

THE PUBLIC POLICY EXCEPTION
UNDER THE
NEW YORK CONVENTION

History, Interpretation and Application

SECOND EDITION

Anton G. Maurer

JURIS

Questions about This Publication

For assistance with shipments, billing or other customer service matters, please contact the Customer Services Department at:

customerservice@jurispub.com

For questions of an editorial nature, contact the Editorial Department at:

editorial@jurispub.com

To obtain a copy of this book, or to find other titles related to this topic, please visit:

www.arbitrationlaw.com

COPYRIGHT 2022
by JurisNet, LLC

All rights reserved.

Printed in the United States of America

ISBN 978-1-944825-62-1

JURIS
52 Elm Street, Ste 7
Huntington, New York 11743
USA
www.arbitrationlaw.com

CONTENTS

<i>Preface to the Second Edition</i>	xv
<i>Preface to the First Edition</i>	xvii
<i>About the Author</i>	xix
 CHAPTER 1	
Introduction	1
 CHAPTER 2	
Interpretation of International Conventions	5
 CHAPTER 3	
Drafting History of Article V (2) (b) of the New York Convention	11
I. The Geneva Convention on the Execution of Foreign Arbitral Awards 1927.....	12
II. The ICC Reviewed the Geneva Convention and Prepared the Preliminary Draft Convention	13
A. Study of Improvements to International Arbitration ...	13
B. The ICC Draft Convention	14
C. The ICC Draft Convention and the Public Policy Exception.....	14
III. ECOSOC's Ad Hoc Committee Prepared Draft Convention	16
A. Ad hoc Committee to Submit Draft Convention	16
B. Comments by Governments on the ICC Draft Convention.....	17
C. Meeting of the Ad hoc Committee	18
D. Discussion of the Public Policy Clause	18
E. Draft Convention of the Ad hoc Committee.....	23
IV. Comments from Governments and NGOs on the Draft Convention	26
A. Comments from Governments	26
B. Comments from NGOs	28
C. Comments and Recommendation of the Secretary-General	30
D. Memorandum by the Secretary-General.....	32
E. Further Comments	33
F. Consolidated Report by the Secretary-General.....	35

CONTENTS

V. United Nations Conference on International Commercial Arbitration	35
A. General Debate	36
B. Proposals on, and Discussion of the Public Policy Clause in the Plenary Sessions.....	38
C. Discussion of the Public Policy Clause	41
D. Working Party No. 3 for Articles III–V.....	43
E. Discussion of the Proposal of Working Party No. 3 and Decision on Wording	45
F. Drafting Committee	47
G. Final Text Approval.....	48
H. Resolution on Measures for Increasing the Effectiveness of Arbitration.....	49
I. Signing.....	50

CHAPTER 4

Interpretation of Article V (2) (b)	53
I. Limitation of Grounds.....	53
A. Literal Interpretation	53
B. Confirmed by Drafting History.....	54
II. Contrary to the Public Policy “of That Country”	54
A. Literal Interpretation	54
B. Not Governing Law Nor <i>Lex Arbitri</i>	54
C. No Transnational Public Policy Intended	55
D. Differences Were Accepted.....	57
III. Literal Interpretation: “Public Policy” Is Not Identical to “Domestic Law”	58
A. Making Enforcement Easier than under the 1927 Geneva Convention	58
B. Mistake in Fact or Law Is Not Included in Article V ...	59
C. Even the 1927 Geneva Convention Was Narrower than “Domestic Law”.....	59
D. Differences in the Wording of the Public Policy Clause	59
E. Confirmed by Drafting History.....	60
IV. “May Also Be Refused”	61
A. Discretion.....	61
B. Pro-enforcement Bias	61
C. Can Discretion Also Be Exercised in Implementing the Convention in Domestic Law?	62

CONTENTS

V. “Public Policy”—Narrow or Wide Interpretation?	62
A. Goal to Uphold the Finality of an Award	63
B. Drafting Changes Support Narrow Interpretation.....	64
C. Guidance from Article 34 and 36 UNCITRAL Model Law?	65
D. Pro-enforcement Policy	66
VI. Relationship between Article V(1) and V(2)(b).....	67
A. Article V(1) Has Its Own Meaning and Is Not Included in Article V(2).....	67
B. Working Papers Support Backup Position of Public Policy	70
C. Party Autonomy and Burden of Proof.....	71
D. ILA Recommendation.....	71

