

**IBA SUBCOMMITTEE ON RECOGNITION AND ENFORCEMENT  
OF ARBITRAL AWARDS**

**Report on the Public Policy Exception in the New York Convention**

**October 2015**

**INTRODUCTION**

The present report summarizes the findings of the country reports prepared by the different Members and Reporters of the International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards (the “**Subcommittee**”)<sup>1</sup> on the public policy exception in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**the Convention**”). These country reports are appended to this report.

According to Article V(2)(b) of the Convention:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) [...]

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Contravention of public policy is thus one of the few grounds for refusing the recognition or enforcement of a foreign award. But the notion of public policy was (intentionally) not defined in the Convention and its concrete manifestations may substantially vary from one jurisdiction to another.

The Subcommittee therefore decided to launch the ambitious project of attempting to define public policy as a ground for refusal of enforcement of awards under the Convention, and of drawing up a catalogue of its concrete manifestations, based upon the decisions issued by enforcing courts having denied enforcement for violation of public policy.

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<sup>1</sup> The members of the Subcommittee and country reporters are listed at the end of this report. Lawyers from jurisdictions not already covered are welcome to volunteer for preparing a memorandum addressing the public policy exception of the Convention under their jurisdiction’s law. Any interested volunteer should contact the chairman of the Subcommittee at [pascal.hollander@hvdb.com](mailto:pascal.hollander@hvdb.com).

The project carried out by the Subcommittee (under the chairmanship, first, of Eduardo Silva Romero and, since 2015, of Pascal Hollander) is an on-going one: its ambition is to give the members of the IBA Arbitration Committee an overview of the public policy exception as applied in as many jurisdictions as possible. At present, more than 40 jurisdictions are covered. The Subcommittee's ambition is also to identify any trends in the definition of public policy by commercial and investment arbitral tribunals. This part of the research is, however, still on-going and will thus not be addressed in the present report.

After setting out the scope of the research that was conducted by the Subcommittee (I), this report outlines a preliminary catalogue of general definitions of the notion (II), and gives a first overview of particular manifestations of public policy (III). All country reports are available on the website of the Arbitration Committee.

## **I. SCOPE OF THE RESEARCH**

The country reporters were first asked to explain how the notion of public policy is defined by domestic courts in their jurisdiction, in the contexts of (i) enforcement of arbitral awards, and (ii) setting aside of awards, and to highlight any difference between them. They were also asked to explain whether domestic courts in their jurisdiction refer to a specific category of public policy rules (international public policy rules) when enforcing an international award or whether they do not make any distinction in applying public policy rules, and to indicate whether the courts adopted a specific way of applying public policy rules to the enforcement (or setting aside) of awards.

The second part of the country reports is a catalogue of concrete situations where the enforcement of an award was resisted due to an (alleged) violation of public policy, distinguishing, where applicable, between procedural and substantive public policy. Reporters were of course asked to mention whether the recognition or enforcement of the award had been refused or not.

## **II. DEFINITION OF PUBLIC POLICY**

### **A. Absence of statutory definition of public policy**

As mentioned above, the Convention does not define public policy. This concept was thus left for the Convention Member States to individually define.

A first interesting finding is that, in none of the covered jurisdictions is public policy statutorily defined, with two notable exceptions, being the UAE and Australia.

In the UAE, Article 3 of the Civil Transactions Law states in general (thus not limited to the context of arbitration) that public order "*include[s] matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individual ownership and the other rules and*

*foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Sharia.”*<sup>2</sup>

In Australia, Section 8(7A) of the 1974 International Arbitration Act provides that “*To avoid doubt and without limiting paragraph (7)(b)[which makes the violation of public policy a ground for refusing to enforce a foreign award], the enforcement of a foreign award would be contrary to public policy if: (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award.*”<sup>3</sup>

Sweden should also be mentioned, as Section 55 item 2 of the Swedish Arbitration Act does not refer to violation of *public policy* as a ground for refusal of enforcement of foreign arbitral awards, but seems to give more precise content to the notion by providing that “[*Recognition and enforcement of a foreign arbitral award shall also be refused where the court finds:] [...] that it would be manifestly incompatible with the **fundamental principles of Swedish law** to recognize and enforce the arbitral award*” (emphasis added).<sup>4</sup>

## **B. Uniform definition of public policy in the context of arbitration (setting aside v. enforcement)?**

In the absence of a conventional or statutory definition of public policy, it is thus the task of state courts to attempt to define this notion.

In some jurisdictions, the notion is uniformly defined in the context of arbitration, regardless of whether contravention of public policy is raised as a defense against enforcing a foreign award (the situation governed by Article V(2)(b) of the Convention) or as a ground for setting aside an (international)<sup>5</sup> award in accordance with the applicable arbitration law.<sup>6</sup>

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<sup>2</sup> See Hassan Arab and Laila El Shentenawi, *UAE*, p. 3.

<sup>3</sup> See Hilary Birks, *Australia*, p. 2.

<sup>4</sup> See Pontus Ewerlöf, *Sweden*, para. 2.

<sup>5</sup> As is well known, some national arbitration laws (e.g. France, Switzerland, Singapore, Lebanon, Portugal) differentiate between domestic and international arbitration, setting out their own criteria for determining when an arbitration (and therefore an arbitral award) is domestic or international. Given the scope of the research conducted by the Subcommittee, when such difference between domestic and international arbitration exists, only the courts’ definition of public policy in the context of the setting aside of international awards (however characterized in that jurisdiction) was reviewed for the purpose of establishing any consistency or inconsistency with the notion of public policy as a ground for refusing enforcement of foreign awards.

