egypt).

[37] *See* Gunther Teubner, *'Global Bukowina': Legal Pluralism in the World Society, in* GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997) (on the plural nature of law and policy globally).

[38] *See* EMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, CH. 1, TRANS., LEWIS WHITE BECK (1989) (ON a duty arising from violating a deontological 'natural right' that is wrong in and of itself).

[39] *See* ILA, *Report on the Sixty-Ninth Conference,* London, 2000, at 345 (on the ILA identifying international public policy with private international law); Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,* 19 ARB. INT'L 217, 220 (2003) (on the ILA treating *ius cogens* as a constituent element of international public policy). *See further infra* note 188 and Section IXI.

by domestic policy and rule of law requirements.[40] In the absence of a unified and authoritative source of public policy that states share comparatively, public policy that is attributed to a law of nations becomes predominantly aspirational in nature, and not an inherent and functioning part of the domestic public policy of states in general.[41]

Whatever shared conceptions of public policy domestic courts adopt, state courts are likely either not to "domesticate" it, or do so differently. In treating internally generated notions of equity and fairness as definitive exemplars of natural justice, many will embed domestic rather than plural conceptions of liberty.[42] In demarcating liberty and human dignity differently, some states will engrain conceptions of public policy that are neither shared by the global community of states, nor embodied in autonomous policies.[43] Even domestic courts that share so-called "rule of law" traditions comparatively can be expected to differ over when to nullify an award for being "at odds with fairness, equal treatment of the parties and consequently public policy."[44]

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[40] On the relationship between domestic and transnational public policy, *see* International Bar Association, 2015, *supra* note 19 at 2; Javier Garcia De Enterria, *The Role of Public Policy in International Commercial Arbitration*, 21(3) LAW & POL'Y IN INT'L BUS. 389 (1990); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3504 (2ND ED, 2014).

[41] On the tenuous nature of an independent transnational public policy, *see e.g.* 2009); V.V. Veeder, *Is There a Need to Revise the New York Convention?* in THE REVIEW OF INTERNATIONAL ARBITRATION, at 87-89; Van den Berg, *Hypothetical Draft Convention supra* note 23, at 360. *See also* Vesselina Shaleva, *The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia*, 19 ARB. INT'L. 67 (2003) (on the public policy exception applied on grounds of public morality in Central and Eastern European states).

[42] *See* Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOYOLA LA, INT'L. & COMP. L. Rev. 565, 602-3 (2006) (on collective liberty in Sharia Law); John Makdisi, *Legal Logic and Equity in Islamic law* AM. J. COMP. L. 63 (1985) (on equity in Islamic Law).

[43] On philosophical divergence over the conception of liberty in Western liberal thought, *see* ISAIAH BERLIN AND THE POLITICS OF FREEDOM. 'TWO CONCEPTS OF LIBERTY' 50 YEARS LATER, (B. BAUM & R. NICHOLS, EDS., 2013) (on positive and negative liberty); K. FLICKSCHUH, FREEDOM: CONTEMPORARY LIBERAL PERSPECTIVES (2007) (on the conceptions of liberty of Berlin, MacCallum, Nozick, Steiner, Dworkin and Raz). *See also* MORDECAI ROSHWALD, LIBERTY: ITS MEANING AND SCOPE (2000).

[44] *See Smart Systems Technologies. v. Domotique Secant*, XXXIII Y.B. Com. Arb. 464, Quebec Court of Appeal, Canada (2008). *See* generally, PATRICK H. GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (2014) (on the impact of legal traditions on the rule of law); Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law in* HUTCHINSON & MONAHAN, EDS., THE RULE OF LAW: IDEAL OR IDEOLOGY (1987) (critiquing the rule of law in liberal democracies).

States and their courts that adopt mono-local conceptions of public policy are also likely to vary over the scope of that policy, such as the scope of trade liberalization. Domestic courts in Western liberal economies inevitably diverge from planned economies over the ambit of the sanctity of contracts.[45] Civil and common law courts differ over when to declare contracts unenforceable,[46] while civil law courts sometimes decline to enforce foreign judgments based on common law fraud.[47] Domestic courts of states that share legal traditions, such as the common law, vary over the right not to perform a contract on grounds of frustration or economic impracticability.[48] Even states that share religious values, such as Islamic states, deviate in interpreting Sharia Law, such as when to annul an international arbitration award that includes costs on interest. These interpretative differences, in turn, increase challenges for courts in Western liberal states in deciding whether to recognize arbitral awards applying Islamic Law under the NY Convention.[49] However much "[the] genius of the New York Convention is to have foreseen, and made provision for, the progressive liberalization of the law of international

[45] On the variability of freedom of contract in international and comparative law, *see* David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 152 (2013); Leon Trakman, *Pluralism in Contract Law,* BUFF. L. REV.1032-5 (2010); NAGLA NASSAR, SANCTITY OF CONTRACTS REVISITED: A STUDY IN THE THEORY AND PRACTICE OF INTERNATIONAL COMMERCIAL TRANSACTIONS (1994).

[46] *See e.g.* Nelson Enonchong, *Effects of Illegality: A Comparative Study in French and English Law*, 44 INT'L. COMP. L.Q. 196 (1995); Leon Trakman, *Effect of Illegality in the Law of Contract: Suggestions for Reform*, 55 CAN. BAR REV. 625 (1977).

[47] This is exemplified by Chinese courts declining to enforce Hong Kong judgments grounded in common law fraud *See* JIE HUANG, INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS 258 (2014).

[48] *See e.g.* HÜSEYIN CAN AKSOY, IMPOSSIBILITY IN MODERN PRIVATE LAW (2014); Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471 (1985); Leon Trakman, *Legal Fictions and Frustrated Contracts*, 46 MODERN L. REV. 39 (1983).

[49] On the public policy defense in the Middle East, *see* Mark Wakim, *Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East,* 21 N.Y.U. INT'L L. REV. 44 (2008); Kristin Roy, *The New York Convention and Saudi Arabia: Can A Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?* 18 FORDHAM INT'L L J 920 (1995); Rizwan, supra note 41, 494.

arbitration,"[50] the reality is that state courts ordinarily propagate localized variants of liberalized trade and investment.[51]

Nor are domestic conceptions of public policy immune from the personal attributes, and indeed opinions, of those who apply them, not least of all, the culturally imbued views of domestic judges. Viewed idealistically, if domestic courts are to allay the perception of them they have succumbed to judicial whim, fancy, or caprice in the pursuit of due process, they ought to depersonalize their decisions from subjective notions of justice. If courts are to accord procedural justice, as Justice Cardoza of the US Supreme Court once interposed, they "are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness."[52] Nor should their personal predilections "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal".[53] However, finding such fundamental principle of justice in the "deep-rooted tradition of the common weal", unchecked by individual notions of expediency and fairness" is optimistic at best.[54] Widely imbued notions of substantive and procedural justice ought assuredly to transcend speculation about the moral dimensions of human virtue within and among a comparative sample of states. However much judicial conceptions of public policy are

[50] 2016 Guide on the New York Convention, *supra* note 143, Clause 9, page 3. *See* Federal Supreme Court, 110 Arrets du Tribunal Federal IB 191, 194 Mar. 14, 1984 ((Switzerland), describing that article VII (1) enshrines 'the principle of maximum effectiveness' ('*regle d'efficacite maximale*').

[51] *See e.g.* Javier Rubinstein & Georgina Fabian, *The Territorial Scope of the New York Convention and Its Implementation in Common and Civil Law Countries*, in Gaillard & Domenico Di Pietro, *supra* note 3, at 95; Hossein Esmaeili, *On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System* 26 ARIZ. J. INT'L & COMP. L. 1 (2009) (on limited development of the rule of law in Saudi Law). *But cf.* M. A. MUQTEDAR KHAN, ISLAMIC DEMOCRATIC DISCOURSE: THEORY, DEBATES, AND PHILOSOPHICAL PERSPECTIVES (2006) (on democratic principles attributable to Islamic philosophy).

[52] Per Cardoza J. in Loucks v. Standard Oil, 120 NE 198, 201 (N.Y. 1918).

[53] *Id*. On invoking public policy to protect fundamental conceptions of justice, *see* EMMANUEL GAILLARD & JOHN SAVAGE, EDS., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 996 (1999).

[54] *See* Cardoza J in Loucks, *supra* note 75.

inextricably linked to moral values, they diverge, not only across but also within, judicial systems that share legal traditions, not limited to common and civil law traditions.[55]

There are nevertheless cogent reasons to establish normative boundaries around conceptions of justice which a plurality of states purports to universalize, even if their domestic courts construe those boundaries disparately in practice. The purpose is, not for those domestic courts to concur on the precise nature of fundamental justice, nor upon the exact quantum of public harm caused by its violation. The purpose is rather for them to strive for agreeing on the kinds of interests that are fundamental, the normative reasons for so determining, and the legal consequences arising from the application of those norms. Illustrating the kinds of interests that are considered fundamental are: declining to recognize foreign decisions in order to protect the national security of the forum;[56] enforcing state sanctions imposed on trade with foreign countries which a plurality of states agree have violated the UN Charter;[57] and preserving public health and the

[55] *See* Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in view of Foreign Mandatory Public Law*, PENN. STATE L REV.1230 (2009 (On the tension between the moral values shared by 'civilized' nations and their national cultural values in applying the public policy defense). *See also*

[56] On forum public policy as the primary determinant of the enforceability of an arbitration award under the NY Convention, *see, e.g., Traxys Europe v. Balaji Coke Industry*, [2012] FCA 276 (Austl.); IPCO (Nigeria) v. Nigerian National Petroleum. [2005] EWHC 726, [2005] 2 Lloyd's Rep 326 (England); *Gao Haiyan v. Keeneye Holdings,* [2012] 1 H.K.C. 335 (C.A.) (H.K.); *Renusagar Power. v. General Electric*, 1994 AIR 860 (India); Brostrom Tankers v. Factorias Vulcano [2004] 2 IR 19. (Ireland); *A v. B & Cia*, Supreme Court of Justice, Portugal, 9 November 2003, XXXII Y.B. Com. Arb. 474 (2007); Federal Supreme Court (Switzerland), October 10, 2011, 5A_427/2011; Agility Public Warehousing. v. Supreme Foodservice, 11-5201-cv (Ct. App. 2d Cir. 2012). *See* also ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION: HISTORY, INTERPRETATION AND APPLICATION 54, 61 (2012).

[57] On UN Security Council resolutions imposing sanctions on North Korea, *see* <http://www.securitycouncilreport.org/un-documents/dprk-north-korea/> accessed 11 September 2018. There are, as yet, no reported judicial reports on sanctions against North Korea on public policy grounds. However, there are reported cases on sanctions imposed, *inter alia*, by the US against Iran in 2011. *See e.g.*, Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., 665 F.3d 1091 (Ct. App. 9th Cir. 2011). *See also Ameropa v. Havi Ocean*, WL 570130 (Dist. Ct. S.D.N.Y. 2011).

environment from the importation of dangerous goods.[58] These interests also include according states' sovereign immunity to avert political or economic destabilization, not least of all by being subject to due process requirements that expose the executive or legislature to public censure.[59] While likeminded states treat these interests as fundamental, they are truly universal only as abstractions, or viewed pejoratively, as platitudes. There is far less reason to insist that fundamental justice is, or ever will be, truly universalized in judicial practice.

III. The Scope of the Public Policy Exception

A controversial but important issue facing international commercial arbitration is how domestic courts ought to construe the public policy exception under Article V(2)(b) of the NY Convention.[60] Given the broad scope of the concept and the proclivity of judges to construe it disparately, one option is for domestic courts to avoid referring to public policy as a defense. Reinforcing this reluctance is Article V(2)(b) which provides only that a signatory state has the right to decline to enforce an arbitration award in accordance with "the public policy of that country",[61] without elaborating on the nature and scope of "public policy" viewed comparatively. Neither the *travaux préparatoires* to the NY Convention, nor the jurisprudence since 1958 have resolved this uncertainty, despite efforts of the International Law Association

[58] *See AnsellA. v. MedBusiness Service*, Highest Arbitrazh Court, Russian Federation, VAS-8786/10, 3 August 2010 (annulling arbitration awards for violating 'universally recognized moral and ethical rules or threaten[ing] the citizens′ life and health or the security of the State.')
[59] On sovereignty immunity as a public policy rationale to limit state liability, *see* Georges R. Delaume, *Sovereign Immunity and Transnational Arbitration*, 3 ARB. INT'L. 28-45 (1987).
[60] *See* CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, 10 June 1958, art V(2)(b), 21 UST 2517, 330 UNTS 38 [hereinafter NY Convention]. On the signatories to the NY Convention, *see, Status, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments adopted in 2006,* UNCITRAL, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 11 September 2018. On the status of the NY Convention until 2016, *see Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),* UNCITRAL, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 11 September 2018.
[61] NY Convention Article V (2)(b).

[ILA] to elaborate its scope of application.[62] Nor do jurists agree on the nature and scope of the defense. Some insist that it should be construed restrictively, encompassing only the localized interests of signatory states.[63] Others contend that it should be construed expansively to include international public policy considerations.[64] Yet others worry that national courts invoking mono-localized interests to annul international arbitration awards, may do so partially and in deference to the state's executive,[65] as the Amsterdam Court of Appeal alleged in relation to

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[62] On the *travaux*, *see* Guide to Article V (2)(b) of the NY Convention (1958) <http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=727&menu=727&opac_view=3 > accessed 19 September 2018. On the ILA's conception of public policy, *see further* Mayer & Sheppard, *supra* note 5, at 255; ILA, INTERNATIONAL LAW ASSOCIATION RECOMMENDATIONS ON THE APPLICATION OF PUBLIC POLICY AS A GROUND FOR REFUSING RECOGNITION OR ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS (2002). *See further infra* text accompanying notes 64 and 135.

[63] On construing the public policy exception restrictively in accordance with a mono-local theory of arbitration, *see e.g.* Anton G. Maurer, *supra* note 56 at 61; Yves Fortier, *Arbitrability of Disputes*, in GERALD AKSEN, KARL HEINZ BOCKSTIEGEL, PAOLO MICHELE PATOCCHI, MICHAEL J. MUSTILL & ANNE MARIE WHITESELL, EDS., GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 274-6 (2005); F.A. Mann, *Lex Facit Arbitrum* in PIETER SANDERS (ED), INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 159 (1967). *See also* Ralf Michaels, *Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature*, LONDON REV. INT'L. L. 35 (2013) (critiquing transnational conceptions of international commercial arbitration law as utopian).

[64] On re-delineating and expanding the public policy exception beyond territorial or 'mono-local' boundaries, *see* Karl-Heinz Böckstiegel, *Public Policy as a Limit to Arbitration and its Enforcement* in IBA J. DISPUTE RESOLUTION, SPECIAL ISSUE, THE NEW YORK CONVENTION -50 YEARS, 11TH IBA ARBITRATION DAY AND NEW YORK ARBITRATION DAY, 123 (2008); Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards*, OHIO ST. J. DISP. RESOL. 365, 372 (1985). *But see* Bernard Hanotiau & Olivier Caprasse, *Public Policy in International Commercial Arbitration*, in Gaillard & Di Pietro, *supra* note 51, at 787, 802 (construing public policy expansively on grounds that it is 'central to the law of arbitration'); Maxi Scherer, The New York Convention: *Violation of Due Process, Article V (1)(b)*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958—COMMENTARY 279, paras. 132-35 (R. WOLFF ED., 2012) (extending the scope of the procedural public policy exception under the NY Convention).

[65] The consternation is both over domestic courts adopting a mono-local theory of arbitration and deferring to local interests, including the Executive. In contention are three different dimensions of public policy: mono-local (identified with internal-domestic public policy), multi-local (identifying public policy with a plurality of states) and transnational (identified with fundamental conceptions of transnational public policy beyond monlocal and plural conceptions of it). *See* EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 28-9, 60-61

Russian judgments that annulled arbitration awards in *Yukos Capital Sarl v Ojsc Rosneft Oil Co.* and discussed in Part VII below.[66] These different perspectives of public policy raise the tension between a mono-local theory that focuses on domestic policy; a pluralist theory that identifies public policy with transnational policy across a plurality of nation states; and a globalist conception of public policy that is attributed to an autonomous international public order.[67]

Legal pluralists have increasingly prevailed in the public policy debate. Pluralists, like the late Arthur von Mehren, reject mono-localism on grounds that international commercial arbitration may function without the sovereign authority of a domestic state, even if arbitration proceedings take place there.[68] He acknowledges that, while applying localized principles and policies may help to resolve a dispute, that help is not necessary in and of itself.[69] Additionally, legal pluralists tend to impute limits to the right of sovereign states to impose conditions in recognizing and enforcing international arbitration awards. As von Mehren could have it, "…no sovereign enjoys an exclusive right to deal with the award and one or more sovereigns' denial of recognition or enforcement does not deprive the award of its legitimacy nor necessarily render it worthless. [70]

Conventional pluralists, in turn, seek to transcend diverse and inconsistent state policies. For example, Jan Paulsson does not deny the influence of state sovereignty on public policy. [71] Nor

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(2010). Gaillard argues against a pluralist theory or arbitration in favor of an international arbitral order based on the *ius gentium.* However, he grounds the latter in monolocal public policy in which courts incorporate transnational into domestic public policy, *see id*. in note at 28, and 60-61. *See also* Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral* Awards*: Is the 'Judgment Route' the Wrong Road?* 4 J. INT'L DISPUTE SETTLEMENT, 587, 592-610 (2013) (on the potentially deleterious effects of a domestic public policy defense).

