

# **International Dispute Resolution and the Public Policy Exception**

**Farshad Ghodoosi**

 **Routledge**  
Taylor & Francis Group  
LONDON AND NEW YORK

First published 2017 by Routledge

2 Park Square, Milton Park, Abingdon, Oxfordshire OX14 4RN  
711 Third Avenue, New York, NY 10017

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

First issued in paperback 2018

Copyright © 2017 Farshad Ghodoosi

The right of Farshad Ghodoosi to be identified as author of this work has been asserted by him in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Notice:

Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

*British Library Cataloguing in Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloging-in-Publication Data*

Names: Ghodoosi, Farshad, author.

Title: International dispute resolution and the public policy exception/  
Farshad Ghodoosi.

Description: Abingdon, Oxon ; New York, NY : Routledge, 2016. | Series:  
Routledge research in international commercial law | Based on author's  
thesis (J.S.D. - Yale Law School, 2015).

Identifiers: LCCN 2016001405 | ISBN 9781138183612 (hbk)

Subjects: LCSH: International commercial arbitration. | Public policy (Law)

Classification: LCC K2400.G54 2016 | DDC 347/.09—dc23

LC record available at <http://lcn.loc.gov/2016001405>

ISBN: 978-1-138-18361-2 (hbk)

ISBN: 978-1-138-61419-2 (pbk)

Typeset in Baskerville

by Swales & Willis Ltd, Exeter, Devon, UK

# Contents

	<i>Foreword</i>	x
	<i>Acknowledgements</i>	xii
	<b>Introduction</b>	<b>1</b>
<b>1</b>	<b>A brief history of the notion of public policy in English common law</b>	<b>5</b>
	<i>A. Paradigm shift</i>	5
	<i>B. Unruliness of public policy</i>	8
	<i>C. Definition</i>	11
	<i>D. Taxonomy</i>	14
<b>2</b>	<b>A brief history of public policy as regulatory planning in the United States</b>	<b>21</b>
	<i>A. The classical approach</i>	22
	1. Formalism	22
	2. Rationalism	25
	<i>B. Age of statutes</i>	27
	1. Emergence of a welfare state	27
	2. American legal realism	29
	<i>C. A need for a new approach</i>	31
	1. The age of multiculturalism	31
	2. The revisionist approach	32
	3. Beyond revisionism	32
<b>3</b>	<b>Economics of the public policy doctrine</b>	<b>34</b>
	<i>A. The law and economics approach in law</i>	34
	<i>B. The law and economics of public policy</i>	37
	1. Protecting parties	37
	2. Protecting third parties	39
	3. Protecting redistributive justice	41

	<i>C. The leading role of public policy</i>	43	
	1. Incompleteness of the law and economics approach	43	
	2. Policy arguments in courts	45	
<b>4</b>	<b>Public policy in arbitration</b>		<b>49</b>
	<i>A. Why people arbitrate: three paradigms</i>	49	
	1. Structural tension	50	
	2. Consent-based	52	
	3. Interest-based	55	
	4. Resistance-based	59	
	<i>B. The doctrine of public policy in arbitration</i>	62	
	1. Role of the public policy exception	62	
	2. Courts' approach to public policy exceptions	63	
	3. Concluding remarks	73	
	<i>C. The United States Supreme Court</i>	73	
<b>5</b>	<b>The trajectory of international dispute resolution</b>		<b>78</b>
	<i>A. Pre-modern developments</i>	78	
	<i>B. Developments in the early modern era</i>	80	
	<i>C. Emergence of the notion of public policy</i>	85	
<b>6</b>	<b>Theorizing international arbitration</b>		<b>91</b>
	<i>A. Judicialization and state power</i>	91	
	<i>B. Two schools of international arbitration</i>	93	
	1. The transnationalist approach	94	
	2. The statist approach	99	
	3. Practical significance	104	
<b>7</b>	<b>Transnational public policy in contemporary international commercial arbitration</b>		<b>108</b>
	<i>A. Public policy in international commercial arbitration</i>	110	
	1. The complicated picture of choice of law	110	
	2. Empirical data on the success rate	113	
	<i>B. Three approaches to transnational public policy</i>	117	
	1. Common values among nations	119	
	2. National courts' international public policy	121	
	3. <i>Lex mercatoria</i>	123	
	<i>C. Transnational public policy in enforcement</i>	128	

<b>8 The development of transnational public policy in international law</b>	<b>131</b>
<i>A. Established norms</i>	<i>131</i>
1. <i>Jus cogens</i>	131
2. Human rights	133
3. Corruption and fraudulent conduct	136
<i>B. Transnational public policy in the twenty-first century</i>	<i>140</i>
1. Economic sanctions	140
2. Sovereign debt	142
<b>Conclusion</b>	<b>145</b>
<i>Index</i>	<b>147</b>