<sup>6</sup> See, for instance, Gao Xiaoli, *China*, p. 2; Craig Chiasson and Kalie McCrystal, *Canada*, p. 4; Nish Shetty, *Singapore*, p. 1; Pontus Ewerlöf, *Sweden*, para. 10; Gerard Meijer, *Netherlands*, para. 5; Massimo Benedetelli and Michele Sabatini, *Italy*, paras. 17-18; Héctor Anaya Mondragon and Andres Cravallo Franco, *Mexico*, p. 3; Hilary Birks, *Australia*, p.3.

In other jurisdictions, there are some nuances between public policy as a ground for setting aside an award and as a ground for refusing the enforcement of a foreign award. For instance, in Portugal, where violation of international public policy is a ground for annulment of international awards as well as for refusal of enforcement of foreign awards, the required level of inconsistency with public policy is lower for setting aside an award than for refusing the enforcement of a foreign award. In the latter case, the Portuguese arbitration law indeed requires a “clear” incompatibility with the (international)<sup>7</sup> public policy of Portugal, but legal scholars express doubts as to whether the legislator really intended to differentiate between the two situations.<sup>8</sup> In Greece, courts tend to apply a more stringent public policy standard for setting aside Greek (international) awards than in the context of enforcement of foreign awards.<sup>9</sup> In Switzerland, there are scholarly discussions on whether the concept should be uniformly defined or distinguished between setting aside and enforcement situations.<sup>10</sup>

Finally, some countries have only recently adhered to the Convention and their courts have thus not yet dealt with the question of the definition of public policy in the context of the recognition and enforcement of foreign arbitral awards under the Convention.<sup>11</sup>

### C. Distinction between “domestic” and “international” (or “transnational”) public policy?

In the context of recognition and enforcement of foreign arbitral awards, many countries draw a distinction between domestic public policy and international (or even transnational) public policy.

While the definition of international or transnational public policy is not necessarily the same in those jurisdictions, the purpose of making such a distinction is always to narrow down the scope of the public policy which must be considered for assessing whether the enforcement of a foreign award is compatible or not.<sup>12</sup> An exception seems to be Turkey where, while it is accepted that Article V(2)(b) of the Convention refers to international, rather than domestic,

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<sup>7</sup> On the difference between international and domestic public policy, see the following Section.

<sup>8</sup> See Sofia Martins, *Portugal*, p. 6.

<sup>9</sup> See Niki Kerameus, *Greece*, p. 3.

<sup>10</sup> See Dominique Brown-Berset, *Switzerland*, pp. 8-9.

<sup>11</sup> See, for instance, Mansoor Hassan Khan, *Pakistan*, para. 1.6; José Antonio Moreno Rodríguez, *Chile, Paraguay, MERCOSUR, Perú and Venezuela*, pp. 11-12.

<sup>12</sup> See, for instance, Virginia Allan and Victor Bonnin Reyes, *Spain*, p.2; Alberto Zuleta and Rafael Rincón, *Colombia*, paras. 11-13; Ismail Selim, *Egypt*, paras. 12-15; José Antonio Moreno Rodríguez, *Chile*, p.8; Noiana Marigo, *Uruguay*, para. 38; Zvi Nixon and Lauren Sobel, *Israel*, para. 5; Mansoor Hassan Khan, *India*, para. 2.2; Maxi Scherer, *England*, p. 22; Massimo Benedetelli and Michele Sabatini, *Italy*, paras. 17-18; Niki Kerameus, *Greece*, p. 3; Hassan Arab and Laila El Shentenawi, *UAE*, p. 6.

public policy, decisions by the competent Court of Appeal show that a narrow interpretation of the concept is not always adopted in the case of foreign awards.<sup>13</sup>

In most countries, the distinction between international and domestic public policy is drawn by the courts, but in some countries, it is mandated by the local arbitration law, such as in France,<sup>14</sup> Lebanon,<sup>15</sup> Portugal,<sup>16</sup> Peru,<sup>17</sup>, Paraguay<sup>18</sup>, Switzerland.<sup>19</sup>

In Germany, the arbitration law distinguishes between the enforcement of domestic and foreign awards, but refers in both cases to violation of “public policy” as a ground for refusal. While there are differences between domestic and international public policy in the case law, they are “*minimal and semantic*”.<sup>20</sup>

On the contrary, in other jurisdictions, courts do not distinguish between domestic or national public policy and international public policy. This absence of distinction does not, however, always mean that courts adopt a broader interpretation of public policy than in the jurisdictions where the distinction exists.<sup>21</sup> In some jurisdictions, however, the reference to public policy is clearly seen as referring to domestic public policy, allowing the courts to exert a stricter control on alleged violations thereof.<sup>22</sup>

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<sup>13</sup> See Bennar Balkaia, *Turkey*, p. 4.

<sup>14</sup> Article 1520, 5° CCP, applicable to international arbitration only. See Charles Nairac, *France*, p. 3.

<sup>15</sup> Article 814 CCP, applicable to international arbitration only. See Jalal El Adhab and Myriam Eid, *Lebanon*, p. 3.

<sup>16</sup> Article 56(1)(b)(ii) Portuguese Arbitration Law, applicable to international arbitration only. See Sofia Martins, *Portugal*, p. 6.

<sup>17</sup> Article 75(3)(b) Legislative Decree 1071, applicable to international arbitration only. See José Antonio Moreno Rodríguez, *Peru*, p. 14.

<sup>18</sup> Article 46 Paraguayan Arbitration Law, applicable to international arbitration only. See José Antonio Moreno Rodríguez, *Paraguay*, p. 10.

<sup>19</sup> See Dominique Brown-Berset, *Switzerland*, p. 1.