[66] *Yukos Capital Sarl v Ojsc Rosneft Oil Co*, 200.005.269/01 28 April 2009 (Amsterdam Court of Appeal). Total relief sought was US$425 million.

[67] For proponents of each of these theories, *see supra* note 5.

[68] A.T. Von Mehren, *Limitations on Party Choice of the Governing Law: Do They Exist for International Commercial Arbitration?* (Tel Aviv University, 1986). 19-20.

[69] Ibid.

[70] Ibid. 19-20.

[71] Paulsson, above note 37, at 36. See also Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' 30 (2) INT'L.COMP. L. Q. 358 (1981); Jan Paulsson, 'The role of Swedish courts in transnational commercial arbitration', 21 VA J. INT'L. L, (1981) 211; Jan Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why it Matters'

does he refute that states may adopt comparable policies based on similar historical, political and/or legal geneses.[72] What he does refute is the existence of an "elusive ultimate norm" as conceived in Hans Kelsen's *grundnorm* (ground-norm) theory, in which a ground norm serves as the source of all policies, including by prevailing over lesser policies.[73]

However, a pluralist conception of public policy comparatively does pose difficulties in determining its scope of application, such as under the NY Convention. At issue are socio-cultural and political differences among the courts of nation states that influence whether and how they apply public policies in specific cases. Even courts in states that manifest comparable political ideologies, such as in subscribing to the Western liberal tradition, diverge in how they relate public policy to individual autonomy and to laissez faire economics.[74]

Further complicating the scope of the public policy defense are demonstrable differences in how courts in different legal systems address public policy. For example, the scope of public policy is impacted by the *opinion juris* of civil law versus the judicial precedent adopted by common law courts. Civil law courts that adhere to a deductive tradition tend not to provide detailed reasoning for failing to recognize foreign arbitration awards. Common law courts that adhere to an inductive tradition tend to provide more detailed reasoning in applying public policy on a case by case basis.[75]

The divergence over the perimeters of public policy is even more stark when political traditions differ along ideological lines. Courts within planned economies such as China, are depicted as identifying public policy more with the communal interests adopted by the Central People's

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(1983) 32(1) INT'L. COMP. L.Q. 53; Jan Paulsson, 'Enforcing arbitral awards notwithstanding local standard annulments' 6(2) ASIA PACIFIC L. REV. 1 (1998).

[72] PAULSSON, THE IDEA OF ARBITRATION, above note 5 at 36-7.

[73] Ibid at 48.

[74] See e.g. Hutchinson & Monahan, *Democracy and the Rule of Law*, *supra* note 43; LORENA CARVAJAL ARENAS, GOOD FAITH IN THE LEX MERCATORIA: AN ANALYSIS OF ARBITRAL PRACTICE AND MAJOR WESTERN LEGAL SYSTEMS (2011).

[75] See Brett G. Scharffs, 'The Character of Legal Reasoning', 61 WASH & LEE L. REV. 739, n 15 (2004).

Party than with individual rights *per se*.[76] Courts within Western Liberal states are presented as championing policies that promote an autonomous transnational mercantile order operating with the tacit support of nation states.[77]

Further accentuating differences in the judicial treatment of public policy is religious divergence across nation states, such as in the separation between Church and State in post-enlightenment Western states and the unity between religion and State in Islamic states subscribing to Sharia Law.[78]

In responding to these concerns, some seek to reconstitute the separate decisions of courts of sovereign states with a comparative legal pluralism based on reciprocal borrowing that unifies their commonalities and marginalizes their differences. For example, Jan Paulsson contends that vertical pluralism that relies on cooperation by a multiplicity of sovereign legal orders is unattainable. He responds by proposing a complementary horizontal plural order in which on-state entities, such as professional associations and trade organizations, contribute to developing a plural social order beyond sovereign state orders.[79]

In contrast, other reject all forms of legal pluralism, including those that evolve from comparative borrowing. The reason for that rejection is itself justified along grounds of policy. For example, Emmanuel Gaillard contends that, applying pluralism to international commercial arbitration leads to instability, as a plurality of states diverge in applying it.[80]

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[76] See e.g. FLORA SAPIO, SUSAN TREVASKES, SARAH BIDDULPH & ELISA NESOSSI, EDS., JUSTICE: THE CHINA EXPERIENCE 289 (2017).

[77] See Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules* ,in Albert Jan van den Berg (ed), PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION. VOL.7, 582-602 (Kluwer, 1996) , *Legal theory of international arbitration*, above note 65. See too, Lew, *supra* note 5; Philippe Pinsolle, 'The Status of Vacated Awards in France: The Cour De Cassation Decision in *Putrabali* (P.T. Putrabali Adyamulia vs Rena Holding (a breach of contract case))(Case overview)' 24(2) *Arbitration International* 277 (2008).

[78] See *Stefanus Hendrianto,* 'Comparative Law and Religion: Three-Dimensional (3D) Approach' RELIGION AND METHOD Section 2.1.2 (October 2017).

[79] Jan Paulsson, 'Arbitration in Three Dimensions', *supra* note 5, at 307-9.

[80] Gaillard, *Legal Theory of International Arbitration, supra* note 65, at 37.

A consensual response to perceived limitations of imputing a pluralist conception of public policy to the decision of state courts, is to subscribe to public policies to which states expressly or by clear implication, consent. The underlying assumption is that state courts engage in comparative legal analysis to harmonize *ex ante* legal divergences among them with the aim of promoting legal certainty and economic stability in the resolution of commercial disputes between subjects of different states. The driving force is identified as courts engaging in the comparative appropriation of otherwise disparate legal principles and public policies into domestic law.[81]

For others, the guiding force in the development of an international legal order does not reside in the usages of transnational commercial parties, nor in the decisions of international commercial arbitrators, nor even in the comparative borrowing of legal principles and policies by state courts. Rather, that order is contingent on the mandate of the states that construct it, including the international institutions through which they express their common intentions.[82] That mandate of states includes them entering into multilateral treaties that seek, *inter alia,* to establish and empower an international arbitration court to develop principles and policies by which to determine when to recognize and enforce international arbitration awards.[83] As Emmanuel Gaillard would have it, this international order is determined by the will of a collectivity of states consenting to the creation and application of that order.[84]

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[81] Beryl A. Radin & David L. Weimer, 'Compared to What? The Multiple Meanings of Comparative Policy Analysis' 20 *J. Comparative Policy Analysis: Research and Practice* 56, 58-64 (2018).
[82] Stephen M. Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in Martin Hunter, Arthur L. Marriott and V. V. Veeder (eds), *The internationalisation of international arbitration : the LCIA Centenary Conference* (Graham & Trotman/Martinus Nijhoff, 1995) 115-23.
[83] See e.g. Howard M. Holtzmann, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur L. Marriott and V. V. Veeder (eds), *The Internationalisation of International Arbitration : The LCIA Centenary Conference* (Graham & Trotman/Martinus Nijhoff, 1995) 109-14.
[84] Gaillard, *Legal Theory of International Arbitration supra* note 45, at 59-61.

This autonomous international order founded on the collective will of states stands in stark contrast to an idealized international order that is grounded in natural law philosophy and explicated through a transcendent natural order. In doubt is the prevalence of core moral values that are attributed to nation states though a transcendent body of public policy that supposedly bind morally, and through it, legally as well.[85] For example, is public policy grounded in natural rights popularized by Western liberal states? Is public policy grounded in socio-cultural and religious interests that transcend liberalized assertions of human rights? Is public policy embodied institutionally in the law of nations, through international conventions, treaties and customary international law? It is formulated formally by a collectivity of states that mandate the conduct of courts, arbitrators and parties to arbitration? Or is public policy simply that which each state attributes to it as a measure of territoriality and sovereignty?[86] Alternatively, does public policy as a defense to the enforcement of a foreign arbitration award, reside in an amalgam of competing mono-local, plural and "truly" international embodiments of it? The answers to these questions are not only elusive, but also contested. In contention is the perceived arbitrariness arising from choosing among competing sources of public policy, and the unpredictable of decisions arising from those choices.[87] This contestation continues below in

[85] On the allegedly natural rights sources of public policy, see *supra* note 38, and *infra* note 289.
[86] On proposals to revise the NY Convention to address this question, among others, *see* Pieter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW 269 (1979); Jan Paulsson, *Towards Minimum Standards of Enforcement: Feasibility of a Model Law*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 574 (ALBERT JAN VAN DEN BERG, ED., 1998); Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*, AJB REV 06 (May 2008). On retaining the NY Convention as drafted, *see* Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 689 (A.J. VAN DEN BERG, ed. 2009); V.V. Veeder, *Is There a Need to Revise the New York Convention?* in THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS, IAI SERIES ON INTERNATIONAL ARBITRATION NO. 6, 183 (2010).
[87] On the adaptive potential of international public policy under the NY Convention, *see* CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN & HUNTER ON INTERNATIONAL ARBITRATION 530-569 (2009); James D. Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, 8 CHINESE J. INT'L L. 81, 86-87 (2009). *See further infra* Section IX and X.

illustrating how domestic courts in China, the US and Holland construe public policy under the NY Convention.

IV. China and the Public Policy Defense

China's acceded to the New York Convention in 1995. Its Arbitration Law also came into effect in 1995, as amended in 2009. The Interpretation of that Arbitration Law by the SPC was promulgated in 2006.[88] In 2013, the SPC published draft rules regulating domestic arbitration with foreign elements (foreign-related arbitration) as well as foreign arbitration [The Proposal].[89] Article 283 of the Civil Procedure Law (CPL), which came into effect on 4 February 2015, also provided specifically for the interpretation of the NY Convention. Article 545 of the Interpretation of the SPC, in turn, distinguished among the review of domestic, foreign-related and foreign arbitration.[90] The SPC clarified further, that disputes between wholly foreign owned enterprises incorporated in free trade experimental zones (FTEZs) can be submitted to foreign arbitration; they provided against arbitration agreements being invalidated for foreign elements;[91] they also validated *ad hoc* arbitration agreements between enterprises incorporated in FTEZs in which the place of arbitration was in mainland China.[92]

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[88] See the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of PRC (effective as of 16 December 2008, hereinafter, the 2008 SPC Interpretation0.

[89] Three legislative bills were introduced as amendments to the Arbitration Law (2013 Bills). Both the SPC Proposal and the 2013 Bills proposed significant reform measures. For example, the SPC Proposal sought to conditionally endorse *ad hoc* foreign-related arbitration in China and proposed a mechanism for joining third parties. The 2013 Bills also considered joining third parties and reducing the limitation period for setting aside awards from six to three months. However, the SPC Proposal has not been finalized and the 2013 Bills are reported to be under consideration by the National Congress.

[90] Review of domestic arbitration is provided for in Article 237 of CPL), foreign-related arbitration institutions of China] (Article 273/274 of CPL), and foreign arbitration institutions (Article 283 of CPL). Foreign related arbitration is further delineated in Chapter 7 (addressing 'special regulations for foreign-related arbitration') of the Arbitration Law of China and the Circular of the Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China.

[91] Provided for in Article 9 (3) of its guiding opinion promulgated in December 2016.

[92] Ibid.

A key conceptual basis upon which Chinese courts will enforce a foreign judgment or arbitral award derives from the principle of reciprocity between states. Such reciprocity entails balancing two principles. The first principle is that domestic courts recognize the decisions of foreign courts based on those foreign courts recognizing the decisions of domestic courts. The second principle is that such reciprocal recognition is subject to domestic public policy, such as in denying reciprocal treatment in order to protect the national security of a domestic state.[93] These related principles of reciprocity is endorsed by the Supreme People's Court. Article 2 of the Notice of the Supreme People's Court on the Handling of Issues Concerning Foreign-related Arbitration and Foreign Arbitration by Peoples' Courts and Article 283 of Civil Procedural Law, provides that the recognition and enforcement in China of foreign arbitral awards should be in accordance with the international conventions China has entered into or the principle of reciprocity. A single but important illustration of Chinese courts adopting the principle of reciprocity occurred in December 2016 when the Nanjing Intermediate Court adopted that principle in response to the Singapore High Court's enforcement of a civil judgment by the Suzhou Intermediate Court in 2014 in the same Province as the Nanjing Court.[94] In applying the principle of reciprocity, the Nanjing Court determined that the Singaporean judgment in issue did not violate basic principles of Chinese law, national sovereignty and security, or social and public interests.[95] It therefore recognized and enforced the Civil Judgment.[96] Implicit in the Nanjing Court's conception of reciprocity is, not only the mutual recognition that domestic and foreign courts accord to each other's decisions, but public policy constraints they place on that recognition, such as on grounds of state sovereignty.

However, the scope that Chinese Courts give to the public policy defense in determining whether to enforce foreign arbitration awards and judgements, is, arguably, limited. In particular, China's Supreme People's Court (SPC) faces an ongoing dilemma in delineating the nature and scope of

[93] See further *infra* text accompanying notes 93-6.
[94] Kolmar Group AG, A Case of an Application for the Recognition and Enforcement of a Civil Judgment of the High Court of Singapore, B&R Typical Case 13 Batch 2 Case 5 (Released by the Supreme People's Court on May 15, 2017)
[95] Ibid.
[96] Decided in accordance with Article 282 of the CPL.

public policy.[97] This dilemma is accentuated at the outset by China's exercise of reservations in adopting the NY Convention,[98] and by the limited analysis of public policy by Chinese courts in determining whether to recognize foreign arbitration awards.[99] The result has been that Chinese courts have seldom invoked the public policy defense in practice. As a 2016 survey "On Enforcing Foreign Arbitral Awards in China – a review of the past twenty years", in only one case (2.94% of the surveyed cases) was the arbitration award denied enforcement under Article V (2)(b) of the NY Convention.[100] This observation notwithstanding, Chinese Law permits domestic courts to construe Article V(2)(b) of the NY Convention on public policy expansively,[101] notably in reviewing the merits of arbitration awards on public policy grounds.[102] It also grants Chinese a wide discretion not to recognize or enforce foreign arbitral awards on grounds that they violate: fundamental principles of Chinese law, China's national sovereignty and security, or are otherwise contrary to China's social and public interests.[103] It also empowers

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[97] For decisions by Supreme People's Court, see www.court.gov.cn For judicial opinions on the official website of the SPC, see <www.court.gov.cn/zgcpwsw> <http://wenshu.court.gov.cn/> accessed 11 September 2018.

[98] In ratifying the NY Convention, China made both commercial and reciprocity reservations. It provided that it would recognize awards only if they were made in the territory of another signatory state and only if they resulted from contractual and non-contractual legal relationships that were considered commercial under Chinese law.

[99] The sources of Chinese law regulating the enforcement of foreign arbitral awards are variously provided for: in the CPL; SPC interpretations on and related to the Arbitration Law; SPC interpretations on and related to the CPL; SPC interpretations in respect of Hong Kong, Macau or Taiwan awards (SPC Arrangement in respect of Mutual Enforcement of Arbitral Awards by the Mainland and the Hong Kong Special Administrative Region effective on 1 February 2000; SPC Arrangement in respect of Mutual Acknowledgement and Enforcement of Arbitral Awards by the Mainland and the Macau Special Administrative Region effective on 1 January 2008; SPC Directives in respect of Acknowledgment and Enforcement of Arbitral Awards Rendered in Taiwan Region effective on 1 July 2015, which replaced the old SPC directives on the same subject matter that came into effect in 1998 and 2009 respectively); SPC Notice on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China.

[100] <http://www.kwm.com/en/knowledge/insights/enforcing-foreign-arbitral-awards-in-china-20160915> accessed 11 September 2018.

