

PUBLIC POLICY IN RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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When the arbitral award is not voluntarily complied with, the winning party in international arbitration will need to have it enforced. The most successful instrument to that effect is the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award. Under Article V(2)(b) of the Convention enforcement of the award may be denied if it would violate forum's public policy.

In general, public policy is a traditional ground for the refusal of enforcement of foreign arbitral awards and foreign judgements, as well as for the refusal to apply a foreign law. Public policy basically guards the fundamental principles of the forum. The perception of public policy varies from country to country. However, under the Convention the scope of public policy has been narrowed (international public policy). The international public policy is to be understood as that part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law, foreign judgement or foreign arbitral award.

In interpretation of the public policy under the Convention, special regard must be made to the Resolution of the International Law Association on Public Policy as a Bar to Enforcement of International Arbitral Awards. The Resolution has been adopted with an aim to clarify and to enhance standardized approach in interpretation and application of Article V(2)(b) of the Convention. Its recommendations are addressed to the judges of all Contracting States. The recommendations are divided into four groups: general recommendations, fundamental principles, public policy rules, international obligations.

International public policy under Article V(2)(b) includes both substantive and procedural violations. Substantive public policy refers to the subject matter of the award, whereas procedural public policy implicates the process by which the dispute was adjudicated.

Substantive public policy aims to safeguard forum's fundamental substantive principles and rules. Enforcement of the award may be barred if public policy rule would be violated by such enforcement. Mandatory rules generally comprise two categories: those that apply only in domestic relations and those applying also in international relations (directly applicable rules, lois de police). The latter are qualified as laws whose observation is essential for safeguarding the political, social and economic organization of the country. Certain directly applicable rules may claim a negative public policy function in enforcement proceedings under the Convention. According to the case law public policy rules can be grouped as regards their specific concerns, which may be monetary, economic or political. In addition, new set of public policy rules is reflected on the regional level, i.e. European public policy rules.

The principle of acting in accordance with good morals has become a widely accepted legal standard. Thus if award purports to enforce one of the generally condemned activities, it would most likely be denied enforcement on public policy grounds. Following reasons have been identified as relevant public policy defense: the awards arisen out of an illegal contract, a contract having as its aim and object traffic in influence through the payment of bribes, a contract obtained by fraudulent maneuvers.

Procedural public policy concerns the fundamental procedural aspects under which the award was rendered. An important principle of due process is active participation in the proceedings. This principle demands that each party must have been effectively offered opportunity to be heard. But if, after having been duly notified, a party refuses to participate or remains inactive in the arbitration, he must be deemed to have deliberately forfeited the opportunity. A violation of procedural public policy cannot be invoked because the award was rendered in default of the party, in the circumstances where the party who was duly notified of the proceedings, voluntarily and intentionally refused to participate.

Procedural public policy comprises the fundamental principle of due process (natural justice), the respect of which must be ensured in all phases of the proceedings. Following matters have been recognized as a violation of due process: parties were not informed of arbitrators' names and of their appointment, the award was rendered on the basis of evidence presented by one party but of which the other party was never informed, the defendant never received a copy of pleadings which the claimant had sent to the tribunal, the defendant did not have opportunity to comment documents submitted by the claimant.

Impartial administration of justice is considered to rank first on the scale of all procedural fundamental principles. Claims of arbitrator's bias often arise in enforcement proceedings. The courts generally distinguish between the case where there are circumstances which might have created the lack of impartiality of the arbitrator (imputed bias or appearance of bias) and the case where the arbitrator has effectively not acted in an impartial manner (actual bias). It is in the latter case only where the courts are prepared to refuse enforcement of the award.

The award procured or affected by fraud and/or corruption may be denied enforcement under the public policy defense as well.