

IBA SUBCOMMITTEE ON RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS – COMPARATIVE STUDY

Introduction

1. In 2014-2015, the IBA Subcommittee on Recognition and Enforcement of Arbitral Awards conducted a comparative study on the “public policy” exception to the recognition and enforcement of arbitral awards contained in Article V(2)(b) of the New York Convention. The Subcommittee has solicited and received reports from Arbitration Committee members reporting jurisdiction by jurisdiction on the treatment of public policy by the domestic courts in the context of enforcement of foreign arbitral awards.

2. In October 2015, the Subcommittee published its General Report on the “public policy” exception and, in addition, has published specific reports from the following jurisdictions (at the time of writing): Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China, Colombia, Egypt, England, European Union, Finland, France, Germany, Greece, India, Indonesia, Israel, Italy, Japan, Kenya, Lebanon, Mexico, Nigeria, Pakistan, Paraguay, Peru, Poland, Portugal, Russia, Singapore, Spain, Sweden, Switzerland, The Netherlands, Turkey, United Arab Emirates, Uruguay, United States, Venezuela.

How is “public policy” defined?

3. The General Report confirms that what will be viewed as a contravention of public policy may be very different in different jurisdictions.

4. As a general rule, “public policy” is not a concept that is defined by statutory provision. However, this is not to say that all jurisdictions leave the concept completely open to interpretation. Australia and the United Arab Emirates have statutory provisions containing non-exhaustive lists of matters which will be contrary to public policy, whilst the Swedish Arbitration Act refers to the refusal of recognition and enforcement where that would be “manifestly incompatible with the fundamental principles of Swedish law”.

5. Further, whilst it is not uncommon for national arbitration laws to observe a distinction between the recognition of domestic and international arbitral awards, as a general rule this distinction is not observed in relation to the public policy exception to recognition and enforcement of arbitral awards. As a matter of national law, public policy is generally a uniform concept.

The approach to “public policy” on: (i) an application to set aside an award; and (ii) an application to refuse enforcement of an award

6. Some jurisdictions apply different standards to “public policy” arguments in different contexts: (i) on an application to set aside an arbitral award; (ii) as grounds for refusing enforcement of foreign awards. An example is Portugal, where an application for refusing enforcement of a foreign award requires a “clear” incompatibility with Portugal’s

international public policy, whilst an application for annulment requires a lower level of inconsistency with public policy.

“International” public policy and “domestic” public policy

7. The public policy exception to the recognition and enforcement of foreign arbitral awards under the New York Convention is widely accepted as requiring the national courts to observe international rather than domestic public policy. This requirement is usually established in case law, but some jurisdictions elevate the distinction to a statutory requirement. The General Report, however, shows that this requirement often does not necessarily entail that the national courts of jurisdictions observing such a distinction will take a narrower construction of “public policy” compared to those jurisdictions that do not draw the distinction at all.

8. The General Report observes that there is a general difference in terms of how “public policy” is viewed in civil law jurisdictions compared to common law jurisdictions. Whilst the courts of civil law jurisdictions adopt definitions of “public policy” that are based upon general concepts, social principles or fundamental values, the common law courts have attempted to introduce more specific values – including justice, fairness, morality and situations where enforcement would be “wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised”. Whilst more specific, these definitions are in practice extremely broad.

How much of a contravention is required?

9. The General Report also observes that different jurisdictions not only differ on what constitutes “public policy” but also differ on the level of contravention or violation required in order to justify setting aside or refusing enforcement of an arbitral award. For example, whilst the French courts have previously required a contravention to be “flagrant, effective and concrete”, other jurisdictions require that a violation must merely be “clear”. Furthermore, some jurisdictions hold the view that the courts’ assessment of whether the public policy exception is satisfied or not should not require an examination of the rationale underpinning the arbitral decision, merely the operative part of the award, while other jurisdictions adopt a more intensive review.

Procedural Contraventions / Substantive Violations

10. In terms of situations where public policy has been held to be contravened, the majority of jurisdictions observe both procedural and substantive aspects to public policy. Under the New York Convention, grounds for refusal of enforcement include where the losing party was not given proper notice of the arbitration or was otherwise unable to present their case (New York Convention, art. V(1)(b)) or where the arbitral tribunal was constituted not in accordance with the parties’ agreement or the law of the seat (New York Convention, art. V(1)(d)). The majority of jurisdictions take the view that the matters covered by these two provisions may also be raised as violations of public policy. However, Switzerland is a notable exception – viewing the public policy exception as a purely substantive objection to enforcement.

Common Trends

11. The General Report notes the national courts' approach to the following procedural irregularities:

11.1. *Almost universally accepted as violations of public policy:*

- 11.1.1. violation of right to be heard or of due process;
- 11.1.2. violation of equal opportunity to present one's case;
- 11.1.3. award obtained by fraud;
- 11.1.4. award obtained by bribery or coercion;

11.2. *Generally deemed to be violations:*

- 11.2.1. violation of res judicata;
- 11.2.2. arbitrator bias;

11.3. *Generally not accepted as violations:*

- 11.3.1. complete lack of reasons supporting an arbitral award;
- 11.3.2. where pending proceedings in another jurisdiction where enforcement is sought could result in an incompatible decision.

12. In terms of substantive contraventions of public policy, the Subcommittee found it hard to identify common trends. However, matters such as breach of competition law, breach of the principle of "pacta sunt servanda", state immunity, the prohibition of punitive damages or excessive interest, and the need to preserve the equality of creditors in matters of insolvency are generally observed to be substantive grounds for setting aside or refusing enforcement of an arbitral award on grounds of "public policy". Both Brazil and Switzerland have adopted more extensive lists of substantive public policy objections.

Conclusion

13. Notwithstanding the accomplishments and the scope of the Subcommittee's research, the General Report demonstrates that public policy is still a difficult concept to assess. The headline point is still that what constitutes public policy, the approach taken by the national courts and the requirements of a successful challenge are issues that potentially vary dramatically between different jurisdictions. To that end, the jurisdiction-specific reports of the Subcommittee are likely to prove a useful resource.

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