[101] See Article 71 of the Arbitration Law and Article 274 of the CPL

[102] See Article 63 of the Arbitration Law and Article 237 of the CPL, including to protect domestic interests

[103] See Article 282, CPL.

the SPC to decline to recognize foreign awards under Article V(1)(b) of the NY Convention on procedural grounds, including: the lack of a valid arbitration agreement; the failure to serve the respondent notice of impending arbitral proceeding; the failing to provide the respondent with the opportunity to appoint an arbitrator, or to present a case. It also entitles the SPC not to enforce foreign arbitration awards on grounds that: the composition of the arbitral tribunal or the conduct of the arbitral procedure diverge from the applicable arbitration rules; the issue in dispute is not arbitrable or is outside the scope of the arbitration agreement; and the enforcement of the award is contrary to China's social and public interests.[104] Chinese courts can also decline to recognize and enforce foreign judgments and awards where preliminary/provisional proceedings (such as decisions by emergency arbitrators) are not final and conclusive;[105] or provisional measures granted by foreign arbitral tribunals are not final and conclusive.[106]

Given these statutory developments, it is pertinent to determine how Chinese courts construe the public policy defense, the extent to which they do so consistently, and how they might reconcile their different constructions in the future.

What is apparent is that, in recent years. Chinese Law has sought to redress perceived inconsistencies, *inter alia*, in the judicial application of the public policy defense. This is notably in the 2016 directions to the SPC to clarify how Chinese law applies in recognizing and enforcing foreign law, including foreign judgments and arbitration awards.[107] While Chinese law does not explicitly direct how courts determine whether, when, why and how to construe public policy, it does impose a duty on the SPC to redress judicial divergence over the validity of arbitration clauses in contracts, including when to declare arbitration clauses unenforceable. However, Chinese courts have varied over the when to enforce foreign arbitral awards. Some have declined to enforce foreign awards on public interest grounds, such as *Hemofarm DD et al*

[104] See Article 274, CPL.
[105] This issue has not been tested before the SPC to date. In contrast, partial or interim awards that dispose of some (but not all) of the issues in the arbitration may be recognized and enforced.
[106] However, to date this has not been tested before the SPC.
[107] See further Articles 2 & 3 of Notice of the Supreme People's Court, Ibid.

v Jinan Yongning Pharmaceutical Co. Ltd.,[108] and ***Wicor Holding AG v. Taizhou Haopu Investments Limited.***[109] In contrast, the SPC has enforced a foreign arbitration award in *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co, Ltd,*[110] and has upheld the validity of an arbitration agreement providing for ICC-administered arbitration in China in *Longlide Packaging v. BP Agnati* (2013).[111] These cases are discussed briefly below.

i. *Hemofarm et al v Yongning* [112]

In this 2008 case, the SPC declined to recognize and enforce a foreign award rendered by the ICC's International Court of Arbitration (ICC) on grounds of public interest. The case concerned a 1995 joint venture agreement between a Chinese company and three foreign companies, and provided for ICC arbitration in Paris in the event of a dispute. A leasing dispute arose between the Chinese and foreign parties to the joint venture company. The Chinese party brought an action before a Chinese court, which accepted jurisdiction and issued an asset preservation order against the joint venture company. In response, the three foreign companies within the joint venture commenced an ICC arbitration against the Chinese party. The ICC tribunal ruled, among other determinations, that the Chinese party had breached the joint venture contract by seeking the asset preservation order against the joint venture before a Chinese court, and awarded damages to the foreign parties. The foreign parties then sought recognition and enforcement of the ICC award in China. However, the Chinese court held that the leasing dispute was outside the scope of the arbitration clause and that the ICC tribunal's asset preservation order violated Chinese judicial sovereignty. Importantly, the Chinese Court declined to recognize and enforce the ICC award on the ground of public policy under Article V(2)(b) and Article V(1)(c) of the NY Convention.

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[108] Case number (2008) Min Si Ta Zi Di 1.
[109] Civil Action (2015) Tai Zhong Shang Zhong Shen Zi No. 00004). (2 June 2016). The first reported case in which a Chinese court declined to enforce a foreign arbitral award in public policy grounds is *Züblin International vs. Wuxi Woke* (2004).
[110] (2013) Min Si Ta Zi No. 46.
[111] SPC Docket Number: 2013-MinTa Zi No.13.
[112] See *supra* note 108.

Upon first impression, it is arguable that the Chinese court based its decision on mono-local sovereignty grounds, while the ICC tribunal favored the foreign parties on grounds that the Chinese party breached a joint venture contract agreed to by all parties. However, these first impressions fail to acknowledge that the public policy defense under the NY Convention includes protecting the domestic policies of signatory states on mono-local grounds that include national sovereignty. The operative question is not whether the NY Convention entitles Chinese courts to construe China's national sovereignty expansively. The courts in signatory states are so empowered. The issue is whether and for what reasons Chinese courts choose to construe its national sovereignty expansively on public policy grounds, as the SPC held in *Hemofarm*. Importantly, this is an issue that is included in the SPC's mandate to unify disparate judicial determinations in the recognition and enforcement of foreign arbitration awards. It is also a mandate that is not generally imposed on the courts of other signatory states to that Convention.[113]

The contention, following *Hemofarm*, that Chinese courts are likely to decline to enforce foreign arbitral awards that conflict with Chinese public interests is equally directed at the courts of other signatory states to the NY Convention. Further diluting this criticism of Chinese courts is the limited number of publicly available Chinese decisions that adopt a mono-local conception of state sovereignty as a public policy ground to decline to enforce a foreign arbitration award.

ii. Wicor Holding AG v Taizhou Hope Investment Co, Ltd.[114]

In June 2016, the Taizhou Intermediate Court declined to enforce an ICC award rendered in Hong Kong on ground of public policy. The Taizhou Court held that the Chinese court that had invalidated the arbitration agreement under Chinese Law preceded the ICC award validating that agreement. It held that these inconsistent findings on the validity of an arbitration agreement themselves constituted a public policy ground for declining to enforce the ICC award.

[113] See Yves Hu & Clarisse von Wunschheim "Reforms on the 'Prior Reporting System' — A Praiseworthy Effort by the PRC Supreme People's Court, or Not?" Kluwer Arbitration Blog (2017), http://arbitrationblog.kluwerarbitration.com/2018/01/08/reforms-prior-reporting-system-praiseworthy-effort-prc-supreme-peoples-court-not/> accessed 11 September 2018.
[114] (2015) Tai Zhong Shang Zhong Shen Zi No. 00004 Civil Ruling.

It is arguable that the Taizhou Court construed the public policy defense mechanically, in determining not to enforce an arbitration award on public policy grounds solely because a Chinese judicial decision predated an ICC award to the contrary. This criticism, while true on its face, does not demonstrate that the courts of signatory states to the NY Convention ought not to adopt such mechanical reasoning in interpreting the public policy defense. Indeed, it is at least arguable that a court that invokes public policy to decline to enforce an arbitration award that disregards a contrary judicial determination is at least justifiable in seeking to produce coherence and certainly in law. What is desirable is that such a judicial determination is verified by ancillary evidence, such as by facts demonstrating that the arbitral tribunal took due account of the preceding and contrary judicial decision which the arbitral tribunal ultimately declined to recognize.

A criticism of *Wicor* that is more pertinent to this study is that a Chinese court ought not to annul a foreign arbitration award that undermines the private commercial interests of a Chinese party, unless enforcement of that award also threatens China's public interests. However, this perception fails to recognize that domestic courts of signatory states that identify private commercial interests with domestic public policy may well act in accordance with, not inconsistently with, the public policy defense under the NY Convention. This recognition that public policy under the Convention is sufficiently expansive to include private interests nevertheless does raise concern about protectionism directed at insulating private interests from foreign competition that itself may undermine domestic public interest, such as increases prices and diminishing the quality of the applicable goods or services. However, such determinations are ultimately for domestic legislatures and courts to make, however much they may be questioned academically.

iii. *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co, Ltd.* (*(2013) Min Si Ta Zi No. 46*)

In contradistinction to *Wicor* where the court annulled a foreign arbitral award, the SPC in *Castel* enforced a foreign award, notwithstanding that a Chinese court in related legal proceedings

refused to enforce the applicable arbitration agreement. In effect, the SPC recognized an award that predated a Chinese court decision that purported to annul that arbitration agreement. More substantively, the SPC stressed that, in the absence of grounds for declining to enforce awards under Article V of the NY Convention, Chinese courts would enforce those awards.

A technical inference drawn from *Castel*, juxtaposed against *Wicor*, is that, if an arbitration award enforcing an arbitration agreement precedes a judicial decision determining declining enforcement, no public policy conflict would arise. A concern is that this will lead to mechanical reasoning by which a violation of public policy is based on whether enforcement of an arbitral award preceded or postdated a contrary judicial determination. However, such mechanical reasoning inheres in judicial reasoning generally, including before common law courts.[115]

iv. Competing Conceptions of Public Policy in Chinese Law

As a pervasive observation, there are insufficient published judgements by Chinese courts to determine whether and to what extent judges invoke mono-local conceptions of public policy on grounds of sovereignty. Nor is there adequate evidence as to whether they invoke the public policy defense under the NY Convention to protect Chinese commercial interests over foreign interests, or local over transnational commerce.

Nevertheless, Chinese courts face competing conceptions of public policy that, as will be demonstrated, arise faced, comparatively and comparably, elsewhere. On the one hand, Chinese judges are incentivized to accommodate foreign interests in applying the public policy defense, not least of all to maintain China's global leadership in inbound and outbound trade. On the other hand, Chinese courts are empowered to protect China's mono-local interests from foreign judgments and awards that might otherwise undermine China's domestic and regional markets. The challenge for the Chinese legal system, not limited to its courts, is to encourage foreign trade

[115] *See e.g.* Brian Leiter. 'Legal Formalism and Legal Realism: What Is the Issue? 16 (2) LEGAL THEORY, 2010.

and investment, while protecting mono-local interests from subjugation by that self-same trade and investment.[116]

In judicial contestation, therefore, are mono-local public interests, such as enshrined in national security. These interests complete with interests that a plurality of states share, as well as transnational policies that conceivably transcend both local and plural interests, such as promoting global investment. This contest is protracted by the realization that China's planned economy adds a further layer to its public policy which is, at least arguably, less prevalent in market economies associated with so-called Western liberal states.[117] Encompassed in this planned civil law system is the prospect of Chinese courts balancing public policy and due process constraints within China's planned economy, while contributing to the *opinion juris* across its judicial system in accordance with its evolving Civil Code.[118] A challenge for Chinese courts, as for civil law courts generally, is to provide cogent reasons for annulling arbitration awards in order to foster a robust *opinio juris*, in contradistinction to the inductive case-by-case analysis ascribed to common law courts.[119]

This does not infer that Chinese courts, because of planned economy and civil law accretion, have failed to recognize and apply due process procedures, or recognize substantive conceptions of public policy in determining whether to enforce foreign judgements or awards. Based on

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[116] On this challenge, see e.g. Ernst-Ulrich Petersmann, "Trade and Investment Adjudication involving 'Silk Road Projects': Legal Methodology Challenges" EUI Working Papers 2 (Department of Law, 2018). On the Supreme People's Court of the People's Republic of China, see <http://en.chinacourt.org/> accessed 19 September 2018. For a U.S. perspective on China's openness to and restrictions on foreign investment, see State Department's Office of Investment Affairs' Investment Climate Statement, China - 1-Openness to, & Restrictions Upon Foreign Investment, 7/20/2017, <https://www.export.gov/article?id=China-1-Openness-to-Restrictions-Upon-Foreign-Investment> accessed 11 September 2018.

[117] See Xuetong Yan, Chinese Values vs. Liberalism: What Ideology Will Shape the International Normative Order? 11 (1) *The Chinese J. Int'l. Politics*, 1–22 1 March 2018, <https://doi.org/10.1093/cjip/poy001> accessed 11 September 2018.

[118] Ling Li, 'The Chinese Communist Party and People's Courts: Judicial Dependence in China' 64(1) Am J. Comp. L. 28 (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551014> accessed 11 September 2018.

[119] On China's case law system, see Jinting Deng, 'The Guiding Case System in Mainland China', 10 (3) Frontiers of Law in China 1-26, (2015); Albert H.Y. Chen, 'An Introduction to the Legal System of the People's Republic of China' (Hong Kong: Lexis Nexis, 2011).

cases like *Wicor* and *Castel*, it is arguable that Chinese courts sometimes subject public policy to formal legal requirement, such as declining to enforce a foreign arbitral tribunal made *after* a Chinese court has reached a contrary decision. However, the choice between an automated and a variable conception of public policy peculiar to Chinese courts. Courts in so-called Western liberal democracies face comparable issues and do not invariably address them coherently, cogently, or sometimes, at all.[120] Foreign courts also adopt mechanical reasoning; they defer to foreign judicial decisions; and they engage in reciprocal recognition of foreign judgements, such as in upholding or annulling arbitration awards.[121]

Nor has academic commentary often helped to resolve seemingly intractable differences over the scope and application of public policy. Typically, defenders of a mono-local public policy regime stress each state's sovereignty and the territorial application of its laws.[122] Critics target domestic courts in multiple jurisdictions for failing to nullify arbitration awards on public policy grounds, or nullifying them too readily.[123] Sceptics warn that "[p]ublic policy is one of the most important weapons in the hands of the national court which allows it to refuse enforcement of an arbitral award which is otherwise valid".[124] Chinese courts are also not alone in seeking consistent, coherent and sustainable grounds on which to decide when and how to decline to enforce foreign-related and foreign arbitral awards on public policy grounds.[125] The experiences of selected courts in Western liberal states are dealt with immediately below.

VI. A New York Court construes Local Interests Expansively

[120] See e.g. *infra* Sections V.
[121] See *infra* Section X-XI.
[122] *See e.g.*, Maurer, *supra* note 56 at 61; Fortier, *supra* note 61, at 274-6; Mann, *supra* note 2, at 159; Michaels, *supra* note 63, at 35.
[123] On such a restrictive approach, *see e.g.* Maurer, *supra* note 56, at 61; Yves Fortier, *supra* note 61, at 274; Hakan Berglin, 'The Application in United States Courts of the Public Policy Provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' at 16 Dickinson J. Int'l. L. 167, 169 (1986).
[124] Sameer Sattar, *National Courts and International Arbitration: A Double-edged Sword*? 27 J. INT'L ARB. 51, 51 (2010). *See also* JAMES E. ANDERSON, PUBLIC POLICYMAKING 5-21 (2014) (On the influence of domestic public policy on international public policy).
[125] *See infra* Sections IV (New York) and V (The Netherlands).

A growing number of controversial domestic decisions, including in the US, have annulled foreign arbitration awards on domestic public policy grounds, or refused to enforce foreign judgments ruling on those awards. Among these is a recent litigation chronicle in New York, concluding with a 2017 decision of the New York Appellate Division, Citigroup Global Mkts. v. Fiorilla.[126] That Court upheld earlier New York decisions vacating an arbitration award under the NY Convention on grounds that the arbitrators had "manifestly disregarded the law in failing to enforce a prior settlement agreement between the parties".[127] Significantly, the Court enjoined the award creditor from seeking to enforce in France the arbitral award that had been annulled in New York.[128] The case heralds a potentially changing landscape in which an appellate domestic court imposed an order with purportedly extra-territorial application on a party, "in the interests of protecting the New York judgment on the merits".[129]

Such judicial action kindles conflict between a determining court in New York, and an enforcing court in France, over whether the French court ought to recognize the annulment of an award based on the purportedly mono-local interests of New York.[130] Resolving these judicial

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[126] 151 AD 3d 665 (2017).

[127] *Id.*, citing Citigroup Global Mkts. v. Fiorilla 127 AD 3d 491 [1st Dep't 2015], *lv denied* 26 NY3d 908 [2015]. *See also* Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered November 14, 2016, November 25, 2016 and January 18, 2017. In support of its injunction against enforcement of the award, the court cited Indosuez International Finance v. National Reserve Bank, 304 A.D.2d 429, 430, 758 N.Y.S.2d 308, 310 (1st Dep't 2003). It is noteworthy that this cited decision did not involve arbitration.

[128] *Id.*, citing Sebastian Holdings, Inc. v Deutsche Bank AG., 78 AD 3d 446, 446-47 [1st Dep't 2010]. The Court in Fiorilla so held even though it did not appear, on the facts, to have acted on the award debtor's specific request to direct the award creditor to release any assets whose attachment was premised on the award.

[129] *See supra* note 126, at 665. In chronological order, following the award's annulment by the NY Supreme Court, the award creditor moved in NY to vacate the previously annulled award there, notwithstanding that the award had already been enforced in France. The award debtor responded by petitioning the court to direct the award creditor to release any assets whose attachment was premised on the award. The NY court refused to vacate its judgment of annulment, holding that the award creditor had not informed the French court that the award had been annulled in NY and that the award creditor '[had] commenced the French proceeding in bad faith.' In Re Citigroup, *id.* in note, at 665.