CHAPTER 5

The Application of the Public Policy Exception in Various Countries	73
I. Austria	73
A. Law	73
B. Public Policy: Violation Must Concern Basic Principles of the Austrian Legal System.....	73
C. Parties Cannot Waive the Public Policy Defense	75
D. Refusal of Recognition and Enforcement.....	76
1. No Distinction between Domestic and International Public Policy	76
2. Irreconcilable with Austrian Fundamental Principles.....	77
3. Lack of Impartiality and Independence of Arbitrators	78
4. Different Standards Based on Closeness to Austria	79
5. Time of Violation Is Relevant.....	79
6. Burden of Proof.....	79
II. Canada.....	80
A. Law	80
B. Public Policy: Fundamental Notions and Principles of Justice	81
1. No Review of Facts or Law.....	82
2. Fundamentally Offensive to Canadian Principles of Justice and Fairness.....	84
C. Refusal Is Permissive, Not Mandatory	88

CONTENTS

III. England	89
A. Law	89
B. Public Policy: Clearly Injurious to the Public Good or Wholly Offensive.....	90
1. International Public Policy	90
2. Serious Irregularity.....	92
3. Contrary to Natural Justice.....	95
4. Harmful to International Relations.....	96
5. Illegality	96
6. Contractual Penalty under Swiss Law Was Held Enforceable	97
C. Refusal of Recognition and Enforcement.....	98
1. Illegal English Contract.....	99
2. Uncompromisable Moral Principles.....	100
IV. France	100
A. Law	101
B. Blatant, Actual, and Concrete Violation of International Public Policy.....	102
C. Judge of the Award, Not the Dispute?	106
D. Refusal of Recognition and Enforcement.....	109
1. Lack of Impartiality.....	109
2. Failure to Comply with Time-Limit.....	110
3. Corruption	110
4. Procedural Fraud	110
5. Incompatibility with <i>Res Judicata</i>	111
V. Germany	111
A. Law	111
B. Ordre Public International	111
C. Only Severe Defects Can Violate International Public Policy	113
1. Grave Violation of Fundamental Principles of State and Economic Life	113
2. Decisive Impartiality	114
3. Violation of Competition Law	114
4. No Review of the Merits	116
5. The German Constitution Doesn't Demand an Oral Hearing.....	118
D. Refusal of Recognition and Enforcement.....	118
VI. Hong Kong	121
A. Law	122

CONTENTS

B.	May Refuse	123
C.	Narrow Interpretation	124
1.	Violation of Most Basic Notions of Morality and Justice	124
2.	International Public Policy	126
D.	Refusal of Recognition and Enforcement	129
VII.	Hungary.....	130
A.	Law	130
B.	Foreign Award	131
C.	Public Policy: Broad Interpretation	131
D.	“High Amount” of Legal Fees Are Contrary to Public Policy	133
VIII.	Ireland.....	134
A.	Law	134
B.	Public Policy: Narrow Scope.....	135
IX.	Italy	136
A.	Law	136
B.	No Review of the Merits.....	138
C.	International Public Policy.....	141
X.	Japan.....	143
A.	Law	143
B.	Public Policy: Basic Principles or Rules of the Japanese Judicial Order	144
XI.	Republic of Korea	146
A.	Law	146
B.	Foreign Awards Are <i>Res Judicata</i>	147
C.	Public Policy: Narrow Interpretation.....	148
D.	Good Morals and Social Order	150
E.	Refusal of Recognition and Enforcement.....	153
XII.	Malaysia	154
A.	Law	154
B.	Convention Award—Foreign Award.....	157
C.	Public Policy: Malaysian Law, Governmental Policy, and Moral Values.....	159
XIII.	Mexico.....	160
A.	Law	160
B.	No Review of the Merits.....	162
C.	Public Policy	163
D.	Exception: <i>Amparo</i> Lawsuits.....	163

CONTENTS

XIV. New Zealand.....	164
A. Law	164
B. Public Policy: Breach of Fundamental Principle of Law and Justice.....	165
C. Public Policy: Obvious, Substantial Miscarriage of Justice	166
XV. Republic of the Philippines	168
A. Law	168
B. Supreme Court Defines the Public Policy of the Philippines	168
XVI. Singapore.....	172
A. Law	173
B. Purpose of the International Arbitration Act: Establishing an International Arbitration Center	173
C. Primary and Secondary Jurisdiction	174
D. Public Policy: Extremely Narrow Interpretation	175
E. Application of Singapore Public Policy under Article V (2) (b)	183
XVII. Spain.....	186
A. Law	186
B. Foreign Award	187
C. No Review of the Merits.....	187
D. International Public Policy.....	187
XVIII. Sweden.....	194
A. Law	194
B. Public Policy: Clearly Incompatible with Basic Principles	195
XIX. Switzerland.....	196
A. Law	196
B. Public Policy: Article V (1) Is <i>Lex Specialis</i> to Article V (2).....	196
C. International Public Policy.....	197
D. Independence and Impartiality of the Arbitrator	202
E. Refusal of Recognition and Enforcement.....	206
XX. United States of America	210
A. Law	210
B. Public Policy: Pro-Enforcement Bias, and Very Narrow Interpretation	211
1. <i>M/S Bremen, and Scherk</i>	211
2. Most Basic Notions of Morality and Justice	212

