

学校编码：10384

分类号\_\_\_\_\_密级

学号：X2012120065

UDC

廈門大學

碩 士 学 位 论 文

公共政策保留之适用问题研究  
——以国际商事仲裁裁决承认与执行  
为视角

On the Application of Public Policy  
——From the Perspective of Recognition and  
Enforcement of International Commercial Arbitration  
Awards

陈 慧 琳

指导教师姓名： 蔡 庆 辉 副 教 授

专 业 名 称： 法 律 硕 士

论文提交日期： 2015 年 10 月

论文答辩时间： 2015 年 月

学位授予日期： 2015 年 月

答辩委员会主席： \_\_\_\_\_

评 阅 人： \_\_\_\_\_

2015 年 月

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## 内容摘要

随着国际经济贸易蓬勃发展，仲裁制度近年来已成为国内和国际间解决商事纠纷最有效的途径。国际商事纠纷的当事人通常向国际仲裁机构寻求救济，但这种救济还需依赖一国法院对国际仲裁机构裁决的承认和执行方能得以落实。没有什么比在经历了一场耗费不菲的仲裁大战后发现手中的裁决无法执行更令当事人苦恼沮丧的了，他们需要的是实实在在的利益，而非一纸空文。如此一来，仲裁裁决获得执行的可能性大小自然将影响投资者选择和仲裁还是诉讼方式来解决纠纷，以及选择在何地仲裁，甚至是否进行投资。这些商业选择反过来又会对一国的仲裁立法产生影响，并推动各国国际商事仲裁领域相关制度的完善。质言之，裁决的域外可执行性是国际商事仲裁制度存在及发挥作用的重要基础和前提。

公共政策保留能实际阻碍仲裁裁决内容的最终实现，因而直接关系到国际商事仲裁事业和国际经贸交往健康发展。几乎所有国家的国内法及与司法或仲裁有关的国际条约都订有此类条款，但对其内涵及具体适用标准却鲜有提及，故这一制度始终处于重要但模糊的状态、存在被滥用或被虚置的风险。对于公共政策保留，摆在我国理论界和实务界面前的最大课题，在于如何于规则设立上构建国际认可的、具有可操作性的标准，并在具体解释适用上保证其发挥应有作用，获得妥当结果。

基于上述原因，本文拟以国际商事仲裁裁决的承认与执行为视角，研究这一背景下公共政策保留的适用，将重点放在“捕捉”具有不确定性的公共政策保留的“共性形态”，分析公共政策保留适用之问题和改进之方向。为达此目的，本文将综合运用系统分析、问题分析、比较分析、价值分析、规范分析等多种分析工具，最终得出由“价值衡量”出发、以“类型化”为落脚点，将公共政策保留制度适度具体化的结论。

**关键词：**公共政策；仲裁裁决；域外执行

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## Abstract

In an economy that is constantly growing and developing, arbitration has over recent years proven to be the most effective way over the world to resolve economic disputes not only at a domestic level, but also an international level. Parties to an international dispute usually refer their cases to an international arbitration tribunal, but must still rely on a local court to recognize and subsequently enforce the award. Nothing frustrates parties more than to discover after prevailing at a hard fought and costly arbitration that the arbitral award cannot be enforced. They want money, not just a piece of paper. Meanwhile, the perceived enforceability of awards will naturally influence an investor's decision whether to settle, arbitrate or litigate, where to arbitrate and perhaps in some cases whether to invest at all. Those choices from business may, in reverse, affect countries with their arbitration legislation and push forward international commercial arbitration.

Public policy is closely related to the healthy development of international commercial arbitration, as well as international trade association, since it can stop the realization of a foreign arbitral awards. Most of the countries in the world have clauses about public policy in their domestic laws, so as in international treaties relating to judicial or arbitration, while the specific definition and the application of public policy is rarely mentioned, which makes it important but catchall, easy to be abused or falsely used. The very problem to us in our country is how to build up international recognized system, which is operability and useful.

This article is supposed to present the existing situation about the enforcement and recognition of foreign arbitration awards, reveal the problems concern and give recommendations accordingly. To achieve this goal, some analytical tools, such as method of system approach/ method of problem analysis/ method of comparative analysis etc, will be used. The solution this article gives is to properly embody the concept of public policy by value measuring and categorizing.

**Key Words:** Public Policy; Arbitral Awards; Recognition and Enforcement  
Abroad

## 案例表

Fertilizer Corp. of India v. IDI Management, Inc.,517 F. Supp. 948,955 (S. D. Ohio 1981).

Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaartkantoor B. V.,574 F. Supp. 367 (S. D. N. Y. 1983).

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,473 U.S. 614 (1985).

Wilko v. Swan,346 U.S. 427 (1953).

Scherk v. Alberto-Culver Co.,417 U.S. 484 (1974) .

Rodriguez de Quijas v. Shearson/American Express Inc.,490 U.S. 477 (1989).

Trasmarine Seaways Corp. of Monrovia v. Marc Rich & Co.,480 F. Supp. 352(S. D. N. Y. 1979).

Shearson/American Express Inc. v. McMahon,482 U.S. 220 (1987).

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

Dalmia Dairy Industries Ltd. v. National Bank of Pakistan.,(1987)2L10yd's Rep 246.

Parsons & Whittemore Overseas Company v. Societe General De'L Industrie Du Papier(Parkta),508 F. 2d. 969 (2nd,Cir. 1974).

Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A. G.,480 F. Supp. 352 (1979).

Laminoirs-Trefileries-Cableries de Lens S. A. v. Southwire Co.,484 F. Supp. 1063(1980).

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