

**PUBLIC POLICY IN RECOGNITION AND ENFORCEMENT OF
FOREIGN ARBITRAL AWARDS
UPLATNĚNÍ VEŘEJNÉHO POŘÁDKU PŘI UZNÁNÍ A VÝKONU
CIZÍCH ROZHODČÍCH NÁLEZŮ**

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Abstrakt

Tento příspěvek se zabývá problematikou veřejného pořádku jako důvodu pro odmítnutí uznání a výkonu cizího rozhodčího nálezu podle článku V odst. 2 pís. b) Newyorské úmluvy. Příspěvek se snaží nastínit, jak národní soudy aplikují veřejný pořádek, a analyzuje jednotlivé důvody, které vedly k odmítnutí uznání a výkonu rozhodčího nálezu podle článku V odst. 2 pís. b). Zvláštní pozornost je věnována Rozhodnutí Mezinárodní právní asociace o veřejném pořádku jako důvodu pro odmítnutí výkonu mezinárodních rozhodčích nálezů.

Klíčová slova

Rozhodčí nález, uznání, výkon, Newyorská úmluva, veřejný pořádek, mezinárodní veřejný pořádek, hmotněprávní veřejný pořádek, procesní veřejný pořádek

Abstract

This contribution deals with the particular problem of the recognition and enforcement of foreign arbitral awards under the New York Convention. Under Article V(2)(b) of the Convention enforcement of the award may be denied if it would violate forum's public policy. The contribution explains how national courts use the public policy defense and analyses reasons which have lead to the denial of enforcement under Article V(2)(b). Special regard is made to the Resolution of the International Law Association on Public Policy as a Bar to Enforcement of International Arbitral Awards.

Key words

Arbitral award, recognition, enforcement, New York Convention, public policy, international public policy, substantive public policy, procedural public policy

1. Introduction

The recognition and enforcement of arbitral awards is of paramount importance for the success of arbitration in the international arena. This is well evidenced by the fact that the enforceability of awards world wide is considered one of the primary advantages of arbitration. Unless parties can be sure that at the end of arbitration proceedings they will be able to enforce the award, if not complied with voluntarily, an award in their favour will only be a pyrrhic victory.¹

There is no point in having arbitration-friendly law, well-drafted arbitration rules and competent arbitrators, if no effective enforcement mechanism is available.² Moreover, an effective system for the enforcement of awards in case of non-compliance strongly influences the degree of voluntary compliance.

There is an international policy favouring enforcement of awards. It is a well-established fact that the vast majority of arbitral awards are internationally enforced.³ With exceptions, it is rare to find examples of non enforcement in published cases. The percentage of refusals appears to remain more or less stable: approximately ten per cent of the reported enforcement cases.⁴ This is mainly the result of harmonization of the rules relating to recognition and enforcement and the extensive acceptance by so many states of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award

2. New York Convention

The New York Convention is generally regarded as the most successful international convention in the field of private international law. The Convention has worldwide coverage

¹ Lew, J.D.M., Mistelis, L.A., Kröll, S.M.: *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 2005, p. 688

² Kaufmann-Kohler, G.: *Enforcement of Awards – A Few Introductory Thoughts*, in *New Horizons in International Commercial Arbitration and Beyond*, Kluwer Law International, The Hague, 2005, p. 287

³ Berg, A.J.: *Why Are Some Awards Not Enforceable?*, *Enforcement of Awards – A Few Introductory Thoughts*, in *New Horizons in International Commercial Arbitration and Beyond*, Kluwer Law International, The Hague, 2005, p.291

⁴ Berg, A.J.: *Why Are Some Awards Not Enforceable?*, *Enforcement of Awards – A Few Introductory Thoughts*, in *New Horizons in International Commercial Arbitration and Beyond*, Kluwer Law International, The Hague, 2005, p.291

of more than 130 Contracting States.⁵ It rarely occurs that enforcement of an award made in another country is sought on a basis other than the Convention.⁶

The overall scheme of Articles IV – VI of the Convention is the facilitation of the enforcement of the award. The scheme reflects a “pro-enforcement bias”.⁷ Article V lists the reasons for non-enforcement of awards. There are three main features of the grounds for refusal: the grounds are exhaustive, a court may not re-examine the merits of the award, and the burden of proof rests on the respondent.⁸ Article V is divided into two parts. The first paragraph lists the grounds which are to be proven by the respondent. The second paragraph lists the grounds on which a court may refuse enforcement on its own motion. Under Article V(2)(b) of the Convention enforcement of the award may be denied if it would violate forum’s public policy.