[130] Interestingly, the NY AD did not clarify why the case was international and why the dispute was subject to the NY Convention. However, both can be inferred from the fact that the award was recognized and enforced in France, and that the US and France are long-standing signatories to the NY Convention.

differences is complicated by the fact that the Hague Convention on the Recognition and Enforcement of Foreign Judgments, as distinct from the NY Convention on the recognition of foreign arbitration awards, has few albeit growing numbers of signatories.[131] However, Article V of that Convention does set the tone for domestic courts in general to decline to enforce foreign judgment which they deem "manifestly incompatible with the public policy of the state addressed or if the decision resulted from proceedings that were incompatible with the requirements of the rule of law or if either party had an inadequate opportunity to fairly present her case."[132]

A difficulty with limiting the "public policy exception" explicitly to internally generated domestic interests, as arose in Fiorilla, is the stark and unqualified mono-local application of the public policy defense. This practice is at variance with the practice of some foreign courts that seek to legitimate domestic at least by justifying their mono-local determinations procedurally and/or substantively.[133] A further obstacle arises from the likelihood that determining and enforcing courts will differ over the significance of mono-legal and plural interests such as in promoting foreign commerce.[134] Given how studiously state legislatures avoid defining public policy, limiting it to narrow mono-legal may perpetuate and indeed further imbed rigid national in the very interstices of public policy.[135]

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[131] The signatories to the Hague Convention are: Albania, Cyprus, Kuwait, Portugal, the Netherlands and Aruba. *See further* Zeynalova, Yuliya, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?* 31 BERKELEY J. INT'L. L.198 (2013); Juliane Oelmann, *The Barriers to the Enforcement of Foreign Judgments as Opposed to those of Foreign Arbitral Awards*,18 BOND L. REV. 1 (2006); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding Local Standard Annulments* 6 Asia Pacific L.J. 1 (1998); Georges R. Delaume, *Enforcement Against a Foreign State of an Arbitral Award Annulled in the Foreign State* 2 INT'L. BUS. LAW J. 253, 254 (1997).

[132] The Hague Conference on Private International Law of 1 February, Hague Academy of Private International Law (1971) <https://assets.hcch.net/docs/bacf7323-9337-48df-9b9a-ef33e62b43be.pdf> accessed 11 September 2018.

[133] On mono-local conceptions of public policy and due process in China, see generally *supra* Section III.

[134] The local interests of New York identified in Fiorilla are local interests that do not necessarily coincide with US interests. This difference between local and national interests may arise before the Federal Court, in Foirilla v. Citigroup, 1:177-cv-05123-PKC (S.D.N.Y., 2017).

[135] *See* IBA SUBCOMMITTEE ON RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS, REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION 2 (IBA, 2015)

The Fiorilla decision also potentially undermines the principle of comity by which states and their courts accord each other reciprocal treatment based on trust and mutual respect between and among states, such as between New York and French courts. This apparent disregard of reciprocal recognition of foreign judgements enforcing or annulling arbitration awards in Fiorilla deviates from the 2016 Chinese case in which the Nanjing Intermediate Court enforced an award in reciprocity for the Singapore High Court's enforcement of an award in a comparable case.[136] Had the French court taken judicial notice of the New York decision in Fiorilla, it might also have declined to enforce the arbitration award based on mutual respect and reciprocity between New York and French courts and identified with "judiciary comity".[137]

The consequence of domestic courts adopting the principle of reciprocity is to extend public policy beyond the strictures of mono-localism, promoting grounds for enforcement (or non-enforcement of awards) based on more expansive bi-local or plural grounds derived from the practice of reciprocity between and among states.[138] At one extreme, a French court could enforce the New York decision in Fiorilla in reciprocation for like enforcement of French decisions in New York. At the other extreme, the French court could "reciprocate" negatively, by denying effect to New York's mono-local policies on grounds that prior French decisions were not enforced in New York. In issue is whether and to what extent domestic courts should reciprocate on hierarchical grounds. For example, should French and New York courts reciprocate in the basic laws of foreign jurisdictions, such as in accordance with their

(finding that, of more than 40 jurisdictions surveyed, only Australia and the UAE had established explicit statutory definitions of 'public policy'). For general and country reports, *see* RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS - STUDY ON PUBLIC POLICY (IBA (2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx>, accessed 12 September 2018.

[136] See *supra* note 109.

[137] *See* Elisa D'Alterio, *From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?* 9 INTL J. CONST. L. 394 (2011) (on comity based on mutual respect between states); Andrew Tweeddale & Keren Tweeddale, Arbitration of commercial disputes 444 (2005) (on comity as a ground for enforcing international arbitration awards).

[138] On divergence over the nature and significance of transnational public policy, *see* OGH, 26 Jan. 2005, 3Ob221/04b, in XXX Y.B. Com. Arb. 421 (2005) (Austria); Mahkamat al-Isti'naf, Court of Appeal, 23 May 2001 (Egypt). *See also infra* Section III& IV.

constitutions or prevailing commercial codes? Should they reciprocate, more expansively, by recognizing the decisions of foreign courts that interpret those basic laws, such as the decision of the New York Appellate Division?[139] Still, should they reciprocate based on divergent religious-cultural values, such as recognize public policies against usury in Islamic states, if those states enforce public policies in Western liberal states that limit usury to unfair or unconscionable dealings?

Importantly, domestic courts need to determine whether to reciprocate on procedural and/or substantive grounds in enforcing foreign awards and judgments. Should they reciprocate procedurally, they need to reconcile differences among mono-local, plural, or transnational onceptions of procedural due process. Western liberal states need to decide, in particular, whether to adopt their mono-local conceptions of due process over "other" or "lesser" due processes they ascribe to foreign courts, as Amsterdam Court of Appeal sought to do in deciding whether or not to enforce arbitral awards annulled by Russian Courts in *Yukos Capital Sarl v Ojsc Rosneft Oil Co.*[140]

If courts they are to reciprocate substantively, such as in determining the policy boundaries of party autonomy, they need to reckon with differences in the substantive law applied by foreign courts, such as relate to the sanctity of contracts and the validity of their terms.[141]

In issue in reciprocating on procedural or substantive grounds is in determining the nature and scope of public policy itself. Should states adopt such reciprocity only sparingly, such as in

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[139] On the hierarchy of procedural and substantive norms of public policy in international commercial arbitration, *see* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?* 31 BERKELEY J. INT'L. L. 198 (2013); Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform* 41 COLUM. J. TRANS. LAW 923 (2003); Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience* 38 HASTINGS L.J. 239 (1987). *See also* BCB Holdings v. The Attorney General of Belize, [2013] CCJ 5 (AJ) (Caribbean).

[140] *Yukos Capital Sarl v Ojsc Rosneft Oil Co,* 200.005.269/01 28 April 2009 (Amsterdam Court of Appeal). See further below, Section VII.

[141] *See e.g.* Karl Riesenhuber, 'English Common Law versus German Systemdenken: Internal versus External Approaches, 7(1) Utrecht L. Rev. (2011).

protecting human rights deemed to be fundamental under the so-called "law of nations" and as explicated through consensus among the courts of compliant states? Should domestic courts reciprocate only where alleged cornerstones of public policy are threatened, such as clear threats to a foreign state's national security and/or economic stability?[142] Alternatively, should they reciprocate according to international law rules adopted by foreign legal systems, such as under French law, even if those rules diverge from the rules attributed to transnational law in general, in effect, by deferring to "an international rule of French law and not a transnational rule"?[143]

The alternatives are diffuse. A French court may defer to the New York decision in Fiorilla, in deference to New York interests as enunciated by a superior court there. It may enforce foreign judgments on grounds that the public policy favoring enforcement is fundamental in nature, reflects the interests of a plurality of states, or is "truly" transnational in nature. It may enforce a New York decision based on New York's conception of international law regarding the enforcement of foreign arbitral awards, even if that conception diverges from the interpretation of international law generally, including by French courts.

These issues raise some vexing problems when state courts decline to reciprocate by not enforcing foreign judgments on grounds that foreign courts fail to comply with the standards of procedural or substantive justice adopted by the courts in the enforcing state. This is particularly so when a court in the enforcing state decides that the determining court that has annulled an arbitration award, has violated mono-local, including the international standards of due process of the enforcing state, or transnational standards such as are institutionalized in international conventions or codes. This is discussed immediately below.

VII. A Dutch Court declines to Enforce Russian Judgments on Due Process Grounds

[142] On this restrictive conception of public policy, *see* Oelmann, *supra* note 131, at 1. On applying public policy only in exceptional circumstances, *see* Case C-7/98, Dieter Krombach v André Bamberski [2000] ECR I-1935 (Germany). *See also* Maxicar v. Renault II, ECR 2000, I-2973, para. 28.

[143] *See* JEAN-FRANCOIS POUDRET, SEBASTIEN BESSON COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 83 (2 ED., 2007). On prioritizing domestic over transnational public policy, *see supra* Sections III–IV.

In *Yukos Capital Sarl v Ojsc Rosneft Oil Co.*[144] the Amsterdam Court of Appeal applied a mono-local conception of procedural public policy in refusing to enforce the decisions of Russian courts in related proceedings on grounds that those courts had engaged in a "partial and dependent judicial process".[145] In contention were Russian decisions that had annulled four arbitration awards that favored Yukos Capital, a private corporation in a long-standing dispute with Rosneft Oil, a Russian state-owned corporation. The cause of action was that Rosneft had failed to repay a loan to Yukos.[146] In declining to recognize the Russian judicial decisions, the Amsterdam Court of Appeal enforced the arbitration awards, authorizing Yukos to seize Rosneft's assets in Holland, in contradistinction to the Russian decisions that had annulled them.

While the Dutch decision relates to the refusal to enforce a foreign judgment, as distinct from a foreign arbitral award, it is a fitting illustration of a determining court deciding against enforcement on mono-local due process grounds. In particular, the Dutch court held that "the manner in which said [Russian] judgment was brought about does not satisfy the principles of due process and for that reason recognition of the judgment *would lead to a conflict with Dutch public order*."[147] However, it also found that the Russian decisions violated the independence of the judiciary that underpins public law, stating that the Russian judiciary "allows itself to be led by the interests of the Russian state and is instructed by the executive."[148] It concluded that the Russian courts had failed to rebut Yukos's allegation that those courts were "not impartial and independent".[149]

The Amsterdam Court's decision is questionable on grounds that it adopted a stringent mono-local conception of public policy, rather than a transnational conception of it. At issue was its

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[144] *Yukos Capital Sarl v Ojsc Rosneft Oil Co,* 200.005.269/01 28 April 2009 (Amsterdam Court of Appeal). Total relief sought was US$425 million.
[145] *Yukos Capital Sarl v Ojsc Rosneft Oil Co,* 200.005.269/01 28 April 2009 (Amsterdam Court of Appeal). Total relief sought was US$425 million.
[146] On the background to the *Yukos* case, *see, Yukos Capital Sarl v Ojsc Rosneft Oil Co* [2011] EWHC 1461 (Comm).
[147] *See Yukos Capital*, *supra* note 144, at 3.5. Emphasis added.
[148] *Id* at 3.9.3.
[149] *Id.*

insistence based on localized Dutch conceptions of due process that the Russian Courts were partial. In measuring the public policy exception according to domestic Dutch requirements, rather than due process transnationally, the decision invites mono-local responses to enforcement of foreign judgements that vary from state to state.[150] Indeed, it was precisely in the Dutch Court's localization of international public policy that the English Court of Appeals set aside a decision of the English High Court that had also refused to recognize the Russian annulment judgments on grounds that the Dutch Court's had held that those judgements violated international (procedural) public policy. The English High Court held, to the contrary, that the local public policy of Hollard was peculiar to Holland; that it was not identical to English public policy; and importantly, that English courts should determine English public policy, not defer to the local public policies of Holland.[151]

In issue, too, is divergence over substantive conceptions of public policy, such as whether the Dutch court, in applying substantive mono-local conceptions of judicial independence, potentially disregarded the relationship between the executive and judiciary in Russia.Moreover, even in established Western liberal democracies, the judiciary is not inevitably independent of the Executive, as when the president of a libertarian government nominates judges who are likely to minimize government regulation of international commerce consistent with that libertarian ideology.[152] Nor, too, is the distinction between state and non-state owned enterprises peculiar to socialist economies, or to their reconstitution in Russia. National courts in liberal democracies also decide cases between state owned and private entities, in which judicial independence is also not assured.[153]

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[150] *See further supra* Section II. *See also* Anselmo Reyes, *Due Process Paranoia*, ASIAN DISPUTE REV.160 (2017) (on divergence over the scope of due process); A. N. Zhilsov, *Mandatory and Public Policy Rules in International Commercial Arbitration*, 42(1) NETH. INT'L L. REV. 81, 100 (1995) (on courts invoking forum public policy to exclude the application of foreign law).

[151] *See Yukos Capital SarL v. Ojsc Rosneft Oil Company* [2012] EWCA CIV 855.

[152] On judicial independence in Western liberal democracies, *see* Shimon Shetreet, *The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges*, 10 CH. J. INTL. L. 275-332 (2009); LORD WOOLF, THE PURSUIT OF JUSTICE 161–74 (2008).

[153] *See* e.g. Xuetong Yan, *supra* note 117.

More controversial, too, is whether the Amsterdam Court of Appeal should have deferred to the Russian courts formally based on "comity" between states, an argument Rosneft raised in its defense. The rationale is that, had the Dutch court enforced the Russian decisions, it would have recognized Russian conceptions of due process that accorded with Russian political-legal traditions.[154] It would also have increased the likelihood that Russian Courts might reciprocate by recognizing the construction of due process before Dutch courts. The application of the principle of reciprocity in the recognition of foreign judgements is also not exceptional. For example, such reciprocity was adopted by the Nanjing Intermediate Court in response to the Singapore High Court's enforcement of a foreign judgment.[155]

The issue of whether courts adopt the principle of reciprocity mechanically or in a principled manner is less easily resolved. Had the Dutch court recognized the Russian decisions mechanically, it might have minimalized, and marginalized due process requirements when viewed transnationally. Had the Dutch court adopted transnational due process requirements, beyond mono-local Dutch standards, it may have raised the threshold of due process to transnational standards, albeit falling short of Dutch standards.

This is not to assert that the Amsterdam court's findings based on mono-local due process requirements were wholly unwarranted. That court did highlight European and British judicial opinions that Russian courts lacked judicial independence, including in relation to officers of Yukos in indirectly related criminal proceedings.[156] Domestic courts must sometimes also rely somewhat on evidence of past patterns of due process violations in the absence of comprehensive evidence of due process violations that are not readily on the record in the instant case under review.[157] What is open to debate is whether the Dutch court had sufficient *prima*

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[154] *See* 1155 U.N.T.S. 331, 8 I.L.M. 679 (on comity in Article 31 of the Vienna Convention on the Law of Treaties, 1969). *See* ROBERT JENNINGS & WATTS ARTHUR, OPPENHEIM'S INTERNATIONAL LAW, 51 (1996) (on comity among nations). *See also infra* note 138.
[155] See *supra* note 94.
[156] *Id.*, at 3.8.8. *See also* William E. Butler, *State Interests and Arbitration: The Russian Model*, 113 PENN STATE L. REV. 1189 (1909).
[157] On such judicial notice, *see* Apex Tech Investment v. Chuang's Development (China) [1996] 2 HKLR 155 (15 March 1996).

facie evidence of "exceptional circumstances" justifying not enforcing a Russian decision for "the violation of generally accepted principles of due process", "partiality and dependence of the civil court concerned", and "utterly insufficient reasoning of its decisions".[158]

What is subject to challenge are mono-local public policies that are wholly internal to the enforcing court and that transcend the norms of both the foreign court's decision under view as well as transnational norms that derive from consensus among a plurality of states. While theories of sovereignty and territoriality legitimate mono-localism, they fail to address external norms that deviate from such mono-localism. Nor is the proposition that Dutch courts should studiously avoid applying Dutch conceptions of due process. It is rather that wholly mono-local and internally generated conceptions of due process may sublimate contraindicated external norms, whether on philosophical, ideological, functional, economical, or legal grounds.

A remaining question is whether a conception of public policy that is shared comparatively by a plurality of states, is a realistic alternative to a mono-local conception. If that is the case, further questions arise as to the nature of a plural conception of public policy, how it evolves and how it is applied in specific cases. The limits of such a plural conception are discussed below.

VIII. The Case for Plural Conception of Public Policy

A tension arises between domestic courts that seek to maximize mono-local policies on strict sovereigntist grounds; and courts that seek to promote plural policies that states share, such as relating to cross-border commerce, while still protecting mono-local state interests. That tension is readily evident in how state courts address the public policy defense under the NY Convention. Inasmuch as a court enforces a "procedurally delocalized award, whether rendered inside or outside the state where enforcement is sought,"[159] it can do so on pluralistic grounds, notably by affirming its application according to the shared practices of a plurality of other states. In support of a plural conception of public policy transcending mono-localism, the

[158] *Yukos Capital*, supra note 144, at 3.2.
[159] STEPHEN TOOPE, MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS 127 (1990).