<sup>20</sup> See Hilmar Raeschke-Kessler and Hildegard Ziemons, *Germany*, para. 3; see also Maxi Scherer, *Germany*, p. 2.

<sup>21</sup> See as examples of jurisdictions where courts restrictively interpret public policy, without distinguishing between domestic and international public policy: Craig Chiasson and Kalie McCrystal, *Canada*, p. 3; Beata Gessel, *Poland*, para. 4; Maxi Scherer, *Austria*, p. 3.

<sup>22</sup> See, for instance, Noiana Marigo, *Argentina*, para. 3; Gao Xiaoli, *China*, p. 2; Giovanni Ettore Nanni, *Brazil*, p. 6; Héctor Anaya Mondragon and Andres Cravallo Franco, *Mexico*, p. 3; José Antonio Moreno Rodríguez, *Venezuela*, p. 16; Hiroyuki Tezuka and Yutaro Kabawata, *Japan*, paras. 7-8; Frans Winarta, *Indonesia*, p. 1.

#### **D. Courts' definitions of public policy as a ground for refusal of enforcement of foreign awards**

In the absence of a definition of public policy in most arbitration laws, domestic courts seem, in general, to have difficulty in precisely defining the meaning and the scope of the notion.

In the vast majority of jurisdictions covered by this report, a violation of public policy implies a violation of *fundamental* or *basic* principles. These principles seem, however, to be differently expressed by courts (and scholars) depending on whether they are in civil law or common law jurisdictions. In the first group, the definitions of public policy generally refer to the basic principles or values upon which the foundation of society rests, without precisely naming them. In the second group, on the other hand, the definition often refers to more precisely identified, yet very broad, values, such as justice, fairness or morality.

Hereafter follows a non-exhaustive and illustrative list of definitions from civil law jurisdictions, referring to public policy as the foundation of the legal system, on which society's moral, political or economic order rests.

- Argentina: “*Fundamental principles upon which the Argentinian legal system is based.*”<sup>23</sup>
- Austria: “*Fundamental values of the Austrian legal system.*”<sup>24</sup>
- Belgium: “[W]hat touches upon the essential interests of the State or of the community or sets, in private law, the legal basis on which rests the society's economic or moral order.”<sup>25</sup>
- Brazil: “*The fundamental principles of its jurisdiction. It is worth mentioning that public policy includes the political, legal, moral and economical aspects of the constituted State.*”<sup>26</sup>
- China: “*The principle of the law, fundamental interests of the society, safety of the country, sovereignty and good social customs.*”<sup>27</sup>

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<sup>23</sup> See Noiana Marigo, *Argentina, Uruguay and investment tribunals*, p. 2.

<sup>24</sup> Judgment of the OGH of 24 August 2011, 3 Ob 65/11x; Judgment of the OGH of 12 October 2011, 3 Ob 186/11s; Judgment of the OGH of 28 August 2013, 6 Ob 138/13g; Judgment of the OGH of 26 January 2005, 3 Ob 221/04b, quoted by Maxi Scherer, *Austria*, p. 2.

<sup>25</sup> Cass., 18 June 2007, quoted by Pascal Hollander, *Belgium*, p. 1.

<sup>26</sup> SEC 854 (Superior Court of Justice), quoted by Giovanni Ettore Nanni, *Brazil*, p. 4.

<sup>27</sup> See Gao Xiaoli, *China*, p. 2.

- Egypt: “Rules aiming to achieve a public interest, whether political, social or economic, pertaining to the society’s high order and which prevails over the individual interest.”<sup>28</sup>
- Finland: “Fundamental principles and value that reflect public interest.”<sup>29</sup>
- Germany: “The very fundamentals of public and economic life” or “[t]he fundamental principles of the German legal order.”<sup>30</sup>
- Greece: “The fundamental statutory, moral, social, legal or economic perceptions that prevail in the country.”<sup>31</sup>
- Israel: “Those central and vital values, interests and principles that a given society at a given time wishes to maintain, protect and foster. These are the foundations of the Israeli nation, spirit, society and market ...”<sup>32</sup>
- Italy : “Those fundamental norms and values of ethical, social, political and economic nature that lie at the heart of the Italian legal order.”<sup>33</sup>
- Japan : “The basic principles or basic ideas of the legal system of our country.”<sup>34</sup>
- Mexico: “The legal institutions, principles, norms that conform the State. ... The essential principles of the State that transcends to the community given the offensiveness of the mistake made in the decision”.<sup>35</sup>
- Peru: “A group of principles and institutions that are considered essential in the organization of a State and inspire its legal system.”<sup>36</sup>

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<sup>28</sup> See Ismail Selim, *Egypt*, para.5.

<sup>29</sup> See Marko Hentunen & Thomas Kolster, *Finland*, p. 1.

<sup>30</sup> See Maxi Scherer, *Germany*, p. 2.

<sup>31</sup> Greek Supreme Court 17/1999 and 102/2012, quoted by Niki Kerameus, *Greece*, p. 3.

<sup>32</sup> *Vuance Ltd. V. Departement of Resources Supply of the Ministry of Internal Affairs of Ukraine*, quoted by Zvi Nixon & Lauren Sobel, *Israel*, para. 5.

<sup>33</sup> See Massimo Benedetelli & Michele Sabatini, *Italy*, para. 3.

<sup>34</sup> *Northcon I, Oregon Partnership v. Mansei Kôgyô Co Ltd* quoted by Hiroyuki Tezuka and Yutaro Kabawata, *Japan*, para. 5.

<sup>35</sup> See Francisco González de Cossio, *Mexico*, p. 1.