3. Public Policy

In general, public policy is a traditional ground for the refusal of enforcement of foreign arbitral awards and foreign judgments, as well as for the refusal to apply a foreign law. A public policy provision can be found in almost every international convention or treaty relating to these matters. Its function is basically to be the guardian of the fundamental moral convictions or policies of the forum.⁹

The idea of public policy is notorious among judges and scholars as a concept not susceptible to definition. Theory and practice generally agree that public policy reflects some

⁵ Concerning the main reasons of success of the NY Convention see for example Berg, A.J.: The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas, in *The New York Convention of 1958: A Collection of Reports and Materials Delivered at the ASA Conference held in Zürich on 2nd February 1996*, ASA, Zürich, 1996, p. 25 - 26

⁶ Although enforcement on the basis of a more favourable basis via Art. VII(1) should not be ignored.

⁷ Berg, A.J.: *Why Are Some Awards Not Enforceable?*, *Enforcement of Awards – A Few Introductory Thoughts*, in *New Horizons in International Commercial Arbitration and Beyond*, Kluwer Law International, The Hague, 2005, p. 292

⁸ Berg, A.J.: *Why Are Some Awards Not Enforceable?*, *Enforcement of Awards – A Few Introductory Thoughts*, in *New Horizons in International Commercial Arbitration and Beyond*, Kluwer Law International, The Hague, 2005, p. 292; Berg, A.J.: *The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas*, in *The New York Convention of 1958: A Collection of Reports and Materials Delivered at the ASA Conference held in Zürich on 2nd February 1996*, ASA, Zürich, 1996

⁹ Berg, A.J.: *The New York Arbitration Convention of 1958*, T.M.C. Asser Institute, The Hague, 1981, p. 360

moral, social, economic and legal principles as important as to require their maintenance at all costs and without exception.¹⁰

The purpose of the public policy exception is to protect the fundamental principles of the society, namely fundamental legal principles and moral values. Difficulties arise, however, when an attempt is made to define those principles and values that constitute the public policy of a particular state.¹¹

Since the issue of public policy stands within the context of application of the legal principles of a particular state, the interpretation of public policy is subject to the values and standards accepted by that state. These standards are determined by the applicable economic, political, social and legal systems, which vary among societies. Therefore, the standards constituting public policy change as these societies develop.¹²

3.1. Public policy defense under the Convention

A public policy defense has been frequently invoked by the unsuccessful party in arbitration. Arbitral awards that were actually denied enforcement on this ground are rare. There are several reasons why many public policy claims failed before courts. It is mainly due to the Convention's pro-enforcement bias which is generally respected. Regarding the nature the claims, it is in part due to the fact that the public policy defense is often asserted in bad faith. It has generally become accepted that the public policy defense under the Convention is of a more restrictive scope than domestic public policy, and it is thus referred to as international public policy.

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.¹³ The Resolution has been adopted with an aim to clarify and to enhance standardized approach in interpretation

¹⁰ Shaleva, V.: 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, *Arbitration International*, Vol. 19, No.1, p. 68

¹¹ Shaleva, V.: 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, *Arbitration International*, Vol. 19, No.1, p. 69

¹² Böckstiegel, K.H.: Public Policy and Arbitrability, in *Comparative Arbitration Practice and Public Policy in Arbitration*, Kluwer Law, Deventer, 1986, p.180

¹³ See *Arbitration International*, Vol. 19, No. 2, p. 213 - 215

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. They will be examined throughout this article.