Quebec Court of Appeal contended, *erga omnes*, that public order is so widely conceived in the legal systems of different states that it does not require "translation into the national system of law".[160]

A plural response to mono-local public policy is therefore to cultivate a de-localized conception of public policy that the legal systems of a plurality of states share, beyond the mutual interests of two reciprocating states.[161] This plural approach conceives of each state as incorporating into its legal system, as far as practicable, a comparable conception of public policy into its domestic law that extends beyond reciprocated policies. The perceived result is that legal conceptions of public policy "floats" across the legal systems of multiple states, and is not "anchored" either in the local interests of one state, or the reciprocated interests of two states.[162] Central to such support for plural conceptions of public policy is the perceived value of harmonizing disparate mono-local laws expansively beyond national boundaries; and indeed, serving as the source of public policy in the transnational legal regime.[163]

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[160] *Compagnie Nationale Air France c. Mbaye*, [2003] R.J.Q 1040 (Can.). *See also* Van den Berg, THE NEW YORK ARBITRATION CONVENTION 1958, *supra* note 35, at 382.

[161] *See* Ahmed Masood, *The Influence of the Delocalization and Seat Theories upon Judicial Attitudes Towards International Commercial Arbitration*, 77 ARB. 406, 478 (2011) (on the influence of delocalization on the judicial enforcement of international commercial arbitration awards). *See also* Matthew Barry, *The Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts*, J. INT'L ARB. 289, 295 (2015).

[162] *See* Jan Paulsson, *Arbitration Unbound*, *supra* note 37, at 358-387 (1981) (on delocalized arbitral awards 'floating' or 'drifting' across jurisdictions); THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION 82-90 (2014) (on the 'relative legality' of an autonomous arbitral order). *See also* PT Putrabali Adyamulia (Indonesia) v. Rena Holding, (2007) XXXII YEARBOOK COM. ARB 299, 301 (Cour de Cassation) (On an 'international arbitral award – which is not anchored in any national legal order.'); Dell Computer v. Union des consommateurs, (2007) 2 S.C.R. 801 [51] (Supreme Court of Canada) (holding that '[e]he arbitrator has no allegiance or connection to any single country.') *But see contra*, favoring localized international commercial arbitration awards, Coppee Lavalin v. Ken-Ren Chemicals (In Liquidation in Kenya) (1995) AC 38, 63 (HL); Bank Mellat v. Helleniki Techniki, (1983) QB 291, 301; Francis A. Mann, *England Rejects Delocalised Contracts and Arbitration*, 33 INT'L. COMP. L. Q. 193 (1984).

[163] *See e.g.* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 208-209 (2012); Hossein Fazilatfar, *Transnational Public Policy: Does it Function from Arbitrability to Enforcement?* 3 CITY U. L. REV. 289, 294, 311 (2011).

There are four general arguments favoring national courts adopting plural conceptions of public policy in law that, while not wholly delocalized, are adopted by a commonality of states in determining whether to recognize and enforce international arbitration awards.

First, conceptions of public policy that states share can counter-balance mono-local conceptions of public policy that are unduly rigid or conceivably, incoherent in their legal application.[164] The proposition is not that reliance on mono-local conceptions of justice is unjustified, but that conceptions of public policy that states share can help to remedy undue, and often both conflicting and confusing, variations of public policy across jurisdictions and legal systems. Second, conceptions of public policy that states share can help to limit the scope of mono-local policies that are discriminatory, such as that diverge over the nature and scope of anti-competitive behavior.[165] Third, domestic courts can advance common conceptions of public policy in response to widely accepted commercial practices that extend beyond national boundaries, such as by endorsing a transnational Law Merchant based on widely practiced mercantile customs and usages.[166] Fourth, conceptions of public policy that domestic courts share can redress corporate behavior that is deemed to be contrary to socially responsible corporate behavior embodied in the soft law that "binds" state and non-state entities.[167]

The problem with a pluralistic conception of public policy is in delineating its source and scope of application. The notion that it evolves from the practices of states and solidifies into pluralistic policy raises questions about its consensual roots and functional application. Does pluralism simply "float" from one domestic legal system to the next, gathering support as commercial trade customs evolves "spontaneously", as Hayek would have it, into comparative

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[164] *See* NIGEL BLACKABY, REDFERN & HUNTER, *supra* note 29 (on public policy varying from state to state).
[165] *See* Tim Büthe, *The Politics of Market Competition: Trade and Antitrust in a Global Economy* in LISA MARTIN, OXFORD HANDBOOK OF THE POLITICS OF INTERNATIONAL TRADE (2017) (on depoliticizing policies directed against price-fixing, bid-rigging, and other forms of anticompetitive behavior and abuses of market power).
[166] On the transnational Law Merchant, *see infra* notes 221-2.
[167] *See e.g.* United Nations, *Draft Code of Conduct of the UN on Transnational Corporations*, in ILM VOL. XXII 177 (1983) (on long-standing international efforts to regulate the conduct of transnational corporations).

and ultimately, international law? Or is pluralism the product of consensus that emerges incrementally into comparative and international law, as each state and its court selectively endorses the public policies that are proffered to it? In effect, are plural conceptions of public policy merely stages along which both domestic and plural conceptions of public policy blossoms into fundamental principles of comparative law, akin to commercial usages that develop into fixed, constant and pervasive customs?

Jurists who question the comparative and international development of public policy respond to these questions disparately. Some courts reject plural conceptions of public policy based on a strict interpretation of the plain word meaning of the NY Convention. For example, an Australian court adopted a restrained mono-local conception of public policy on grounds that there is "no express reference in the [NY] Convention to any concept of international or transnational public policy".[168] Other courts reject plural conceptions based on variations among nation states over when their sovereign independence prevails over their political, economic and legal interdependence.[169] Yet others have challenged plural as well as universal conceptions of public policy, not only on grounds of national sovereignty, but because they are indeterminate (or indeterminable) in nature.[170] For example, the Supreme Court of India explicitly rejected the concept of "international public policy" for the lack of a "workable definition" of it.[171]

However, some jurists reject such pluralism in favor of universalized norms of public policy that are "fundamental to notions of morality and justice,"[172] or the "violation of really fundamental conceptions of legal order in the country concerned".[173] It is in this pervasive conception of

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[168] *See Traxys Europe SA v Balaji Coke Industry Pty Ltd (No 2)* [2012] FCA 276, [94].
[169] *See e.g.* Catherine Kessedjian, *ICCA Congress June 2006*, ICCA CONGRESS SERIES NO. 18, 149 (2007) (on transnational public policy and the sovereignty of states).
[170] *See* S. Gopalan, *Creation of International Commercial Law: Sovereignty Felled*, 5 SAN DIEGO INT'L. L.J. 267-322 S. (2004).
[171] *Renusagar Power v. General Electric,* AIR 1994 SC 860 (India).
[172] *Hebei Import & Export Corp. v. Polytek Engineering,* [1999] 2 H.K.C. 205. (C.F.A.) (H.K.).
[173] *See e.g.* Pieter Sanders, *Commentary* in 60 YEARS OF ICC ARBITRATION - A LOOK AT THE FUTURE 364 (1984). *See also Hebei Import & Export Corp v. Polytek Engineering*. XXIV YBCA 652, 670, Court of Final Appeal, Hong Kong (1999).

public policy in a moral order beyond law *stricto sensu* that state courts sometimes take comfort, as is illustrated below.

IX. The Case for Universal Norms of Public Policy

Is the quest for a universal regime of public policy a "dream"? As Julian Lew pondered: "Is the concept of delocalised arbitration, or arbitration not controlled by national law, a dream or a nightmare?"[174] At its most optimistic, this dream embraces an autonomous global legal order which transcends both procedural and substantive policy embodied in national law and is specifically not subjugated by the *lex arbitri* at the seat of the arbitration.[175] The dream is about national courts enshrining fundamental conceptions of public policy in enforcing foreign judgments and arbitration awards.[176] It is a dream that supposedly evolves comparatively, as domestic courts incorporate it into their domestic legal systems, as allegedly did France,[177] Singapore,[178] Portugal,[179] Italy,[180] and Algeria.[181] A normative argument supporting the delocalization of public policy is to imbed "core" moral or ethical values that surpass both competing local interests and plural conceptions of public policy shared by self-selected states.[182] For example, the Highest Arbitrazh Court of the Russian Federation identified public policy with a pervasive natural law consisting of "universally recognized moral and ethical

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[174] Julian D.M. Lew, *supra* note 5, at 179. *See too* Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' (2003) 36 *Vanderbilt Journal of Transnational Law* 1313. *But see contra* Ralf Michaels, 'Dreaming Law without a State, *supra* note 63 at 35.
[175] See William W. Park and Jan Paulsson, 'The Binding Force of International Arbitral Awards' (1983) 23(2) *Virginia Journal of International Law* 253; William W. Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32(1) *International and Comparative Law Quarterly* 21; Jan Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why it Matters' (1983) 32(1) *International and Comparative Law Quarterly* 53; Emmanuel Gaillard, *Legal Theory of International Arbitration, supra* note 45.
[176] Maurer, *supra* note 2, at 128-9.
[177] Articles 1498 and 1502, Title V, New Code of Civil Procedure (1981). *See also* French Code of Civil Procedure, Decree 2011-48, 13 January 2011.
[178] Chapter 143A, International Arbitration Act, 1994 (REV. ED, 2002).
[179] Article 1096(f), Code of Civil Procedure (1986).
[180] Corte d'Apello di Milano, 4 December 1992, XXII Y.B. Com. Arb. 725 (Italy)
[181] Article 458 bis 23(h), Decree No. 83.09 (1993).
[182] On divergence in ranking principles of justice, *see supra* text accompanying note 71.

rules".[183] Alternatively articulated in the English *Yukos* case: "[I]t would be both unsatisfactory and contrary to principle if the Court were bound to recognize a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy."[184]

The problem is that none of these judicial decisions provide any comprehensive conception of such "core" or "fundamental" moral values. What is the source and scope of the moral duty evolving from precepts of natural rights? How does that natural right evolve into a legal duty within and across comparative legal systems, and into international law? Does it develop through comparative legal adoptions into the shared heritage of a plurality of nation states? And does it ultimately reside in a *ius gentium,* or law that nations, that applies universally, such as in an international charter or convention? [185]

According to the International Law Association, "international public policy" is 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 'civilized nations'." Rather than answer the questions immediately above the quotation, the ILA's propositions attenuate them. The first complication is in determining whether there are, indeed, transcendent principles of public policy arising in natural law,[186] reflected in comity among states,[187] or embedded in a mandatory *ius cogens*?[188] The second is in establishing whether and how domestic courts ought to treat these principles as more fundamental than local or plural interests arising in comparative law? The third impediment is to

[183] *Ansell v. OOO MedBusinessService-2000*, Highest Arbitrazh Court, Russian Federation, Ruling No. VAS-8786/10, 3 August 2010.
[184] Simon J. in *Yukos Capital SARL v OJSC Rosneft Oil Company* (2014) EWHC 2188.
[185] On these divergent sources of law, including in moral theory, *see supra* note 187 (*ius gentium*) and note 287 (*ius naturale*).
[186] *See supra*, note 187 (on the natural law foundations of Western liberal democracies).
[187] *See supra* notes 138 & 155 (on comity among nations).
[188] On the ius cogens in international commercial arbitration, *see* Valentina Vadi, Jus Cogens *in International Investment Law and Arbitration*, NETHERLANDS YBK. INT'L. L. 357 (2015).

determine how domestic courts can apply such fundamental public policies, if they exist, universally and consistently.[189]

A partial response is to demarcate "core" or "fundamental" principles of public policy operating beyond mono-local states, both affirmatively and reactively. Articulated affirmatively, "core" procedural norms are directed at resolving disputes in accordance with fundamental principles of natural justice,[190] such as in a transparent and impartial manner.[191] Expressed reactively, "core" public policies are directed at redressing fundamental denials of natural justice, and a lack of judicial impartiality and independence.[192] Articulated normatively, "core" norms provide at least minimal standards of procedural fairness,[193] and extend beyond mere "procedural irregularities".[194]

A more perplexing third challenge is to determine how domestic courts can determine and apply these "core" norms of international public policy in a substantively and procedurally fair manner. A manageable substantive challenge for a reviewing court is to determine when to sanction "fundamental" and egregious defilements of good morals, such as human trafficking across

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[189] *See* Van den Berg, The New York Arbitration Convention of 1958, *supra* note 80, at 263 (on the binding nature of 'fundamental' public policy).

[190] *See Anaconda Operation Pty Ltd v Fluor Australia Pty Ltd* [2003] VSC 276; Federal Supreme Court, Germany, 15 May 1986, reported in (1987) XII Y.B. Com. Arb. 489, 490 (balancing procedural fairness against efficiency in international commercial arbitration). *See also* JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 15-17 (2012).

[191] On standards of procedural justice in international commercial arbitration, *see* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 150-153 (2005); Richard Kreindler, *Standards of Procedural International Public Policy*, in INTERNATIONAL ARBITRATION AND PUBLIC POLICY (2014); Stephen M. Schwebel &, Susan G. Lahne, *Public Policy and Arbitral Procedure*, in Sanders, *supra* note 2, at 205.

[192] *See supra* text accompanying notes 37 & 38 (on the partiality and dependence which the Amsterdam Court of Appeal attributed to the Russian judiciary in *Yukos*). *See* TRANSPARENCY INTERNATIONAL, <https://www.transparency.org/research/cpi/overview> accessed 11 September 2018 (indices ranking states according, *inter alia*, to judicial independence).

[193] *See e.g.* Piero Bernardini, *The Role of the International Arbitrator*, 20(2) ARB. INT'L. 113, 116 (2004). (on three minimal standards of justice: the right to be heard, *audi alteram partem* [the right to be appraized of the opponent's case] and the right to be treated alike.)

[194] *See* Hebei Import & Export v. Polytek Engineering, [1999] 2 H.K.C. 205. (C.F.A.) (H.K.) (on the relationship between procedural irregularity and public policy).

states borders, particularly where domestic courts tacitly condone such trafficking through state-centric local policies.[195] A manageable procedural challenge for a reviewing court is evident in one negotiating party "appointing himself as the sole arbitrator" in a manner that "is so extreme, that it is hard to imagine that any free and democratic legal system could equate the award rendered by such an arbitrator to a sovereign State act and enforce it."[196]

Less manageable are contestable "core" principles of substantive and procedural justice, together with public policies based on them. In contention are over-generalized natural laws, tenuous laws of nations, and incongruent merchant practices that deny efficacy to international custom.[197] Disquieting indictments include that: "[t]ruly international public policy" is "quasi universal in nature",[198] "unclear and unnecessary",[199] and sometimes difficult to reconcile with mono-local policies.[200] Not articulated are the variable boundaries of substantive principles of justice, such as in regulating anti-competitive behavior[201] and the indeterminate scope of "fundamental

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[195] On judicial annulment of arbitral awards for violating public morality, such as for promoting bribery and corruption, *see e.g. Karaha Bodas v. Perusahaan Pertambangan Minyak,* 2007 ABQB 616 (Canada); *Gater Assets v. Nak Naftogaz Ukrainiy* [2008] EWHC 237, [2008] 1 CLC 141; *Westacre Investments v. Jugoimport Holdings,* [2000] 1 QB 288; *Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak,* [2007] CACV 121/2003 (HK CA); Karaha Bodas v. Perusahaan Pertambangan Minyak, 364 F.3d 274 (5th Cir. 2004); *Shen Min Zi No. 16,* Oberlandesgericht, Dusseldorf, Germany, 15 Dec. 2009, I-4 Sch 10/09; Corte Suprema de Justicia. 19 Dec. 2011; Justice Fernando Giraldo Gutierrez, 11001-0203-000-2008-01760-00 (Colombia); Court of Appeal, Paris, April 10, 2008, 06/15636 (France); Geotech Lizenz v. Evergreen Systems, F. Supp. 1248 (E.D.N.Y. 1988); *Minmetals Germany v. Ferco Steel,* (1999) CLC 647, 662 (QB).

[196] *See e.g.* District Court of Affoltern am Albis, Switzerland, May 1994, XXIII Y.B. Com. Arb. 754, paras. 18-24, 21-22 (1998).

[197] *See* DEZALAY & GARTH, *supra* note 55, n.19 (1996) ('These people [arbitration practitioners] are deciding by the seat of their pants. There's no such thing as the *lex mercatoria.*)

[198] Fry, *supra* note 87, at 87-89.

[199] Van den Berg, *Hypothetical Draft Convention, supra* note 86, at 360.

[200] *See* ILA, Report, *supra* note 96, at 345. *See also* A. N. Zhilsov, *supra* note 41, 81, 95-98 (1995).