CONTENTS

3.	Antitrust Claims	213
4.	Manifest Disregard of the Law.....	215
5.	Violations of U.S. Sanctions	217
6.	Inconsistent Testimony and Forged Agreements.....	218
7.	High Legal Fees	219
C.	Refusal of Recognition and Enforcement.....	221
D.	Is Forum Non Conveniens Applicable?	224

CHAPTER 6

The Application of the Public Policy Exception in Brazil, Russia, India and China.....		227
I.	Brazil	227
A.	Law	227
B.	Foreign Awards	229
C.	Brazilian Public Policy: No Review of the Merits.....	230
1.	No Reviw of the Merits—Assessment of Formal Requirements Only.....	230
2.	Public Policy Is Defined by Doctrine.....	234
D.	Refusal of Recognition and Enforcement.....	237
II.	Russian Federation	243
A.	Law	244
B.	Public Policy: Basic Principles of Russian Law	250
1.	Basics of the Social Formation of the Russian State.....	250
2.	Informational Letter No. 96	253
3.	Informational Letter No. 156	255
C.	Enforcement Despite Broad Interpretation of Public Policy	257
D.	Refusal of Recognition and Enforcement.....	261
E.	Very Broad Interpretation Leading to Refusal.....	263
1.	Social and Economic Interest.....	265
2.	Review of Merits	267
3.	Mandatory Russian Rules and National Property	268
4.	Misapplication of Russian Law.....	269
5.	Issue Estoppel and Public Order	273
6.	Irreconcilable Later Judgment with Earlier Arbitral Award.....	274
7.	Harming the Budgetary Interests of the Russian Federation.....	274

CONTENTS

8. Failure to Comply with Amicable Settlement Efforts	275
9. Indication of One-Sideness Violates Public Policy	275
10. Failure to Notify Respondent by Special Letter through the Russian Ministry of Justice	276
F. Other Ways to Refuse Enforcement: Third Party Litigation.....	276
G. Very Mixed Picture.....	278
III. India.....	280
A. Indian Arbitration Laws Are Generally Enacted Prospectively.....	281
B. Implementation of the New York Convention.....	282
1. Foreign Awards (Recognition and Enforcement) Act, 1961	282
2. Arbitration and Conciliation Act, 1996.....	284
3. Arbitration and Conciliation (Amendment) Act, 2015.....	287
4. Arbitration and Conciliation (Amendment) Act, 2019.....	290
5. Arbitration and Conciliation (Amendment) Act, 2021.....	290
C. Foreign Awards—Two Major Restrictions	291
1. Foreign Awards under the New York Convention.....	291
2. Foreign Awards under the Foreign Awards Act, 1961	291
3. Foreign Awards under the Arbitration and Conciliation Act, 1996	295
4. Was Limitation “Governed by Indian Law” Dropped?	299
5. Indian Definition of “Foreign Award” Violates New York Convention	306
D. Public Policy Exception—Statutory Law.....	306
1. Foreign Awards Act 1961	306
2. Arbitration and Conciliation Act, 1996.....	307
3. Arbitration and Conciliation (Amendment) Act, 2015.....	308
E. Public Policy Is Not Limited to Fraud and Corruption	308