3.1.1. Domestic and international public policy

As mentioned above, the public policy defense rarely leads to a refusal of enforcement. One of the reasons is the distinction between domestic and international public policy. According to this distinction what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. It means that the number of matters considered to fall under public policy in international cases is smaller than that in domestic cases. The distinction is justified by the differing purposes of domestic and international relations.¹⁴ The Convention can be said to refer to international public policy.

The notion of international public policy is accepted by the ILA Recommendations as well. The expression 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 award. It is not to be understood as referring to a public policy which is common to many states (transnational public policy) or to public policy which is part of public international law.¹⁵

The concept of international public policy is not a purely theoretical construction. France was the first country to give statutory recognition to the notion of international public policy. In a great number of court decisions reported under the Convention, the distinction

¹⁴ Berg, A.J.: *The New York Arbitration Convention of 1958*, T.M.C. Asser Institute, The Hague, 1981, p. 360; Berg, A.J.: *Why Are Some Awards Not Enforceable?*, *Enforcement of Awards – A Few Introductory Thoughts*, in *New Horizons in International Commercial Arbitration and Beyond*, Kluwer Law International, The Hague, 2005, p.309; Paulsson, J.: *The New York Convention in International Practice – Problems of Assimilation*, in *The New York Convention of 1958: A Collection of Reports and Materials Delivered at the ASA Conference held in Zürich on 2nd February 1996*, ASA, Zürich, 1996, p. 113; Berg, A.J.: *The New York Convention: Summary of Court Decisions*, in *The New York Convention of 1958: A Collection of Reports and Materials Delivered at the ASA Conference held in Zürich on 2nd February 1996*, ASA, Zürich, 1996, p. 91; Lew, J.D.M., Mistelis, L.A., Kröll, S.M.: *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 2005, p. 721

¹⁵ Mayer, P., Sheppard, A.: *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, *Arbitration International*, Vol. 19, No. 2, p. 250 - 253

between domestic and international public policy has been made either expressly or implicitly. One of the most well known cases is *Parsons & Whittemore Overseas Inc. v RAKTA*.¹⁶ In this case the US Court of Appeal observed: “*The Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum’s state basic notions of morality and justice.*”

The concept of international public policy has been further restricted by the idea of a so-called truly international or transnational public policy (ordre public réellement international) – quite a controversial notion developed by French and Swiss authors. Transnational public policy reflects the existence of what is perceived as universal standards or accepted norms of conduct common to the international community.¹⁷ The rules of this public policy would comprise fundamental rules of natural law, the principle of universal justice, ius cogens in public international law and the general principles of morality accepted by what is referred to as civilized nations.¹⁸ The precise contents of this category of public policy, however, are rather unclear. Moreover, these rules can be deemed to be covered to a large extent by international public policy.¹⁹

3.1.2. Substantive public policy under Article V(2)(b)

The international public policy of any state under Article V(2)(b) includes: (i) fundamental principles, pertaining to justice or morality, that the state wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social and economic interests of the state, these being known as lois de police or public policy rules; (iii) the duty of the state to respect its obligations towards other states or international organizations.²⁰

¹⁶ Court of Appeal, Second Circuit, USA, 23 December 1974, *Parsons and Whittemore Overseas Co., Inc. (USA) v Rakta (Egypt) and Bank of America (USA)*, US no.7, reported in *Yearbook Commercial Arbitration (YCA)*, Volume I (1976), p. 205

¹⁷ Lalive, P.: *Transnational or Truly International Public Policy in International Arbitration*, in *Comparative Arbitration Practice and Public Policy in Arbitration*, Kluwer Law, Deventer, 1986, p. 266

¹⁸ Lew, J.D.M.: *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, Oceana, Dobbs Ferry, NY, 1978, p. 535

¹⁹ Berg, A.J.: *The New York Arbitration Convention of 1958*, T.M.C. Asser Institute, The Hague, 1981, p. 361

²⁰ ILA Recommendation 1(d)