[201] *See e.g. Tensacciai v. Freyssinet Terra Armata* 4P.278/2005, 24 ASA Bull 550 (2006); 132 ATF III 389, 2006 (Switzerland) (on subjecting EU competition law to fundamental values that are necessarily part of any legal order *and* to prevailing opinions in Switzerland). *See also* Manu Thadikkaran, *Enforcement of Annulled Arbitral Awards: What Is and What Ought To Be?* 31 J. INT'L. ARB.575, 598-603 (2014) (justifying annulling arbitration awards for: violating basic procedural fairness, the wrongful assumption of primary jurisdiction, technicalities based on local standards, and violating fundamental notions of justice).

standards of fairness".[202] In issue, too, is the potential marginalization of procedural and substantive justice in international conventions arising from reservations by acceding states, such as China and the US's reservations in acceding to the NY Convention.[203]

X. Mediating between Localized and Delocalizing Public Policy

The courts of state signatories to the NY Convention diverge noticeably over the legitimacy of mono-local, plural and fundamental conceptions of public policy. In contention are potentially irreconcilable differences among them over the legal boundaries of public policy, whether they are best explicated through sovereign states acting separately or in aggregation, or through a transcendent political order. Those who subscribe to a strict conception of state sovereignty are likely to envisage a "body of truly international customary rules" that "does not form part of the *ius gentium,* but … is applied in every national jurisdiction by tolerance of the national sovereign whose public policy may override or qualify a particular rule of that law."[204] So conceived, public policy evolves through comparative law as states incorporate these pervasive customs into their domestic legal systems. Those who identify international public policy with the aggregation of state sovereignty are likely to identify it with comparative law borrowings across a plurality of otherwise differently constituted states,[205] conceivably including non-state actors.[206] Those who subscribe to a transcendent public order, beyond that aggregation, are likely to cling to natural

[202] *See* Jorf Lasfar Energy v AMCI Export, (WD Pa, Civ No 05-0423, 22 Dec 2005), slip op 6; *Louis Dreyfus v. Holding Tusculum,* 2008 QCCS 5903 (Can.).
[203] On China's accession to the NY Convention, and its reservations, *see supra* note 88. On the US's reservations on acceding to the NY Convention, *see* Jaranilla v Megasea Maritime Ltd, 171 F Supp 2d 644, 646 (La, 2001) (holding that a seafarers' employment contract was outside the scope of a 'commercial dispute', arising from the US's exercising a commercial reservation under Article 1(3) in acceding to the NY Convention). On such commercial reservations, *see also* Sumitomo Corp v Parakopi Compania Maritima, SA, 477 F Supp. 737 (S.D.N.Y., 1979); *Food Corp of India v. Mardestine Compania Naviera,* (1979) 4 Y.B. Com. Arb. 270.
[204] *See* Clive Schmitthoff, *The Unification of the Law of International Trade,* 1968 J. BUS. L. 105, 108-09 (1968).
[205] In support of such pluralism, see JAN PAULSSON, THE IDEA OF ARBITRATION 29-50 (2013). *See* too *supra* note 5.
[206] *See e.g.* Jan Paulsson, 'Arbitration in Three Dimensions', *supra* note 81, 307-9.

rights conceptions of public policy.[207] Those who attribute that international public order to the will of nation states acting as a collectivity as likely to subscribe to an overriding *ius gentium* or law of nations.[208] For yet others, that international order is embodied in customary law that derives from and depends upon, human and social interaction operating beyond law *stricto sensu*.[209]

Public policy underlying transnational commercial arbitration is also conceived functionally as inspired by self-ordering transnational merchants who determine policy with the passive support of nation states.[210] Typically, economic libertarians highlight a long-standing tradition in which transregional merchants develop commercial policies and practices, embodied in an autonomous Law Merchant and unchecked by government incursions.[211] They maintain further, that these

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[207] *See supra* note 186 and *infra* note 290. *But see* Emmanuel Gaillard, *Legal Theory of International Arbitration, supra* note 45, at 59-61.
[208] *See supra* note 65 & *infra* 291.
[209] *See* Lon L Fuller, 'Human Interaction and the Law' (1969) 14 *The American Journal of Jurisprudence* 1, 2-4.
[210] On the disparate nature of transnational public policy and its incremental reception into domestic law, *see e.g.* KLAUS-PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 100-101 (1999); Teubner, *supra* note 37, at 3-4; Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant,* 144 U. PA. L. REV. 1643, 1647 (1996); Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions,* 2 B.U. INT'L L.J. 317, 320-4 (1984)4. *But see* Renata Brazil-David, *Harmonization and delocalization of international commercial arbitration,* 28 J. INT'L. ARB. 445, 465 (2011) (arguing for harmonizing transnational law and policy governing international arbitration); T.T. Arvind, *The 'Transplant Effect' In Harmonization,* 59(1) INT'L. & COMP. L.Q. 65, 66-9 (2010) (on the 'transplantation effect' in harmonizing law and policy transnationally).
[211] *See e.g.* Leon Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage*, 12 J. MAR. L. & COM. 1, 5 (1980) ('The only law which could effectively enhance the activities of merchants [was] suppletive law, *i.e.*, law which recognized the capacity of merchants to regulate their own affairs through their customs, their usages, and their practices.'); ANA M. LÓPEZ RODRÍGUEZ, LEX MERCATORIA AND HARMONIZATION OF CONTRACT LAW IN THE EU 87 (2003) ('For several hundred years uniform rules of law, those of the law merchant, were applied throughout the market tribunals of the various European trade centers.'); Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347, 356 (2001) (ascribing the origins of the modern *lex mercatoria* to the customs of medieval merchants); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State,* 14 IND. J. GLOBAL LEG. STUD. 447 (2007) (on the Law Merchant as 'truly' transnational law operating beyond the nation state); Harold J. Berman & Felix J. Dasser, *The 'New' Law Merchant and the 'Old': Sources, Content, and Legitimacy, in* THOMAS E. CARBONNEAU, ED., LEX MERCATORIA AND ARBITRATION: A

merchant-driven policies act as pivotal influences on the plural, if not universal mercantile policy that states share, notably in resisting regulatory intrusion upon merchant usages that evolve into custom.[212]

These tensions among mono-local, plural and universal conceptions of public policy inevitably impact on judicial opinions that evolve through comparative law. Judges who seek to reconcile mono-local with plural public policies need to reconcile the inconsistencies between those policies, such as in determining whether mono-local interests in the administration of justice diverge from public policy that is shared by nations. Courts that identify public policy with fundamental norms of substantive and procedural justice need to prioritize those norms according to universal natural rights that bind both state and non-state parties, and a *ius gentium* that states may, or may not, endorse collectively.[213] Judges who delocalize public policy in favor of policies to which a plurality of states subscribe, need to reconcile the extent to which individual states and their courts may apply those policies differently.[214] Courts that seek to reconcile localized and delocalized policies need to reconcile inconsistencies between them, such as in reconciling a state's localized interest in the administration of justice with a conception of justice that evolves comparatively and is shared by other nations. At issue, therefore, is how the courts of states can realistically mediate between sovereigntist, pluralist, and globalist depictions of transnational public policy. Also in issue is how they can incorporate these divergent conceptions of public policy into domestic law, such as by construing norms of comparative law

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DISCUSSION OF THE NEW LAW MERCHANT 53, 61 (REV. ED. 1998); R.S. LOPEZ, THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES, 950-1350 (1971). For a tempered view of the universality of the Medieval Law Merchant, *see* Leon Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265 (2003).

[212] *See* Chris Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux* 97 HARV. L. REV. 1495-1508 ((1984) (review of TRAKMAN, THE EVOLUTION OF THE LAW MERCHANT, *ibid*]. Williams labels Trakman as a 'post legal realist' whom she identifies with American Realist, Karl Llewellyn. For assertions that Trakman's work on the Law Merchant, among others, is ahistorical, *see* Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1154, notes 2, 3, 4, 5, 8, 9, 43, 45, 70, 71, 153,159,164,174 (2012)

[213] *See* Gaillard, Legal Theory of International Arbitration, *supra* note 4, at 35 (grounding arbitration in 'higher values' identified with 'the nature of things or of society.') *See further supra*, Section III-IV-.

[214] *See* Clive Schmitthoff, *supra* note 204, 105-112 (arguing that international trade law extends beyond national law to transnational law and policy shared by a plurality of states).

expansively. It may well be that they are better able to develop delocalized standards of procedural justice than substantive standards under the NY Convention.[215] Often, it is less difficult for them to harmonize minimal standards of procedural than substantive justice, such as in determining whether a party to an arbitration received a fair hearing.[216] However, even procedural conceptions of justice are disparately construed by domestic courts, not least of all in courts diverging over the scope and application of the rule of law based on comparative disparities in domestic law.[217]

The purpose of courts mediating between localized and delocalized norms of public policy is not to arrive at a perfected good. Courts that apply "core" values underlying delocalized public policy cannot realistically achieve full convergence across comparative legal systems, such as by propagating a uniform conception of the "just price" as a shared legal solution.[218] Nor can they produce a hermetically sealed regime of global public policy to supersede cultural, economic and religious divergence over the scope of fair exchange in international markets. Courts also cannot realistically incorporate, or even adapt, every norm underlying transnational public policy comprehensively and indelibly into domestic law by comparative legal means. Nor can they be relied on to embody those norms infinitely in all cases through a pervasive *opinion juris* or

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[215] *See* Maxi Scherer, *Article V (1) (b)*, in Wolff, 292-297; Van den Berg, *supra* note 80, at 297. *See also* Sesostris v. Transportes Navales,727 F.Supp. 737 (D. Mass.1989); Yukos Capital v. OAO Samaraneftegaz, 2013 WL 4001584, at 4-6 (S.D.N.Y.); China National Building Material v. BNK International, 2009 WL 4730578, at 6 (W.D. Tex.); Judgment of 7 September 2009, 26 Sch 13/09 (Oberlandesgericht, Frankfurt, Germany); *Judgment of 8 December 2009,* Aiduoladuo (Mongolia) v. Zhejian Zhancheng., 2009 Min Si Ta Zi No. 46 (Chinese Zuigao Fayuan).

[216] *See* JOSHUA D. H. KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 242 (2013) (International commercial arbitration 'has already generated a set of harmonised, autonomous procedural rules that enjoy general acceptance.'). *See also* Gaillard, *Legal Theory of International Arbitration, supra* note 45, at 9; HERBERT KRONKE, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 231-239. (2010).

[217] On the rule of law, *see* s*upra* note 40.

[218] *See* Trakman, *supra* note 112 at 7-8 (on the 'just price' in the medieval Law Merchant). On cultural and economic determinants of the 'just price' in the common law, *see* M. WEBER, ECONOMY AND SOCIETY 578, 583, 589, 1198 (1978); W.J. ASHLEY, AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY 126 (1920); J Gordley, *Equality in Exchange*, 69 CALIF L. REV. 1387 (1981). On the 'just price' in civil law, *see* F. Dawson, *Economic Duress and Fair Exchange in French and German Law,* 11 TUL L. R. 345, 365 (1937).

precedent. What they can do is identify the kinds and degrees of competition among policies relating to fair exchange, without mandating the exact nature of that exchange, such as determining the precise perimeters of usury in their comparative legal systems.[219] They can also reconcile domestic and international public policies selectively, such as identifying when a "course of dealings" complies with transnational public policy, while still being able to accommodate the law of the situs.[220] They can adopt law underlying public policies from other states through comparative law accretions, such as through judicial precedent in common law systems and the *opinion juris* in civil law systems.

Their mediatory purpose is not to seek a perfectly level playing field among courts across multiple states, but to promote standards of fairness that satisfy domestic interests, without being wholly confined by them.[221] An illustration of procedural norms courts can invoke to mediate between localized and delocalized public policy is the NY Convention's requirement that signatory states shall not impose "substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."[222] The mediatory principle here is not to set an exact quantum of fees or charges. It is rather to ensure that, in determining whether to enforce a foreign arbitral, the fees imposed are not higher than those imposed in enforcing a domestic award. The mediatory principle in determining the nature and limits of these fees and charges evolves through expansive norms of comparative law, as different states seek to mediate over such fees by balancing fairness against commercial viability.

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[219] *See supra* notes 226 & 245 (on 'internationalizing' competition policy in world trade); CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 160 (2002) (on the law of usury limiting mercantile freedom).

[220] *See e.g.* U.C.C. § 1-303, 'course of performance, course of dealing, and usage of trade.'

[221] *See* M. MARINIELLO, D. NEVEN & A.J. PADILLA, ANTITRUST, REGULATORY CAPTURE AND ECONOMIC INTEGRATION (2015) (on consumer welfare in determining standards for antitrust regulation in the EU).

[222] Article III, NY Convention. See also Glencore Grain Rotterdam *B.V.* v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1121 (9th Cir. 2002); Yukos Oil v. Dardana, A3/2001/102, Court of Appeal, England & Wales (2002).

At issue, too, is that courts mediate between core and lesser violations of delocalized public policy, such as between conduct threatening the administration of justice and conduct perceived to be non-felonious and subject to less severe public reprobation.[223] In mediating between free and fair global commerce, they need to determine when delocalized public policy "adequately redresses" an abuse of bargaining power, without stultifying international commerce.[224] In arriving at reasonable damage awards, they need to decide, *inter alia*, when an arbitration award grants interest on future damages that they deem to be excessive. Importantly, they need to do so in a manner that recognizes unavoidable divergence in comparative legal systems, but also embodies with domestic legal requirements.[225]

The function of mediatory norms is directional, and not necessarily decisive. It includes discouraging state courts from insulating themselves, purposefully or inadvertently, from the responsibility to protect core principles of substantive justice, such as by promoting protectionist trade barriers to entry, or tolerating the *de facto* bribery of state officials.[226] Their application of such norms is pragmatic in seeking to arrive at efficient and fair outcomes, without purporting to deliver perfect justice.[227]

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[223] On egregious violations of public policy, *see* Commission on Human Rights, *Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in ILM VOL. XIX 647 (1980); Organization of American States, Inter-American Juridical Committee, *Draft Convention 1/11 Defining Torture as an International Crime*, ILM VOL. XIX 618 (1980).

[224] *See supra* Section II (on the degrees of violation of public policy).

[225] *See* ED & F Man (Hong Kong). v. China National Sugar, [2003] Min Si Ta Zi No. 3. (Sup. People's Ct., 1 July 2003) (on whether charging interest on future damages violates public policy).

[226] *See supra* note 196 (on courts redressing bribery and corruption); C. Ragazzo & M. Binder, *Antitrust and International Arbitration*, UC DAVIS BUS. L.J. 173 (2014) (On international arbitration redressing antitrust violations); MARTYN D. TAYLOR, INTERNATIONAL COMPETITION LAW: A NEW DIMENSION FOR THE WTO (2006) (on 'internationalizing' competition policy in world trade). *See also Interaction between Trade and Competition Policy*, WORLD TRADE ORGANIZATION, <https://www.wto.org/english/tratop_e/comp_e/comp_e.htm> accessed 11 September 2018.

[227] On weighing fairness against efficiency in construing public policy in enforcing arbitration awards, *see* Waincymer, *supra* note 191, at 15-17; *Anaconda Operation v. Fluor Australia* (28 July 2003) - [2003] VSC 276 [2003] VSC 276; Federal German Supreme Court, 15 May 1986 reported in (1987) XII Y.B. Com. Arb. 489, 490.

Courts that mediate effectively and fairly between competing localized and delocalized public policy ought to engage in both principled and functional analyses. For example, in mediating the boundaries between mono-local and plural policies, the court's aspiration is to maintain a level playing field across comparative legal systems that share "core" policy aspirations attributed to the global polity. In recognizing that global polity, referred to grandiosely as "the betterment of humankind",[228] they can promote a responsive public international law order that acknowledges domestic and plural threats to the "betterment" of humankind and functional means of allaying them. It is by these functional means that a globally recognized "rule of law" can evolve out of functional principles of natural justice that are less encumbered by incongruent state practices than arises under mono-localism, and are less reliant on incremental comparative legal adoptions.

However, principled and functional conceptions of delocalized public policy are not fixated on achieving an all-encompassing global "order", nor in attaining a definitive mercantile "good". They aspire, proactively, to augment a shared international order that includes, but is not exhausted by, the comparative legal recognition of mercantile customs and usages. They seek, reactively, to reign in potentially dysfunctional localized and delocalized conceptions of the "rule of law".[229] For example, an overriding purpose is to discourage domestic courts from applying shared principles of justice in an intemperate or capricious manner. The collateral function is to dissuade domestic courts from adopting procedural and substantive requirements on foreign parties into domestic law in a discriminatory or otherwise inequitable manner, leading to fundamental injustice.[230]

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[228] 'That is true culture which helps us to work for the social betterment of all.'*Henry Ward Beecher*, AZ QUOTES, <http://www.great-quotes.com/quote/30938>, accessed 12 September 2018.