<sup>36</sup> *Stemcor UK Limited v. Guiceve SAS*, 28 April 2011, Superior Court of Lima, quoted by José Antonio Moreno Rodríguez, *Chile, Paraguay, MERCOSUR, Perú and Venezuela*, p. 15.

- Poland: “*The fundamental principles of Polish legal order.*”<sup>37</sup>
- Portugal: “*The State’s most basic principles of social, ethical, political and economic nature (inclusive of the ones comprised in the Constitution).*”<sup>38</sup>
- Switzerland: “*Fundamental values of the Swiss legal order.*”<sup>39</sup>
- Turkey: “*The entire set of rules and institutions, which determines the foundation structure and protects the fundamental interests of the society from the political, social, economic, ethical and legal perspectives within a specific period of time.*”<sup>40</sup>
- Uruguay: “*The very principles upon which [the] State’s legal individuality is founded.*”<sup>41</sup>

In contrast, the definitions found in the following common law jurisdictions tend to refer to more explicit fundamental values:

- Australia: “*Fundamental norms of justice and fairness.*”<sup>42</sup>
- Canada (Ontario): “*The most basic and explicit principles of justice and fairness in Ontario*” and “*the essential morality of Ontario.*”<sup>43</sup>
- England: Courts are reluctant to precisely define public policy: “[c]onsiderations of public policy can never be exhaustively defined, but they should be approached with extreme caution ... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and

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<sup>37</sup> See Beata Gessel, *Poland*, para. 5.

<sup>38</sup> See Sofia Martins, *Portugal*, p. 8.

<sup>39</sup> Federal Tribunal, 25 September 2014, quoted by Dominique Brown-Berset, *Switzerland*, p. 2.

<sup>40</sup> General Assembly of the Courts of Appeal, 8 February 2012, quoted by Bennar Balkaia, *Turkey*, p. 4.

<sup>41</sup> *Energis S.A. v. Pecom Energia S.A.*, quoted by Noiana Marigo, *Argentina, Uruguay and investment tribunals*, p. 10.

<sup>42</sup> *TCL v. Castel*, Court of Appeal of the Federal Court of Australia (2014) quoted by Hilary Birks, *Australia*, p. 2.

<sup>43</sup> Ontario Superior Court of Justice, *Corporation Transnacionales de Inversiones v. Stet International S.p.A.*, quoted by Craig Chiasson and Kalie McCrystal, *Canada*, p. 3.



*fully informed member of the public on whose behalf the powers of the state are exercised.*<sup>44</sup>

- Singapore: “[T]he most basic notions of morality and justice.”<sup>45</sup>
- USA: “Most basic notions of morality and justice” and “[f]undamental notions of what is just in the United States”.<sup>46</sup>

Finally, in a minority of jurisdictions, public policy seems to be given a much broader content. Examples can be found in the following jurisdictions:

- Indonesia: Courts tend to classify violations of public policy in three categories: “(i) a violation of prevailing laws and regulations in Indonesia; (ii) a danger to the national interest of Indonesia, including its economy and (iii) a violation of the Indonesian sovereignty”.<sup>47</sup>
- India: The enforcement of a foreign arbitral award may be refused by an Indian court on the ground of public policy if such enforcement would be contrary to: “(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality”.<sup>48</sup>
- Kenya: An award is deemed contrary to public policy if it is either “(i) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; (ii) inimical to the national interests of Kenya, or (iii) contrary to justice or morality”.<sup>49</sup>
- Nigeria: Courts have defined public policy as “[c]ommunity sense and common conscience extended and applied throughout the State to matters of public morals, health, safety, welfare and the like”.<sup>50</sup>

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<sup>44</sup> *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell Int'l Petroleum Co. Ltd.*, Court of Appeal, 24 March 1987, quoted by Maxi Scherer, *England*, p. 6.

<sup>45</sup> *Aloe Vera of America v. Asianic Food*, High Court (2006), quoted by Nish Shetty, *Singapore*, para. 12.

<sup>46</sup> See Melida Hodgson and Anna Toubiana, *USA*, p. 3.

<sup>47</sup> See Frans Winarta, *Indonesia*, p. 2.

<sup>48</sup> See Mansoor Hassan Khan, *Pakistan & India*, para. 2.13. There seems, however, to be significant hesitation and uncertainty by the Indian Supreme Court in its recent approach to the public policy concept in the context of international arbitration.

<sup>49</sup> *Christ for All Nations v. Apollo Insurance* (2002), quoted by James Gathii, *Kenya*, p. 2.

<sup>50</sup> *Dale Power Systems PLC v. Witt & Busch* (Lagos Court of Appeal), quoted by Dorothy Ufot, *Nigeria*, p. 1.

- Pakistan: Courts have defined public policy in the context of enforcement of foreign awards as follows: “[o]bjects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups first, objects which are illegal by common law or by legislation; secondly, objects injurious to good Government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to family life; and fifthly, objects economically against the public interest.”<sup>51</sup>

Only a few jurisdictions have adopted the concept of “transnational” public policy in relation to enforcement cases. Such is for instance the case of Lebanon, where courts held that international public policy is “formed of a set of rules of important nature that are applied in so many countries thus giving them an international character”.<sup>52</sup> Although Swiss courts law have defined public policy as “fundamental and widely recognized values that constitute the basis of any legal system, according to the conceptions prevailing in Switzerland” (emphasis added) within the context of decisions relating to the challenge of arbitral awards<sup>53</sup>, they have so far not gone as far in matters of recognition and enforcement of arbitral awards. In the overwhelming majority of cases, the fundamental or basic principles constituting public policy are those as existing in the country where enforcement is sought. This is explicitly stated in Article V(2)(b) of the Convention which refers to a situation where the recognition or enforcement of the award would be contrary to the public policy of “that country” (where enforcement is sought).