International public policy under Article V(2)(b) includes both substantive and procedural violations.²¹ 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. Even though the judicial review of an award normally does not go into the merits, this category of public policy may contain concerns justifying such a review. It should be noted here that some authors consider the concept of objective non-arbitrability to be covered by the public policy exception and thus redundant as a separate ground for refusing enforcement under Article V(2)(a). However, the Convention did not endorse such a *solution de lege lata*.²²

The ILA Report lists examples of possible substantive policy grounds in Recommendation 1(e). An example of a substantive fundamental principle is the principle of good faith and prohibition of abuse of rights. Other examples include: *pacta sunt servanda*, prohibition against uncompensated expropriation, prohibition against discrimination. The prohibition of activities *contra bonos mores* also concerns within this category (for example proscription against piracy, terrorism, genocide, slavery, smuggling, drug trafficking, paedophilia). An example of a public policy rule is anti-trust law. Other examples that are often cited are: currency controls, price fixing rules, environmental protection laws, measures of embargo, blockade of boycott, tax laws, consumer protection laws.²³

3.1.2.1. Public policy rules

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*, *lois d'application immediate*). The latter are qualified as laws whose observation is essential for safeguarding the political, social and economic organization of the country. A

²¹ ILA Recommendation 1(c)

²² For the reasons why non-arbitrability figures as a specific ground see Berg, A.J.: *The New York Arbitration Convention of 1958*, T.M.C. Asser Institute, The Hague, 1981, p. 368 - 369

²³ Mayer, P., Sheppard, A.: *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, Arbitration International, Vol. 19, No. 2, p. 256

directly applicable rule is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs the relationship.

Certain directly applicable rules may claim a negative public policy function in enforcement proceedings under the Convention. Only a limited number of such rules may be considered of a public policy value.²⁴ An award's violation of a mere mandatory rule (i.e. a rule that is mandatory but does not form part of the state's international public policy so as to compel its application in the case under consideration) should not bar its recognition and enforcement, even when said rule forms part of the law of the place of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.²⁵

Applicability of public policy rules by the courts is problematic in several aspects. The identification of public policy rules is a difficult task. Public policy rules are not specifically announced in any of the provision in the Convention. The Convention presupposes none or minimal review of the award as to the merits (which the applicability of these rules may imply). ILA Report recommends conditions for the application of public policy rules.²⁶ In order to apply a public policy rule needs to satisfy its factual and spatial scope of application. Moreover, the check is to be made to ensure that enforcement would manifestly disrupt the essential political, social or economic interests protected by the rule.

According to the case law public policy rules can be grouped as regards their specific concerns, which may be monetary,²⁷ economic²⁸ or political.²⁹ In addition, new set of public policy rules is reflected on the regional level, i.e. European public policy rules.³⁰

Extent of judicial review to be employed in order to examine the issue should be limited. A consensus was, however, reached in ILA as regards some scrutiny over the award that is permissible where a violation of public policy rules is not evident.³¹

²⁴ Every public policy rule is mandatory, but not every mandatory rule forms part of public policy.

²⁵ ILA Recommendation 3(a)

²⁶ ILA Recommendation 3(b), 3(d)

²⁷ Exchange control regulations

²⁸ Export or import prohibitions

²⁹ Laws by which a state accomplishes an act of hostility towards another state as embargoes, blockades or boycotts; embargoes and sanctions imposed by the UN Security Council (see ILA Recommendation (4))

³⁰ It is not possible to deal with the European public policy in detail in this Article, because it overreaches the extent of it.

3.1.2.2. Enforcement of obligations contra bonos mores

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,³² 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,³³ a contract having as its aim and object traffic in influence through the payment of bribes,³⁴ a contract obtained by fraudulent maneuvers.³⁵

3.1.3. Procedural public policy

Procedural public policy concerns the fundamental procedural aspects under which the award was rendered. According to the ILA Recommendation an example of procedural public policy is the requirement that the tribunal is impartial. Other examples of breaches of procedural public policy include: the making of the award was induced or affected by fraud or corruption, breach of the rules of natural justice, the parties were on an unequal footing in the appointment of the tribunal. It may also be a breach of procedural public policy to enforce an award that is inconsistent with a court decision or arbitral award that has res iudicata effect. It is widely accepted that procedural public policy should not include manifest disregard of the law and facts.³⁶

There are opinions that procedural public policy claims may be considered redundant due to different procedural grounds enlisted under Article V(1), especially the due process ground under Article V(1)(b). On the other hand, if procedural infringements may still be invoked under the public policy headings, there is an advantage of this approach. The courts have the possibility to raise procedural public policy violation ex officio and public policy could encompass procedural issues that may not have been enlisted in Article V(1).