[229] M. WOOD, SECOND REPORT ON IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW, INTERNATIONAL LAW COMMISSION, SIXTY-SIXTH SESSION, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY (A/CN.4/672) PARA. 41 (2014) (on the rule of law as customary international law).

[230] On this principle of 'non-discrimination', *see Glencore Grain Rotterdam* B.V. *v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002); *Rosneft (Russian Federation) v. Yukos Capital (Luxembourg)*, Supreme Court, Netherlands, 25 June 2010, XXXV Y.B. Com. Arb. 423 (2010); *Catz International. v. Gilan Trading*, Provisions Judge, District Court of Rotterdam and Court of Appeal, The Hague, Netherlands, 28 February 2011 and 20 December 2011, XXXVII Y.B. Com. Arb. 271 (2012); Gater Assets v. Nak Naftogaz, Court of Appeal, England & Wales, 17 October 2007, A3/2007/0738 (2007); Monegasque de Reassurances v. Nak Naftogaz, 158 F. Supp. 2d 377 (2001).

Embodying principles and functional norms of justice from international roots that are absorbed into domestic law including through comparative legal endorsement, is not peculiar to the public policy defense under the NY Convention. Article 38 of the Statute of the International Court of Justice directs that Court to consider, *inter alia*, the "rules expressly recognized by contesting states", "international custom" and "general principles of law recognized by civilized nations".[231] However much "international custom" is embodied in law, it is mediated through comparative law adaptation by domestic courts. However much international law is determined by "general principles of law recognized by civilized nations", those principles are subject to a mediatory discourse among domestic courts over sometimes elusive boundaries between "civilized" and "uncivilized" conduct.[232]

XI. Looking Forward

Norms of public policy that state courts share are not insulated abstractions, flying above the fray of localized economic and social rights. Nor do they personify unremitting judicial faith in the illusion of a wholly self-perpetuating international mercantile order.[233] Commonly espoused principles of substantive and procedural justice are material sources of domestic, not only international public policy, such as regulating money-laundering schemes.[234] A mercantile tenet of "fair dealings" in global commerce does not evolve independently of, or unresponsively to, domestic conceptions of public policy explicated by state courts.[235] However much conceptions of public policy that state courts share prevail, localized interests are significantly responsible for

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[231] *See* Statute, International Court of Justice, Article 38 (1)(a) (b) & (c).
[232] *See* ILA Report, *supra* notes 5 & 39, at 345 (on applying the international law of civilized nations to international commercial arbitration).
[233] *See supra*, note 126 (discussing the controversial libertarian attributes of the transnational Law Merchant).
[234] *See* INAN ULUC, CORRUPTION IN INTERNATIONAL ARBITRATION (SJD, PENN. STATE U., 2016) < HTTPS://ELIBRARY.LAW.PSU.EDU/SJD/1/>, accessed 12 September 2018 (On bribery and corruption as public policy grounds to annul arbitration awards). *See also supra* note 206.
[235] On the interface between localized and delocalized public policy grounds for annulling arbitration awards, *see* Peer Zumbansen, *Debating Autonomy and Procedural Justice: The Lex Mercatoria in the Context of Global Governance Debates-A Reply to Thomas Schultz*, 2 J. INT'L. ARB. 427, 431-48 (2011); Gunther Teubner, *supra* note 37, at 3-5.

nurturing that policy. [236] Such balancing occurs when domestic courts using public policy to reconcile the sanctity of promises against the abuse of superior bargaining power,[237] and in adapting "winner take all" to "winner take some" remedies in response to economic hardship and economic impracticability.[238]

Nor can domestic courts be expected to seamlessly merge delocalized public policies into a self-sustaining system of comparative law, any more than they can render inherently asymmetrical mercantile practices into a homogeneous international economic order. Transforming a plurality of local markets into an equalitarian utopia is, at best, a virtual reality and at worst, an illusion.[239]

What plural norms of public policy can do, however, is elevate principles of procedural and substantive justice into workable standards that evolve comparatively and that courts adopt domestically. Applied to the Yukos case,[240] the Amsterdam Court of Appeal could have adopted minimal standards of procedural justice that have evolved comparatively and that states, to varying degrees, adopt domestically. These include: the right to be heard; the right to be appraised of the opponent's case (*audi alteram partem)*; and the right to be treated alike.[241] While these standards are subject to disparate mono-local constructions in domestic law, they do serve as both comparative and functional benchmarks by which to determine whether an arbitrator or court has violated a requisite standard of natural justice, including in light of its domestic judicial construction. Domestic courts that subscribe to minimal standards of justice are

[236] *See* Zumbansen, *supra* note 236, at 402-4. *But see* Gaillard, *Legal Theory of International Arbitration*, *supra* note 45, at 9, and accompanying text.
[237] For public policy responses to alleged abuses of corporate power, *see* SEAN MICHAEL WILSON, BENJAMIN DICKSON & HUNT EMERSON, FIGHT FOR POWER! (2013); KEVIN KEASEY, CORPORATE GOVERNANCE (1997); CLINARD MARSHALL, CORPORATE CORRUPTION: THE ABUSE OF POWER (1990).
[238] *See* Trakman, *Winner Take Some*, *supra* note 48, at 471; Trakman, *Legal Fictions*, *supra* note 48, at 39.
[239] On the diffuse sources and boundaries of transnational public policy, *see* Lalive, *supra* note 79, at 287; Fry, *supra* note 87, at 85-8; Oelmann, *supra* note 131, at 1, 4-7.
[240] 200.005.269/01 28 April 2009 (Amsterdam Court of Appeal). *See supra* text accompanying notes 29-34.
[241] On this threefold test, *see* Bernardini, *supra* note 201, at 116.

still bound by the applicable state's socio-cultural, political and legal identity.[242] They may predictably hold that, while delocalized public policies personify idealized conceptions of natural law, comity among nations, or economic liberalism elsewhere, they do not comport with prevailing domestic interests.[243] The Amsterdam Court of Appeal in the *Rosneft* case might well have applied its domestic standard of due process on grounds that international standards are amorphous in nature, the application of the Dutch standard is more coherent and equitable, or simply, that binds Dutch courts.[244]

As a result, public policies that state courts adopt by comparative adoption are unavoidably adapted, both formally and functionally, in accordance with domestic interests. If domestic courts are to address negligent, duplicitous, or anti-competitive conduct, they need to consider domestic standards of substantive and procedural justice, not bypass them as *per se* nullities in pursuit of a single common good.[245] If plural public policies are to have a functional history, domestic courts ought not blithely to elevate England's 13th Century Magna Carta into a transcendent template for a 21st Century transnational "rule of law".[246] If delocalized public policy is to have a sustainable future, domestic courts need to mediate between the vicissitudes in both self-regulatory norms supporting trade liberalization, and regulatory norms addressing

[242] *See* Filippo Fontanelli & Paolo Busco, *What We Talk About When We Talk About Procedural Fairness, in* ARMAN SARVARIAN ET AL, EDS., PROCEDURAL FAIRNESS IN INTERNATIONAL COURTS AND TRIBUNALS, 22 (2015) ('… [T]he idea of procedural fairness prevailing in a community at a certain time depend on social features and legacies. This is perhaps the greatest obstacle to attempts to extrapolate a universal notion of procedural fairness, especially when applied to international legal proceedings.')
[243] *See supra* Sections III & IV (on transnational public policy's roots in natural law, comity and economic rationality).
[244] *See supra* Section VII.
[245] *See* Jonathon B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1 (2015-2016) (on the impact of competition policy upon economic equality).
[246] 1 (1297), 25 Edw. 1. On the influence of the Magna Carta upon constitutional policy, *see* FRANK W. THACKERAY & JOHN E. FINDLING, EVENTS THAT CHANGED GREAT BRITAIN, FROM 1066 TO 1704, ch.2 (2004); ERNEST F. HENDERSON, SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES, 135 (1965); ELWIN LAWRENCE PAGE, THE CONTRIBUTION OF THE LANDED MAN TO CIVIL LIBERTY, ch.5 (1905).

market distortions.[247] If domestic courts are to support a "spontaneous" merchant order, they should also rectify ever-intruding abuses of that order, such as extortionate pricing, including on domestic lines.[248]

The assertion is not that judicialized norms of mediation that are extended incrementally or *en masse* to a collectively of states are able to anthropomorphize an omnipotent common good that prevails comfortable over disparate cultural, political and religious difference. Divergence among legal systems over the legal effect of "economic hardship" on the performance of long-term contracts, is not easily dispensed with by an irresistible force of fairness triumphing over cadre justice.[249] Nor are differences between policies that are ingrained in national judicial cultures readily, or even desirably, dismantled. Disparate views of right reason and the common good are often deeply imbedded in domestic legal systems, including their judicial arms of government. Courts applying Sharia Law customarily treat the award of interest on damages with circumspection, as being religiously reprehensible, unfair and uncertain.[250] Civil law courts in centrally planned economies treat the liberalization of damage awards with greater caution than courts in common market economies.[251]

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[247] On the tension between transnational policy and the regulatory state, *see* DAVID BOAZ, KEY CONCEPTS OF LIBERTARIANISM (1999); David D. Friedman, *Libertarianism*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (2ND ED., 2008).

[248] On "spontaneous ordering", *see* F.A. HAYEK, LAW, LEGISLATION, AND LIBERTY, Vol 1, Ch. 2, at 35-54 (1973); F.A. Hayek, *The Results of Human Action but not of Human Design*, in HAYEK, STUDIES IN PHILOSOPHY, POLITICS, AND ECONOMICS 96-105 (1967); Norman Barry, *The Tradition of Spontaneous Order*, 5 (2) LITERATURE OF LIBERTY, 7-58 (1982); Levin GOLDSCHMIDT, HANDELSRECHT, IN HANDWORTERBUCH DER STAATSWISSENSCHAFTEN, VOL.V, 316-27 (J. CONRAD ET AL. EDS., 1909-11); Bruce Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989.

[249] *See* AHMET CEMIL YILDIRIM, EQUILIBRIUM IN INTERNATIONAL COMMERCIAL CONTRACTS: WITH PARTICULAR REGARD TO GROSS DISPARITY AND HARDSHIP PROVISIONS OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 84-93 (2010); Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L.657, 663-54 (1992).

[250] On contract damages in Sharia Law, *see* Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, in THEMES IN ISLAMIC LAW 1, 78 (W. HALLAQ, ED., 2005); Almas Khan, *The Interaction between Shariah and International Law in Arbitration*, 6 CHI J. INT'L. LAW 791 (2005); Arthur Gemmell, *Commercial Arbitration in the Islamic Middle East, 5* SANTA CLARA J. INT'L LAW 189 (2006).

[251] On divergence over contract damages in civil and common law, *see e.g.* E.D. & F Man (Hong Kong) v. China National Sugar, [2003] Min Si Ta Zi No. 3. (Sup. People's Ct. 1 July 2003);

Importantly, domestic courts are also likely to vary over the legal significance of party autonomy in determining whether to enforce international arbitration awards. Adjudicators can weigh consent to contract against "vices" in consent, without over-relying on unduly formalized principles of *consensus ad idem*.[252] They can adopt equitable standards of misrepresentation, fraud and unconscionable in contracting in weighing free against fair business practice, and merchant autonomy against regulatory action.[253]

Such a mediatory discourse empowers domestic judges to harmonize disparate merchant practices without seeking an all-encompassing unity across incongruent merchant trades and industries.[254] In particular, it enables domestic judges to balance regulatory and market indicators to assess when state action sponsors unfair competition against merchant conduct that exploits market stabilization measures.[255] It empowers them to determine when and how to regulate social interaction in transnational markets, such as informally through mercantile custom and formally through international conventions.[256] It also helps domestic judges to reinvigorate aspirational treaties in balancing the positive *freedom to* trade against the *freedom from* public harm to signatory states, such as by resurrecting the 1946 Treaty of "Friendship, Commerce and Navigation" between the US and China in 1946.[257]

Ukraine Kryukovskiy Car Building Works v. Shenyang Changcheng Economic and Trade Company, Shenyang Intermediate People's Court, China, 22 April 2003, Shen Min Zi No. 16.

[252] *See* Trakman, *Pluralism in Contract Law*, *supra* note 176. *Cf*. Herbert A. Holstein, *Vices of Consent in the Law of Contracts*, 13 TUL. L. REV. 560, 569 (1939) (on the 'just price' as a 'vice' in consent).

[253] *See* Leon Trakman, *The Twenty First Century Law Merchant*, 48(4) AM. BUS. L.J. 775, at 762-6. Trakman, The Evolution of the Law Merchant, *supra* note 212, ch. 1.

[254] *See* David D. Friedman, *Libertarianism*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (2ND ED., 2008) (ON the antithetical relationship between libertarian rights and government regulation); Boaz, *supra* note 247.

[255] *See* C. P. Kindleberger, *The Rise of Free Trade in Western Europe, 1820–1875*, 35 J. ECON. HIST. 20, 55 (1975); RICHARD COBDEN, SPEECHES ON QUESTIONS OF PUBLIC POLICY, VOL. I, 4, 44-47 (1870).

[256] *See* Fuller, *supra* note 256, 1-4 (1969).

[257] *See supra* note 53, US-China Treaty, Art. IV (i) [freedom to trade] and Art. IV (i) [restricting such freedom in the domestic interest].

Such a mediatory discourse between the "legitimate expectations" of the parties[258] and public policy is imbedded in the NY Convention itself. Inasmuch as their contract serves as their primary means of regulating their commercial relationships, it limits the authority of arbitrators who are appointed by contract and the power of courts that review those arbitration awards. Article II (1) of the NY Convention explicitly recognizes the "agreement" of those parties to arbitrate.[259] Article V (1) (d) requires the enforcing court to establish whether the parties had agreed upon the composition of the arbitral tribunal or the arbitration procedure, and whether that agreement had been violated.

Moreover, protecting the parties' choice of law exemplifies public policy, whether it affirms localized public policy or delocalizes it.[260] For example, under US law, the deliberate refusal of an arbitrator to apply the applicable law constitutes a ground to annul the award on grounds that it constitutes a "manifest disregard of the law".[261] Enforcing courts are also expected to interpret contracts in accordance with the parties' choices of law.[262] This includes requiring that they decline to enforce contracts entered into in bad faith that vitiate consent under the applicable

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[258] On such autonomy of the parties, *see* Dell Computer v. Union des consommateurs, (2007) 2 S.C.R. 801 [51] (Supreme Court of Canada) ('arbitration is a creature that owes its existence to the will of the parties alone.'). *But see contra, Société Dubois & Vanderwalle v. Société Boots Frites*, Court of Appeal of Paris, France, 22 September 1995 (arbitrators declining to adhere to the agreement of the parties constituted a breach of public policy). Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 227, at 278 (PIETER SANDERS ED., 1986).

[259] On Article II (1) of the NY Convention, *see e.g.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); *ACD Tridon v. Tridon Australia*, 5738, NSW Supreme Court (2001). *See* Article 2 of Geneva Protocol on Arbitration Clauses of September 24, 1923 which provides that: '[T]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.'

[260] *See* Roy Goode, *The Role of Lex Loci Arbitri in International Commercial Arbitration*, 17 ARB. INT'L. 19, 31 (2001) (arguing for the primacy of party autonomy). On a domestic court favoring the choice of the parties over the International Convention on the Sale of Goods in determining whether to annul an arbitration award, *see* Oberlandesgericht, 15 Feb. 2000, 9 Sch 13/99 (Germany).

[261] *See* Richard Garnett & Michael Pryles, *Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand*, 25 J INT'L. ARB. 899 (2008)

[262] *See e.g.* Fazilatfar, *supra* note 163, at 303 (On party autonomy in international arbitration).

law.[263] It also encompasses their compliance with international law, such as acting in accordance with laws that regulate party autonomy on due process or public policy grounds in the international sale of goods.[264]

However, the problem is to determine the limits of party autonomy. In particular when, if ever, should judges invoke "fundamental" public policies to prevail over party choices? Favoring the paramountcy of mono-local public policy over party autonomy is the argument that, if judges apply the choice of law of the parties, their judicial authority to apply countervailing public policies is unduly restricted.[265] Favoring party autonomy over mono-local public policy invites the criticism of judges insulating "private" markets from countervailing public interests in protecting employees, consumers and the economically disadvantaged. The result is that domestic courts may expand freedom of contract to deny regulating "private" markets on grounds that the agreement between private parties constitutes the primary "law" of the contract.[266] Conversely, they may restrict the scope of that freedom in response to policies that

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[263] *See* Leon Trakman & Kunal Sharma, *The Binding Force of Agreements to Negotiate in Good Faith*, 43(3) CAMBRIDGE L.J. 598-628 (2014) (on English courts, as distinct from civil law courts, declining to enforce contracts to negotiate in good faith).