In many jurisdictions, courts note that public policy, as defined above, must be distinguished from domestic mandatory laws. The fact that an award is in contradiction with a mandatory rule of law in the country where enforcement is sought will thus generally not lead to refusal of enforcement of the award.<sup>54</sup>

Finally, it is important to note that, whatever the definition adopted, many courts stress that public policy is an ever-evolving concept.<sup>55</sup>

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<sup>51</sup> *Nan Fung Textiles Ltd. v. Sadig Traders Ltd*, High Court (1982), quoted by Mansoor Hassan Khan, *Pakistan & India*, para. 1.3. The decision was rendered before Pakistan became a party to the Convention. In the absence of specific case law on public policy as a ground for refusal to enforce a foreign award, rendered after Pakistan’s accession to the Convention, it remains to be seen if this definition will be maintained or modified by Pakistani courts applying Article V(2)(b) of the Convention.

<sup>52</sup> Jalal El Adhab and Myriam Eid, *Lebanon*, p. 7.

<sup>53</sup> See Dominique Brown-Berset, *Switzerland*, pp. 6-7.

<sup>54</sup> See, e.g. Maxi Scherer, *Austria*, p. 6; Gao Xiaoli, *China*, pp. 9 and 11; Alberto Zuleta and Rafael Rincón, *Colombia*, para. 4; Ismail Selim, *Egypt*, para. 13; Gerard Meijer, *Netherlands*, para. 14; Beata Gessel, *Poland*, para. 5; Dominique Brown-Berset, *Switzerland*, p. 4.

<sup>55</sup> See, e.g., Giovanni Ettore Nanni, *Brazil*, p. 8; Ismail Selim, *Egypt*, para.7; Charles Nairac, *France*, p. 4; James Gathii, *Kenya*, p. 3; Mansoor Hassan Khan, *Pakistan*, para. 1.4; Sofia Martins, *Portugal*, p. 7.

## E. Level of inconsistency with public policy and of review of the award

In most of the countries covered by this report, courts tend to narrowly construe violation of public policy as a ground for denying the enforcement of a foreign arbitral award: it does not suffice that public policy is offended or violated by the foreign award, but the violation must be of a certain nature or level.

The level of required violation of public policy varies from one jurisdiction to another: the violation must be “clear”,<sup>56</sup> “concrete”,<sup>57</sup> “evident”,<sup>58</sup> or “patent”,<sup>59</sup> “blatant”,<sup>60</sup> “manifest”,<sup>61</sup> “obvious and manifest”,<sup>62</sup> “flagrant”,<sup>63</sup> “particularly offensive”,<sup>64</sup> “severe”,<sup>65</sup> “intolerable”,<sup>66</sup> “unbearable”,<sup>67</sup> “repugnant to the legal order”,<sup>68</sup> etc.

In France, as is well known, the Court of Appeal of Paris had decided that the violation of public policy must be “flagrant, effective and concrete” (but recent decisions have apparently dropped the requirement of flagrancy). There is an on-going scholarly debate, as well as a debate between the *Cour de cassation* and the Court of Appeal of Paris, as to the exact meaning of this qualification.<sup>69</sup>

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<sup>56</sup> See Article 56(1)(b)(ii) of the Portuguese Arbitration Law, quoted by Sofia Martins, *Portugal*, p. 6.

<sup>57</sup> See Dorothy Ufot, *Nigeria*, p. 9.

<sup>58</sup> See Francisco González de Cossío, *Mexico*, p. 2.

<sup>59</sup> See Francisco González de Cossío, *Mexico*, p. 2.

<sup>60</sup> See Article 814 of the Lebanese Code of Civil Procedure, quoted by Jalal El Adhab and Myriam Eid, *Lebanon*, p. 3.

<sup>61</sup> See Section 55(2) of the Swedish Arbitration Act, quoted by Pontus Ewerlöf, *Sweden*, para. 2; see also Gao Xiaoli, *China*, p. 2.

<sup>62</sup> See Beata Gessel, *Poland*, para. 7.

<sup>63</sup> See Bennar Balkaia, *Turkey*, p. 6.

<sup>64</sup> See Pontus Ewerlöf, *Sweden*, para. 5.

<sup>65</sup> See Maxi Scherer, *Germany*, p. 2.

<sup>66</sup> See Maxi Scherer, *Austria*, p. 2; Dominique Brown-Berset, *Switzerland*, p. 2.

<sup>67</sup> See Dominique Brown-Berset, *Switzerland*, p. 2.

<sup>68</sup> See Massimo Benedetelli & Michele Sabatini, *Italy*, para. 17.

<sup>69</sup> See Charles Nairac, *France*, paras. 30-37.

Whatever the exact delineation of the contravention of public policy, it always serves to narrow the scope of the intervention to be made by the enforcing court and to prevent it from reviewing the merits of the case at the enforcement stage, or at least to limit such review of the merits.

In several jurisdictions, courts stress that the verification of compatibility with public policy should be limited to the result or the operative part of the award only<sup>70</sup> and should not extend to the reasoning adopted by the arbitrators or, in general, to the merits of the dispute which should not be reviewed.<sup>71</sup>

In others, while it is admitted that review of compliance with public policy for the purpose of enforcing a foreign award should be narrow and limited, a certain examination of the content of the award is not excluded. For instance, in Poland, a manifest and radical inconsistency between the arbitral decision and the facts submitted to the arbitrators may be considered as a violation of public policy.<sup>72</sup>

### III. CONCRETE MANIFESTATIONS OF PUBLIC POLICY

Public policy is often invoked, but its manifestations remain uncommon, and recognition and enforcement of a foreign award are rarely refused under Article V(2)(b) of the Convention.<sup>73</sup> In some countries, there are even no known decisions where the enforcement of an award was refused on the basis of inconsistency with public policy.<sup>74</sup>

Most domestic courts concur on the fact that public policy has two aspects: a procedural and a substantive one.