CONTENTS

F.	The Philosophy of the Legal Interpretation of the Supreme Court of India	311
G.	Application of the Public Policy Exception by the Supreme Court of India: Meandering from Narrow to Broad Interpretation	314
1.	Public Policy Doctrine—Modifications and Expansion.....	314
2.	Application of the Public Policy Exception under the Foreign Awards Act	318
a)	<i>Cosid Inc. v. Steel Authority of India: Domestic Policy Only</i>	318
b)	<i>Renuagar Power Co., Ltd. v. General Electric Co.: Narrow Interpretation</i>	319
3.	Application of the Public Policy Exception under the Arbitration and Conciliation Act, 1996	326
a)	Definition of Public Policy Changed in the <i>Saw Pipes Case</i> —“Patent Illegality”.....	326
b)	<i>Hindustan Zinc v. French Coal Carbonisation: Contrary to the Terms of a Contract</i>	334
c)	<i>McDermott International v. Burn Standard Company Ltd.: Setting Aside Awards Which Are Patently Illegal</i>	335
d)	<i>Bhatia International v. Bulk Trading S.A.: Part I Is Generally Also Applicable to Foreign Awards</i>	337
e)	Choosing Foreign Law Is No Implied Exclusion of Part I of the Arbitration and Conciliation Act, 1996	342
f)	<i>DDA v. R.S. Sharma and Co.: Broad Public Policy Interpretation</i>	347
g)	<i>Venture Global Case: Foreign Awards Can Be Set Aside in India</i>	348
h)	High Courts Deviate Sometimes.....	355
i)	Hijacking General Indian Jurisdiction for Foreign Awards	356
j)	<i>Phulchand Exports v. Ooo Patriot: Public Policy Exception for Domestic Awards Is Also Applicable for Foreign Awards</i>	358

CONTENTS

k)	Is There New Hope after <i>Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.</i> ?	359
l)	<i>Shri Lal Mahal Ltd. v. Progetto Grano SpA:</i> Overruled <i>Phulchand</i>	365
m)	<i>Oil & National Gas Corp. Ltd. v. Western Geco International Ltd.</i> : Broad Interpretation of Fundamental Policy of India Includes Wednesbury's Principle of Reasonableness ..	368
n)	<i>Associate Builders v. Delhi Development Authority</i> Cautions Broad Western Geco Interpretation.....	372
o)	<i>Hrd Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd.</i> : Narrow Renusagar Principles Applicable.....	373
p)	<i>Venture Global III</i> : Indicate Conflicting Legal Opinions a Setback?	374
q)	Does "Venue" Exclude the Application of Part I?—Conflicting Judgments.....	375
r)	<i>SSangyong Engineering & Construction Company Ltd. v. National Highways Authority of India</i> : 2015 Act Makes Patent Illegality Test Inapplicable for Foreign Awards	376
s)	<i>South East Asia Marine Engineering and Constructions Ltd. v. Oil India Ltd.</i> : Perverse Contract Interpretation Is against Public Policy	379
t)	<i>National Agricultural Cooperative Marketing Federation of India (NAFED) v. Alimenta S.A.</i> : Observance of Export Control Is Part of Fundamental Public Policy	380
u)	<i>Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors.</i>	381
H.	Public Policy Exception as Gateway to Full Judicial Review	384
I.	Is There New Hope?	387
IV.	People's Republic of China	388
A.	Law	389
	1. Notice of the Supreme People's Court.....	390

CONTENTS

2. Arbitration Law and Several Other Laws Are Applicable	392
B. Foreign Awards	395
1. Foreign Awards Rendered in Institutional and Ad Hoc Proceedings	395
2. Two Years' Deadline	399
C. Centralized Decision by Supreme People's Court in Case of Refusal	401
D. Several Interpretations and Notices by the Supreme People's Court	407
1. Notice on Issues concerning Setting Aside Foreign-Related Awards	408
2. Interpretation concerning Some Issues on Application of the Arbitration Law of the People's Republic of China.....	408
3. Interpretation on the Application of the Civil Procedure Law.....	409
4. Notice on Certain Issues regarding the Centralized Administration of Judicial Review of Arbitration Cases	409
5. Provisions on Certain Issues concerning the Approval of Arbitration Cases That Are Subject to Judicial Review	410
6. Provisions on Issues concerning the Approval and Reporting in the Judicial Review of Arbitration Cases	412
7. Provisions on Certain Issues Relating to the Enforcement of Arbitral Awards.....	412
8. Invalid Arbitration Clauses, and Arbitration-Friendly Interpretation of an Arbitration Clause	413
9. One-Stop Procedure for Awards Rendered by Designated International Arbitration Institutions	415
10. Integrating Socialist Core Values into Court Judgments.....	416
E. Public Policy: Contrary to Social and Public Interest and Fundamental Principles	417
F. Inconsistent Interpretation of the Public Policy Exception	422

CONTENTS

1. Insensitive to Feelings of Chinese People.....	422
2. Breach of Mandatory Provisions of PRC Laws ...	424
3. Mere Unfairness or Injustice	427
4. Violation of China's Judicial Sovereignty	429
5. Absolute Priority of Party Autonomy	437
6. Special Rules for Free Trade Zones	439
G. More Successes than Failures	440
CHAPTER 7	
Conclusion	445
Bibliography	451
Index	467