[264] *See e.g.* Filip De Ly, *Sources of International Sales Law: An Eclectic Model*, 25 J. LAW & COMMERCE 1, 1-3 (2005-06) (on the tension between localized and delocalized law and policy in the international sale of goods).

[265] On domestic codes that permit contracting parties to exclude the judicial review of awards involving foreign elements, *see* s 51 of the Swedish Arbitration Act (1999); Art 1717(4) of the Belgium Code Judiciare (1972); Article 192(1) of the Federal Act on Private International Law (Switzerland, 1987).

[266] For cases that vary over the application and effect of the public policy defense, *see* Presidium of the Highest Arbitrazh Court, Russian Federation, Information Letter No. 156 of 26 February 2013; Esplosivi v. Fuzing, 11-149-RGA (Dist. Ct. Del. 2012); *Penn Racquet Sports v. Mayor International* (2011) 1 Arb. LR 244 (India); *Odfjell v. Sevmash*, Highest Arbitrazh Court, Russian Federation, 26 May 2011, Ruling No. VAS-4369/11; S.T.J. SEC 3.035, Relator: Fernando Goncalves, 19.08.2009 (Brazil); *BCB Holdings v. The Attorney General of Belize* [2013] CCJ 5 (AJ) (Caribbean); *Karaha Bodas v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 AB QB 616 (Canada); S.T.J. SEC 3.035, Relator: Fernando Goncalves, 19.08.2009 (Brazil); Higher Regional Court, 22 June 2009, XXXV Y.B. Com. Arb., 371, 2010 (Germany); *Qinhuangdao Tongda Enterprise Development v. Million Basic* [1993] H.K.C.U. 0605 (S.C.) (H.K.); *C.G. Impianti v. B.M.A.A.B.*, Court of Appeal of Milan, Italy, 29 April 2009, XXXI Y.B. Com. Arb. 802 (2010); OGH, 26 Jan. 2005, 3Ob221/04b, in XXX Y.B. Com. Arb. 421 (2005) (Austria). *See also* William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, BROOK. J. INT'L L. 629, 646-47 (1986).

are "designed to protect the public interests of that State, not of any particular private individual or entity".[267] Importantly, neither the defense of free markets or defending consumers from excesses of such markets are peculiarly mono-local or transnational in character, but can be ascribed to both. Mono-local and transnational norms of public policy may both legitimate restrictive or expansive conceptions of contractual autonomy. Both may enshrine or deny the sanctity of "private" contracts.[268]

A principled response is that "core" public policies are best iterated through delocalized, not localized conceptions of party autonomy. "[W]henever fundamental and universal notions of contractual morality or the fundamental interests of international trade are involved", they are applied "negatively to exclude the applicable law or a state's public policy that contravenes transnational public policy".[269] The rationale is that, insofar as delocalized public policy embodies a higher measure of due process than a domestic choice of law,[270] that delocalized policy should prevail.[271]

An alternative is to adopt a selective approach to reconciling party autonomy with public policy constraints on that autonomy. The first approach is to sanctify the parties' choices of law and

[267] Fry, *supra* note 87, at 8.; *See also* Hanotiau & Caprasse, *supra* note 64, 787, 791-94.
[268] *See e.g.* Nigel Blackaby et al, *Redfern and Hunter, supra* note 29; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* 83 (Sweet & Maxwell, 2nd Ed, 2007).
[269] Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L. J. 511, 530 (1988). *See also* Article 9 of the 1957 Amsterdam Resolution of Arbitration in Private International Law (providing that the law at the seat of the arbitration may override the procedural agreement of the parties).
[270] On the hierarchy of transnational public policies in international arbitration, *see supra* note 139 and Fazilatfar, *supra* note 92, 303-4.
[271] On subjecting the parties' choice of law to fundamental principles of transnational public policy, *see Mabofi s v. RosGas*, Federal Arbitrazh Court, Moscow District, Russian Federation, 24 January 2012, A40-65888/11-8/553; Supreme Court, Spain, 10 February 1984, X Y.B. Com. Arb. 493 (1985). *See* also 2016 Guide on the New York Convention, *supra* note 143, at 639, citing Patricia Nacimiento, *Article V (1)(a), in* Kronke, *supra* note 73, 216; Van den Berg, The New York Arbitration Convention of 1958, *supra* note 35, at 265; Todd J. Fox & Stephan Wilske, *Commentary of Article V (1)(a), in* NEW YORK CONVENTION, R. WOLFF, ED., supra note 3, at 267, 275 (2012).

jurisdiction, for example by recognizing the validity of their arbitration agreement.[272] The second approach is to prioritize fundamental of public policy over party autonomy in the absence of an applicable choice of law.[273] The third approach is to adopt principles of public policy, even in contradistinction to party autonomy, if those principles accord with mono-local public policy. The fourth approach is to adopt fundamental principles of public policy, also in contradistinction to mono-local policy, if those principles accord with transnational mercantile law and policy that support party autonomy.[274] This fourth approach embodies the "tendency [of courts] for applying … transnational public policy where there is a lack of any choice by parties …or where a violation of transnational public policy exists and it overrules applicable laws".[275]

Resolving the tension between party autonomy and countervailing public policies, underlying these four approaches, is unavoidably contentious,[276] Typifying that tension, Professor Reisman argues in principle against shared public policy norms overriding the municipal law chosen by, or regulating the conduct of the parties.[277] Professor Kessedjian differs: arguing contextually, he maintains that arbitrators should prioritize international public policy that states share over localized policy in light of, first, the increasing arbitrability of commercial disputes, and second,

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[272] *See* Bezirksgericht, District Court of Affoltern am Albis, 30, 26 May 1994 (Switzerland) reported in (1998) XXIII Y.B. Com. Arb. 754, 759 (interpreting Articles 19(2) and 24(1) of the Model UNCITRAL Rules providing that, '[p]arties who choose arbitral tribunals desire more flexible and informal proceedings than those offered by the courts, especially in Germanic legal systems'). *See also*, *Rice Trading (Guyana) v. Nidera Handelscompagnie*, District Court of Rotterdam, 2 October 1997 (upheld by Court of Appeal in the Hague), 28 April 1998, reported in XXIII Y.B. Comm. Arb. 731,733 (1998).

[273] *See supra* note 271.

[274] On the policy of merchant autonomy under the traditional Law Merchant, *see supra* notes 210-212.

[275] *See e.g.* Fazilatfar, *supra* note 163, at 3, 306.

[276] *See e.g. Bad Ass Coffee Company of Hawaii v. Bad Ass Enterprises*, 2008 ABQB 404 [15] - [19] (Canada) (on the tension between autonomy of the parties and public policy). For scholarly division over the boundaries of autonomy and procedural justice in the global Law Merchant, *see* Thomas Schultz, supra note 8, at 59; Peer Zumbansen, *Debating Autonomy and Procedural Justice: The Lex Mercatoria in the Context of Global Governance Debates-A Reply to Thomas Schultz,* 2 J. INT'L. ARB. 427 (2011).

[277] Michael Reisman, *ICCA Congress June 2006,* ICCA CONGRESS SERIES NO. 18 (2007).

the declining role played by state courts in reviewing arbitral awards based on predominantly localized public policy.[278]

These different perspectives notwithstanding, there are several difficulties in relying on delocalized public policies when the parties have failed to make a choice of law. The first difficulty is in erroneously holding that the parties have failed to exercise such a choice, thereby undermining their "legitimate expectations".[279] The second difficulty is in a court hypothecating such a choice, leading to it imputing a fictionalized intention to the parties at the time of contracting.[280] The third difficulty is in a court identifying a transnational public policy that prevails over the intention of the parties, either on grounds of its "natural" superiority, or through the consent of nation states.[281] A cautionary answer for both arbitrators and reviewing courts is that it is "still too early to predict that international arbitration will soon arrive at the point in which the entire arbitral procedure can be driven and evaluated by reference to transnational procedural rules".[282] This caution is even more salutary in subjecting arbitration and the judicial review of arbitration awards to the prospectively vast terrain of substantive public policy. However, neither procedural nor substantive obstacles to applying public policy constitute definitive grounds for arbitrators or reviewing courts to apply only policies that are capable of being translated into and preserved by positive law. What public policy offers arbitrators and reviewing courts is other side of the unruly horse, namely, the medium through which public policy can offset, indeed remediate, the rigidly and confinement of positive law, domestic or otherwise.

XII. Conclusion

[278] Catherine Kessedjian, *ICCA Congress June 2006*, *supra* note 168, at 3.
[279] *See further* Derain, *supra* note 258, at 297.
[280] *See* Trakman, *Legal Fictions and Frustrated Contracts*, *supra* note 48.
[281] *See* Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' 24 J. INT'L. ARB. 327–339 (2007).
[282] Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20(4) ARB. INT'L. 333, 337 (2004).

This article identifies three primary judicial tensions in determining the ambit of localized and delocalized public policy. The first is between the choice of domestic law by international commercial parties, and "fundamental" or "core" public policies that are delocalized and allegedly transcend those party choices. The second tension is between public policies that states share through a "law of nations", and domestic public policies that states adopt individually, to the exclusion of the public policies of other states. The third tension is between a "law of nature" that supposedly imbeds a public policy based on justice and fairness, and a *ius commune* ascribed to international commerce where public policy protects, or contains. the free exchange between commercial parties.

The most pervasive tension, however, is between the mono-local policies of a sovereign nation state, tempered by transnational policies that are subscribed to by a plurality of states.[283] That plural interest is often expressed through the reciprocity of treatment that state courts accord to each other, as replicated by courts in third states.[284] At its narrowest, such reciprocal treatment is binational, as two states reciprocate in recognizing the public policy determinations of each other's courts. At its widest, such reciprocal treatment is multilateral, as when a plurality of states subscribes to Article V (2) of the New York Convention. However, divergence across the courts of signatory states in interpreting the scope of public policy under Article V (2) of to the New York Convention attests vastly different construction of that defense in the recognition and enforcement of international arbitration awards.

The middle ground between reciprocating states and a multilateral treaty purporting to bind all signatory states is often occupied by states with comparable legal, cultural and religious

[283] The argument is not that the French court sought to protect local interests in not enforcing the New York decision. Indeed, the judgment creditor did not invoke the New York decision in *see*king enforcement in France of the arbitration award annulled in New York. The argument is rather that, had the French court refused to enforce the New York judgment, that could have led to reciprocal non-enforcement of judgments between French and New York court more generally.

[284] The NY Convention provides for reciprocity between states. Article 1 provides that '… any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State.' The following articles also provide for reciprocity: Article X (colonial territories); Article XI (federal states); and Article XIV (general reciprocity).

traditions. In effect, those states subscribe to public policies which they share on cultural or religious grounds, such as disdain for usury in Sharia Law, within the broader framework of the NY Convention. However, even such culturally and religiously imbued reciprocity can reduce the influence of mono-local public policies upon the enforcement of foreign judgments, such as when Sharia states in Saudi Arabia are unwilling to enforce foreign judgements and awards that permit profit-making, while courts in UAE are willing to do so.[285]

Even more problematic is a conception of public policy that, while being shared by reciprocating states, fails to redress the dilution of the public policy defense beyond those reciprocating states.

Similarly challenging is the practice of states purport to each create two-tiers of public policy, the one consisting wholly of mono-local policies, and the other purporting to be international in nature. The result is to multiply public policy regimes due to deviations in these two-tier systems. [286]

The article therefore focuses on remediating among incongruent conceptions of public policy. These include redressing divergence, *inter alia*, over procedural public policy across states,[287]

[285] It is noteworthy that, according to the IBA, only the UAE and Australia have adopted explicit definitions of public policy under the NY Convention. On Sharia Law in Saudi Arabia, *see* Esmaeili, *supra* note 51.
[286] On a two-tier public policy regime in domestic states, see Gaillard, Legal Theory of International Arbitration, *supra* note 45, at 28-35, 60-62.
[287] *See* Moses, *supra* note 163 (on incongruent conceptions of public policy across states).

the principle of comity,[288] mandatory precepts of natural law[289] and the law of nations.[290] Using a mediatory discourse, it seeks to reconcile domestic conceptions of procedural fairness and judicial independence,[291] as well as fundamental principles of justice attributed to civilized nations and localized interests that allegedly embellish upon or conflict with those principles.[292]

The article recognizes the centrality of party autonomy in the judicial enforcement of international arbitration awards. It stresses, however, that the application of public policy is often thwarted precisely because the parties' choices of law fail to address an otherwise applicable public policy adequately, fairly, efficiently, or at all. Given this, public policy serves as a modulating force in balancing party autonomy against countervailing public policies. It acknowledges the freedom of parties to regulate their contractual relations, without being free to exclude "core" policies directed at remedying procedural and substantive injustice.

On the one hand, delocalized public policies are needed to avert and redress felonious conduct in accordance with an international regulatory framework that responds to the denial and abuse of

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[288] On the divergent scope of international comity, *see* Joel R. Paul, *Transformation of International Comity*, 71 L. & CONTEMP. PROB., 19, 19-20 (2008); Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L REV. 9, 11-16 (1966); Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILLINOIS L. REV. 375, 376 (1919). *But see* UPENDRA BAXI, HUMAN RIGHTS IN A POSTHUMAN WORLD: CRITICAL ESSAYS 58 (2009) (on the 'Destruction of Comity').

[289] *Id* at 70. *See also* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHT, 56, 136 (1997) (ON the disparate nature of natural rights); PHILIP C. JESSUP, A MODERN LAW OF NATIONS (1948) ('modernizing' the *ius gentium*); Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution* 25 COLUM. J. TRANSNAT'L. L. 9 (1986) (exploring a uniform system of international commercial arbitration). PHILIP C. JESSUP, A MODERN LAW OF NATIONS (1948) (on divergence over the scope of a 'modern' *ius gentium*); Lord Steyn, *The Challenge of Comparative Law*, 8 EUR. J. L. REFORM 3 (2007) (on reconciling divergence in law and policy across legal systems).

[290] *See e.g.* EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 17, 68 (1758) (identifying the natural law foundations of the 'Law of Nations').

[291] *See supra* Fontanelli & Busco, note 243 and accompanying text.

[292] On the ILA's multiple sources of international public policy allegedly promoting inconsistent reasoning and results, *see* Mayer & Sheppard, *supra* note 5, at 255.

personal liberties and the expropriation of property in domestic legal systems.[293] On the other hand, delocalized public policies potentially undermine the sovereignty of domestic states, including localized policies that restrict personal liberty, or subject commercial conduct to policies directed at social welfare and the domestic good. The difficulty is in arriving at public policies that are reconciliatory in guiding the fair and efficient conduct of transnational commerce locally, regionally and internationally,[294] that acknowledge the localizing penchants of nation states, while addressing the free market aspirations of commercial parties.[295] At issue is the need to recognize the virtue of a public policy concept that avoids excessive preoccupation with a wholly domesticated good; that perpetuates distortions across global markets under the guise of freedom of contract; and that fosters instability and inequity in local, regional and global markets. It is a challenge that the New York Convention has invited, in providing for a public policy defense by which domestic courts of signatory states can deny recognition and enforcement to international arbitral awards. It is a challenge that is lacking, not only in the Convention, but also in the jurisprudence that has evolved from it since its inception in 1958.

Ultimately, the firmest foundation for international public policy resides in affirming an international socio-economic and legal order that includes but transcends mono-local policies that are solitary, in not being shared by other states, whether acting individually or collectively. In contention are dynamic commercial interactions across an international arbitral community that includes both state and non-state actors, not limited to transnational merchants. The vitality of that public policy lies in an ability to sustain otherwise transient mercantile dealings in that market, including by stabilizing them judiciously, fairly and in accordance with law influenced by policy.

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[293] *See* Ryan M. Welch, *National Human Rights Institutions: Domestic Implementation of International Human Rights Law* 16(1) J. HUM. RTS. 96, 103-109 (2017) (on tensions in implementing international human rights).

[294] *See* Catherine Kessedjian, *Mandatory Rules of Law in International Arbitration: What are Mandatory Rules?* 18 AM. REV. INT'L. ARB. 147, 149 (2007). (on reconciling mandatory domestic, regional and transnational law and policy relating to international commercial arbitration).

[295] *See* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 Nw. U. L. Rev. 1551, 1594-6 (2003) (on transnational law and policy that transcends the nationality of contracting parties).

The judicious resort to public policy in determining whether to enforce a foreign arbitral award or judgement, is not a quest for an illusion. The purpose is rather to maintain a viable social and economic order that depends on the variable application of public policy for its lifeblood and its nourishment. Any quest to render public policy fixed and permanent will inevitably undermine it as the leveling force it was meant to be and without which it would cease to have a meaningful social and economic purpose.