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<sup>70</sup> See *e.g.* Charles Nairac, *France*, para. 24 ; Massimo Benedetelli & Michele Sabatini, *Italy*, para. 7; Marko Hentunen & Thomas Kolster, *Finland*, p. 2.

<sup>71</sup> See *e.g.* Maxi Scherer, *Germany*, p. 8; Maxi Scherer, *England*, pp. 3, 5, 21 and 25; José Antonio Moreno Rodríguez, *Chile, Paraguay, MERCOSUR, Perú and Venezuela*, p. 10.

<sup>72</sup> See Beata Gessel, *Poland*, para. 18.

<sup>73</sup> Most of the appended country reports annex a table summarizing the decisions rendered by the domestic courts on public policy in the context of enforcement of foreign awards. As can be seen from these tables, the number of cases where enforcement was refused is far outweighed by the cases where a public policy defense was raised but rejected by the enforcing court. For the sake of brevity, we will focus in this report on those instances where a violation of public policy was found. The reading of the country reports is nevertheless extremely interesting in identifying procedural or substantive grounds that were held not to violate public policy.

<sup>74</sup> See *e.g.* Alberto Zuleta and Rafael Rincón, *Colombia*, para. 33; Sofia Martins, *Portugal*, p. 9.

## A. Procedural public policy

### 1) Procedural violations as a separate ground for refusal of enforcement?

Procedural public policy is comprised of basic and fundamental procedural rules. It should be noted that procedural irregularities are, as such, grounds for refusing the enforcement of foreign awards, under Article V(1)(b) and (d) of the Convention:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

[...]

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

[...]

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; [...]

In some jurisdiction, there are discussions as to whether procedural grounds which may be invoked to resist the enforcement of a foreign award in accordance with Article V(1)(b) and (d) of the Convention may also be raised as separate grounds of violation of public policy under Article V(2)(b).

For instance, a violation of the right to be heard, or of due process, is undoubtedly a violation of a fundamental principle of any legal order or of natural justice, and is thus a violation of public policy in accordance with the definitions reviewed above. Yet, a violation of this right is a specific ground for refusing the enforcement of a foreign award under Article V(1)(b) of the Convention. The question therefore arises whether a violation of the right to be heard can be sanctioned under Article V(1)(b) as well as Article V(2)(b) of the Convention.

In most of the jurisdictions covered by this report, the answer appears affirmative, with the consequence that such ground may therefore be raised *ex officio* by the enforcing court. This is not the case in Switzerland, where the Swiss Federal Tribunal has held that the public policy ground of Article V(2)(b) is of an extremely subsidiary nature and thus cannot apply whenever there are more specific grounds under the New York Convention to resist the

recognition and enforcement of a foreign award.<sup>75</sup> The same approach is followed in Italy,<sup>76</sup> where it is generally held that procedural public policy will come into play only where there would be no alternative ground for a party to vindicate its fundamental procedural rights and prerogatives.<sup>77</sup> The same question whether a violation of fundamental procedural rules, expressly sanctioned under Article V(1) of the Convention, constitutes a violation of public policy, is also controversial in Japan.<sup>78</sup> A similar debate has taken place in Poland, but has apparently been resolved in favor of including fundamental rules of procedure in the concept of public policy.<sup>79</sup>

Finally, it is worth mentioning that in some jurisdictions, and in the US in particular, Article V(1)(e) of the New York Convention has a public policy “gloss” and has been used as a basis to refuse to enforce an award that was previously set aside by a court of competent jurisdiction in the place where the award was rendered, or the place of applicable law.<sup>80</sup>

## 2) Main manifestations of violation of procedural public policy

Alleged violations of procedural public policy appear to be slightly more likely to result in denial of enforcement of a foreign award than alleged violations of substantive public policy.<sup>81</sup>

A first group of procedural irregularities appear to be almost universally accepted as affecting public policy, with the consequence that, when the enforcing courts find merit in the allegation, they systematically refuse to recognize and enforce the foreign award:

- Violation of right to be heard or of due process;<sup>82</sup>

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<sup>75</sup> Federal Tribunal, 28 July 2010, quoted by Dominique Brown-Berset, *Switzerland*, p. 3.

<sup>76</sup> See Massimo Benedetelli and Michele Sabatini, *Italy*, paras. 22-24.

<sup>77</sup> See Massimo Benedetelli and Michele Sabatini, *Italy*, para. 26.

<sup>78</sup> See Hiroyuki Tezuka and Yutaro Kabawata, *Japan*, para. 16.

<sup>79</sup> See Beata Gessel, *Poland*, para. 11.

<sup>80</sup> Virginia Allan and Nicolette Ward, *USA*, p. 2; Melida Hodgson and Anna Toubiana, *USA*, p. 5.

<sup>81</sup> Without purporting to give a statistical value to the Subcommittee’s findings, a review of the case law annexed to the respective country reports shows that alleged violations of procedural public policy resulted in a refusal of enforcement in more or less 30% of the reported cases, while alleged violations of substantive public policy resulted in a refusal of enforcement in more or less 20% of the reported cases.