³¹ ILA Recommendation 3(c)

³² Bribery or corruption, smuggling, paedophilia, drug trafficking, slavery, terrorism

³³ Court of Appeal, England, *Sion Soleimany v Abner Soleimany*, reported in YCA XXIV (1999), p. 329

³⁴ Court of Appeal, France, *European Gas Turbines v Westman International Ltd.*, reported in YCA XX (1995), p. 198; compare to Court of Appeal, England, *Westacre Investments Inc. v Jugoimport SDRP Holding Company*, reported in YCA XXIV (1999), p. 753 and Court of Appeal, England, *Ominum De Traitement et de Valorisation SA v Hilmarton Ltd.*, reported in YCA XXIV (1999), p. 777

³⁵ Court of Appeal, Luxemburg, *Korsa Holding Company Luxemburg v Infancourtage*, reported in YCA XXI (1996)

³⁶ ILA Recommendation 1(e)

Whichever approach is correct, most courts decisions reported so far evidenced that courts are prepared to examine claims of procedural public policy violations under both Article V(1)(b) and V(2)(b).

a) Default of party

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.³⁷ 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. The same result may occur when the party participated in arbitration proceedings, but kept silent as to the procedural irregularities it later invokes in the enforcement phase. It is said that the party then waived the right to invoke them.³⁸

b) Principle of fair hearing

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. The parties need to be duly notified of the proceedings and appointment of arbitrators, they must be treated fairly and equally in the proceedings and thus given a fair opportunity to present their case. Following matters have been recognized as a violation of due process: parties were not informed of arbitrators' names and of their appointment,³⁹ the award was rendered on the basis of evidence presented by one party but of which the other party was never informed,⁴⁰ the defendant never received a copy of pleadings which the claimant had sent to the tribunal,⁴¹ the defendant did not have opportunity to comment documents submitted by the claimant.⁴²

³⁷ Berg, A.J.: The New York Convention: Summary of Court Decisions, in *The New York Convention of 1958: A Collection of Reports and Materials Delivered at the ASA Conference held in Zürich on 2nd February 1996*, ASA, Zürich, 1996, p.91; Lew, J.D.M., Mistelis, L.A., Kröll, S.M.: *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 2005, p.721

³⁸ Berg, A.J.: *The New York Arbitration Convention of 1958*, T.M.C. Asser Institute, The Hague, 1981, p. 185

³⁹ Court of Appeal, Germany, *Danish Bayer v German Seller*, reported in YCA IV (1979), p. 258

⁴⁰ Court of Appeal Hamburg, Germany, *Firm P v Firm F*, reported in YCA II (1977), p. 241

⁴¹ Court of Appeal, Netherlands, *G.W.L. Kersten & Co. BV v Société Commerciale Raoul-Duval et Cie*, reported in YCA XIX (1994), p. 708

⁴² Court of Appeal, Netherlands, *Rice Trading Ltd. V Nidera Handelscompagnie BV*, reported in YCA XXIII (1998), p. 731

Impartial administration of justice is considered to rank first on the scale of all procedural fundamental principles. An impartial arbitrator is supposed to have no personal interest in the case and is independent vis-à-vis the parties. Claims of arbitrator's bias often arise in enforcement proceedings, even though the Convention does not contain a separate defense for it. That is why it is asserted under the public policy defense.⁴³ 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.⁴⁴

c) Fraud

The award procured or affected by fraud and/or corruption may be denied enforcement under the public policy defense. Defenses based on claims that the award was procured or affected by fraud, mostly committed by one of the parties through perjured evidence, may satisfy the public policy criteria. However, not only its burden of proof very difficult to attain, but the courts hesitate to even examine the fraud assertion if it is found that the party objecting enforcement had knowledge of the fraud during the proceedings, but kept silent.⁴⁵ When the party asserts new evidence on committed fraud, the criteria for its admissibility in enforcement proceedings are very strict.⁴⁶

d) Others

Among other public policy defenses we are able to discover a variety of reasons. Only some of them were successful and lead to the denial of recognition.