<sup>82</sup> See *e.g.* Gerard Meijer, *Netherlands*, paras. 15 and 29; Dominique Brown-Berset, *Switzerland*, p. 10; Bennar Balkaia, *Turkey*, p. 6. In Germany, the BGH (Federal Supreme Court) held that a violation of due process will lead to the non-recognition or non-enforcement of a foreign award only if it is shown by the award-debtor that the violation affected or could have affected the outcome of the dispute. See

- Violation of equal opportunity to present one's case;<sup>83</sup>
- Award obtained by fraud or based on falsified documents;<sup>84</sup>
- Award obtained following bribery of or threats to an arbitrator.<sup>85</sup>

Other procedural violations are generally deemed to be contrary to public policy, although not universally or not systematically:

- Violation of *res judicata*;<sup>86</sup>
- Lack of independence and impartiality of the arbitrators.<sup>87</sup>

Finally, some procedural issues are considered as not affecting public policy in most of the covered jurisdictions, although the opposite position has been adopted in certain jurisdictions:

- The complete lack of reasons supporting an award is generally not seen as a violation of public policy,<sup>88</sup> although the contrary view was adopted by some domestic courts.<sup>89</sup>

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Maxi Scherer, *Germany*, p. 5; see also Hilmar Raeschke-Kessler and Hildegard Ziemons, *Germany*, para. 4.

<sup>83</sup> See e.g. Charles Nairac, *France*, para. 19; Frans Winarta, *Indonesia*, p. 3.

<sup>84</sup> See Maxi Scherer, *England*, p. 7; Charles Nairac, *France*, para. 19; Gerard Meijer, *Netherlands*, paras. 24-25; Pontus Ewerlöf, *Sweden*, paras. 12-14; Marko Hentunen and Thomas Kolster, *Finland*, p. 2.

<sup>85</sup> See Marko Hentunen and Thomas Kolster, *Finland*, p. 2; Zvi Nixon and Lauren Sobel, *Israel*, para. 11.

<sup>86</sup> See e.g. Gao Xiaoli, *China*, p. 2; Massimo Benedetelli and Michele Sabatini, *Italy*, para. 49; Bennar Balkaia, *Turkey*, p. 6. In the opposite direction, in Canada, courts held that the principle of *res judicata* likely does not give rise to public policy concerns. See Craig Chiasson and Kalie McCrystal, *Canada*, p. 6. It must be stressed that in some jurisdictions, a *res judicata* effect is given to a pre-existing decision only if it was declared enforceable in the jurisdiction of the enforcing court (see Charles Nairac, *France*, para. 21) or if it is capable of being recognized in that jurisdiction (see Dominique Brown-Berset, *Switzerland*, pp. 7-8 and 10).

<sup>87</sup> See Dominique Brown-Berset, *Switzerland*, p. 3 and 11. In Germany, the BGH (Federal Supreme Court) held that an alleged bias of an arbitrator could be a violation of public policy only if it was shown by the award-debtor that the bias had actually affected the outcome of the dispute. See Maxi Scherer, *Germany*, p. 3.

<sup>88</sup> See e.g. Craig Chiasson and Kalie McCrystal, *Canada*, p. 10; Marko Hentunen and Thomas Kolster, *Finland*, p. 2; Niki Kerameus, *Greece*, p. 5; Mansoor Hassan Khan, *Pakistan*, para. 1.3; Bennar Balkaia, *Turkey*, p. 10 (in respect of an unreasoned foreign judgment).

<sup>89</sup> See Pascal Hollander, *Belgium*, p. 2; Gerard Meijer, *Netherlands*, para. 17. In Italy, the Supreme Court denied the enforcement of an unreasoned foreign award on the ground that one of the parties had requested the arbitrators to state the reasons for their decision, in accordance with the applicable

- *Lis pendens*: in some jurisdictions, foreign arbitral awards were denied recognition and enforcement for contravening public policy where a pending proceeding before the domestic courts in the country where enforcement is sought could result in incompatible decisions.<sup>90</sup>

## B. Substantive public policy

Contrary to procedural public policy, where trends common to many, if not most jurisdictions, could be identified, it appears difficult to identify categories of violations of substantive public policy which transcend national boundaries and cause foreign awards to be denied recognition and enforcement in any jurisdiction. A notable exception is awards giving effect to illegal activities or, borrowing from the English Court of Appeal “*universally condemned activities such as terrorism, drug trafficking, prostitution, paedophilia (...), corruption or fraud in international commerce.*”<sup>91</sup>

The following list of manifestations is therefore not universal, but reflects trends in the assessment of substantive public policy in various jurisdictions:

- (EU) antitrust and competition law;<sup>92</sup>
- *Pacta sunt servanda*;<sup>93</sup>
- Equality of creditors in insolvency situations;<sup>94</sup>

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arbitration rules. The Court based its denial, however, not on Article V(2)(b) but on Article V(1)(d) of the Convention. See Massimo Benedetelli and Michele Sabatini, *Italy*, paras. 43-45.

<sup>90</sup> See Frans Winarta, *Indonesia*, p. 6; Virginia Allan and Victor Bonnin Reynes, *Spain*, para. 2.2.

<sup>91</sup> See Maxi Scherer, *England*, p. 14. See also Charles Nairac, *France*, para. 21; Dominique Brown-Berset, *Switzerland*, p. 5; Bennar Balkaia, *Turkey*, p. 6.

<sup>92</sup> See Marko Hentunen and Thomas Kolster, *Finland*, p. 2; Maxi Scherer, *Germany*, p. 7; Charles Nairac, *France*, para. 21; Massimo Benedetelli and Michele Sabatini, *Italy*, paras. 27-28; Gerard Meijer, *Netherlands*, paras. 14 and 20; Virginia Allan and Victor Bonnin Reynes, *Spain*, para. 2.1. In a famous 2006 decision, the Swiss Federal Tribunal refused, however, to include EU competition law in Swiss public policy, for the reason that “*it does not belong to the essential and largely recognized values that, according to the prevailing views in Switzerland, should constitute the founding principles of any legal order.*” See Dominique Brown-Berset, *Switzerland*, pp. 6-7.

<sup>93</sup> See Maxi Scherer, *Germany*, p. 5; Beata Gessel, *Poland*, para. 21; Dominique Brown-Berset, *Switzerland*, p. 5.

<sup>94</sup> See Craig Chiasson and Kalie McCrystal, *Canada*, p. 8; Charles Nairac, *France*, para. 21; Virginia Allan and Victor Bonnin Reynes, *Spain*, para. 2.1.



- State immunity;<sup>95</sup>
- Prohibition of punitive damages;<sup>96</sup>
- Prohibition of excessive interest;<sup>97</sup>
- In some jurisdictions, the inarbitrability of a dispute appears to be considered as belonging to public policy,<sup>98</sup> even though the non-arbitrable character of a dispute is a separate ground for refusal of recognition and enforcement of a foreign award under Article V(2)(a) of the Convention.

Finally, in some jurisdictions, courts have issued their own more or less extensive catalogue of substantive public policy manifestations.

Such is the case, for instance, in Brazil, where the Superior Court of Justice held that “*some rules are undeniably of a public policy nature, such as: constitutional matters; administrative matters; procedural matters; criminal matters; organization of the judiciary system; tax-related matters; police force matters; protection of the unable pursuant to the legislation; family matters; conditions and formalities required for certain acts; economical order (related to the wages, currency, and social security).*”<sup>99</sup>

Such is also the case in Switzerland where, in several decisions, the Federal Tribunal drew the following non-exhaustive catalogue of substantive public policy rules: *pacta sunt servanda*; the principle of good faith and its corollary, the prohibition of abuse of right; the prohibition of spoliation and expropriation without fair compensation; the protection of individuals who do not have legal capacity to act; the prohibition of bribery and corrupt practices; the prohibition of discriminatory measures; and the protection of individual rights.<sup>100</sup>

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<sup>95</sup> See Craig Chiasson and Kalie McCrystal, *Canada*, p. 8; Hilmar Raeschke-Kessler and Hildegard Ziemons, *Germany*, para. 6.

<sup>96</sup> See Marko Hentunen and Thomas Kolster, *Finland*, p. 2; Niki Kerameus, *Greece*, p. 5; Massimo Benedetelli and Michele Sabatini, *Italy*, paras. 51-52; Beata Gessel, *Poland*, para. 3; Artur Zurabyan and Andrey Panov, *Russia*, p. 2.

<sup>97</sup> See Maxi Scherer, *Austria*, p. 6; Ismail Selim, *Egypt*, para. 18; Melida Hodgson and Anna Toubiana, *USA*, p. 6.

<sup>98</sup> For instance: inarbitrability of disputes with consumers: see Hilmar Raeschke-Kessler and Hildegard Ziemons, *Germany*, para. 1; Marko Hentunen and Thomas Kolster, *Finland*, p. 2. Inarbitrability of commercial agency and distribution disputes in Lebanon: see Jalal El Adhab and Myriam Eid, *Lebanon*, pp. 13-14.

<sup>99</sup> SEC 802 (Superior Court of Justice), quoted by Giovanni Ettore Nanni, *Brazil*, p. 4.

<sup>100</sup> Dominique Brown-Berset, *Switzerland*, p. 5. This catalogue of public policy rules was drawn in the context of setting aside proceedings, but should provide guidance in defining public policy as a defense to recognition and enforcement of foreign awards pursuant to Article V(2)(b) New York Convention, where it only by way of analogy, in particular because the Swiss Private International Law Act provides

#### IV. CONCLUSION

Not surprisingly, the review of the public policy concept in the more than 40 jurisdictions covered so far in the study conducted by the Subcommittee confirms that it is difficult to clearly apprehend and impossible to precisely define.

Whether it refers to the basic or fundamental rules on which a society rests or to more “colored” values such as justice, fairness and morality, whether it is expressly given an international character or not, public policy as a ground for refusing the recognition or enforcement of foreign awards under Article V(2)(b) of the Convention is overwhelmingly considered to include only a very limited number of fundamental rules or values.

In the vast majority of jurisdictions, courts narrowly interpret or apply these rules and values by requiring a certain level of intensity for a given circumstance to be held contrary to public policy.

While there is no uniformity in the extent of review of the award by the enforcing courts, the predominant trend is to limit the review to a conformity-check of the arbitral decision itself, not its reasons, with public policy as assessed in the country where enforcement is sought.

Public policy has two dimensions: procedural and substantive.

Even though some procedural irregularities constitute autonomous grounds for refusal of recognition and enforcement of foreign arbitral awards under Article V(1) of the Convention, procedural public policy accounts for the majority of cases where recognition or enforcement of a foreign arbitral award was denied under Article V(2)(b) of the Convention. Procedural public policy includes near-universal values or principles such as the right to be heard or due process, the sanction of fraud or corruption in the arbitral process, *res judicata*, and the independence and impartiality of arbitrators.

Substantive public policy appears, in contrast, to be less prone to universal or “transcendental” values or rules, other than the prohibition on giving effect to “illegal” contracts (i.e. entered into for the purpose of carrying out an illegal – criminal – activity), rendering the drawing up of a catalogue of its manifestations a daunting task.

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that all foreign awards (*i.e.* including awards issued in countries that are not parties to the Convention) are recognized and enforced in Switzerland pursuant to the Convention. This question remains, however, debated amongst commentators. See Dominique Brown-Berset, *Switzerland*, pp. 8-9.

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