⁴³ It may also fall under the Article V(1)(b)

⁴⁴ Berg, A.J.: The New York Convention: Summary of Court Decisions, in The New York Convention of 1958: A Collection of Reports and Materials Delivered at the ASA Conference held in Zürich on 2nd February 1996, ASA, Zürich, 1996, p. 93; German charterer v Romanian shipowner, reported in YCA XII (1987), p. 489; Final Court of Appeal, Hong Kong, Hebei Import & Export Corp. v Polytek Engineering Co. Ltd., reported in Export Corp. v Polytek Engineering Co. Ltd., reported in YCA XXIV (1999), p. 652

⁴⁵ District Court Tennessee, USA, Indocomex Fibros Pte., Ltd. v Citron Company International, Inc., reported in YCA XXIV (1999), p. 792

⁴⁶ High Court, England, Westacre Investments Inc. v Jugoimport-SDPR Holdings Co. Ltd., reported in YCA XXIII (1998), p. 836

Extension of the time limit for rendering the award was objected several times in the enforcement proceedings.⁴⁷ This procedural infringement does not amount to a public policy violation as it is generally interpreted under the Convention. It should be rather approached by the defenses set in Articles V(1)(c) and V(1)(d).

The arbitration laws of a number of countries mandate that the award contain the reasons on which the decision is based. In contrast, in several common law countries it is customary not to give reason in the award. By applying international public policy, the courts of the countries under the law of which the giving of reasons is mandatory, generally enforce awards without reasons made in countries where such awards are valid.⁴⁸ The situation is similar concerning the situation where the award is rendered by an even number of arbitrators.

4. Conclusion

The courts in the Contracting States of the Convention maintain the principle embodied in the text of Article V(2)(b), that enforcement may only be denied if enforcement of the award violates public policy. The courts of the Contracting States appear to distinguish between the domestic public policy and international public policy, although not always expressly.

Certain violations of substantive public policy would invariably result in refusal of enforcement, i.e. awards giving effect to activities generally considered to contravene good morals (which are normally also illegal). Where this defect is not evident, the courts apply different standards of review in order to have it established. In examination of claims that enforcement would contravene a forum's public policy rule, a judge needs to ascertain whether the rule indeed pertains to public policy under the Convention. Once the public policy value of a rule has been established, the courts would normally not be able to proceed where the violation is not evident. Thus they should be allowed to make at least some inquiry into the facts of the case in order to establish the violation. The courts in the EU have to deal with the European public policy rules as well.

⁴⁷ Supreme Federal Court, Germany, *Ghezzi (Italy) v Jakob Boss Sohne (Germany)*, reported in YCA XV (1990), p. 454; Court of Appeal, France *Dubois and Vanderwalle v Bolte Fritéz BV*, reported in YCA XXIV (1999), p. 641

⁴⁸ Berg, A.J.: *The New York Convention: Summary of Court Decisions*, p.94

Judges are especially attentive to procedural public policy claims involving above all a denial of the right to a fair hearing, arbitrator's partiality and fraud or corruption during arbitral proceedings. However, these must be asserted in good faith. The public policy ground must not be seen as a catch-all provision to be used whenever convenient.

Even though the courts mostly apply international public policy, some discrepancies in the perception of public policy are unavoidable. Transnational public policy seeks to harmonize certain values and principles globally. It is true that a judge may always look for an inspiration in a universal consensus. However, transnational public policy does not find any support in the Convention. Enforcement of the award may be barred only by public policy of the forum.

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