CHALLENGING AND ENFORCING ARBITRATION AWARDS GUIDE

THIRD EDITION

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Challenging and Enforcing Arbitration Awards Guide

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of the *Challenging and Enforcing Arbitration Awards Guide*.

For those new to Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, alongside more in-depth books and reviews. We also organise conferences and build workflow tools that help you to research arbitrators and enable you to read original arbitration awards. And we have an online 'academy' for those who are newer to international arbitration. Visit us at www.globalarbitrationreview.com to learn more.

As the unofficial 'official journal' of international arbitration, sometimes we are the first to spot gaps in the literature. This guide is a fine example. As J William Rowley KC observes in his excellent preface, it became obvious recently that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and a reference work focusing on this phase was overdue.

The *Challenging and Enforcing Arbitration Awards Guide* fills that gap. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover construction, energy, evidence, intellectual property, M&A, mining disputes and telecommunications in the same unique, practical way. We also have books on advocacy in international arbitration, the assessment of damages, and investment treaty protection and enforcement.

My thanks to the editors for their vision and energy in pursuing this project and to our authors and my colleagues in production for achieving such a polished work.

David Samuels
London
April 2023

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Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – in other words, efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in 169 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 158.

Awards used to be honoured

International corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement,

most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

In the year before the first edition of this guide, Global Arbitration Review's daily news reports contained hundreds of headlines that suggested that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement. Indeed, in the first three months of 2023, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Nigeria seeks to overturn US$11 billion award;
- Russia fails to quash jurisdictional awards in Crimea cases;
- Swiss court upholds multibillion-dollar Yukos award;
- Swedish courts annul intra-EU treaty awards;
- Indian court annuls billion-dollar award for 'fraud';
- Malaysia challenges mega-award in French court;
- GE pays out after losing corruption challenge in legacy case;
- Ukrainian bank's billion-dollar award against Russia reinstated;
- Burford wins enforcement against Kyrgyzstan;
- India loses Dutch appeal over treaty award;
- ECJ dismisses London award in oil spill saga;
- 'Fifteen years is long enough': US court enforces Conoco award;
- Pakistan fails to stay Tethyan award in US; and
- India fails to upend latest award in protracted oil and gas dispute.

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially since 2008. However, the importance of the subject (without effective enforcement, there really is no effective resolution), and my anecdote-based perception of increasing concerns, led me to raise the possibility of doing a book on the subject with David Samuels (Global

Arbitration Review's publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Gordon Kaiser and the late Emmanuel Gaillard agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in April 2021. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said some 40 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

The guide is structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this third edition, the 15 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and admissibility of new evidence.

Part II of the guide is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This edition includes reports on 29 national

jurisdictions. The author, or authors, of each chapter have been asked to address the same 58 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. Obviously, the answers to a common set of questions will provide readers with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

With this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with the *Challenging and Enforcing Arbitration Awards Guide* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors those colleagues who were some of the internationally recognised leaders in the field. My fellow editors and I have felt blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role of funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach even further.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this edition of the publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley KC
London
April 2023

CHAPTER 4

Arbitrability and Public Policy Challenges

Penny Madden KC and Ceyda Knoebel[1]

Introduction

Party autonomy is at the core of international arbitration. However, it has its limits. Two of the most notable limitations to party autonomy are on grounds of arbitrability and public policy.

Arbitrability and public policy defences are often raised by parties to an arbitration either during proceedings brought to challenge an award or to resist its recognition or enforcement (subject to the applicable procedural rules). Challenges on arbitrability and public policy grounds are generally made in accordance with the provisions of the applicable domestic arbitration legislation[2] or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention) (or both).[3]

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1 Penny Madden KC is a partner and Ceyda Knoebel is of counsel at Gibson, Dunn & Crutcher UK LLP. The authors would like to thank Horatiu Dumitru, an associate at Gibson, Dunn & Crutcher UK LLP, for his research assistance for this chapter.

2 To date, 85 countries have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 (as amended in 2006) (Model Law), aimed at bringing arbitration laws of different jurisdictions on set-aside and recognition and enforcement closer. That said, some of the leading arbitral jurisdictions, such as England and Wales, France and the United States, have not adopted the Model Law and have their own arbitration legislation. For an updated status, see https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed 3 February 2023).

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958 and entered into force 7 June 1959) (New York Convention), which has more than 170 signatory states at the time of writing. For an updated status, see https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last accessed 3 February 2023).

A different regime applies to the annulment, recognition and enforcement of awards rendered pursuant to the International Centre for Settlement of Investment Disputes (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (the ICSID Convention), pursuant to which awards (1) can be challenged in accordance with specific and limited grounds provided in the ICSID Convention itself,[4] and (2) must be recognised as if they were final judgments of the courts in ICSID Convention contracting states.[5]

For awards issued outside the ICSID Convention context – such as those pursuant to the rules of other international arbitral institutions or those by *ad hoc* arbitral tribunals – set-aside, recognition and enforcement will generally be governed by the law of the arbitral seat, the law of the recognition or enforcement forum, and the rules under the New York Convention, where applicable.[6]

Definitions and concepts[7]

Arbitrability

A dispute is arbitrable if it can be submitted to arbitration[8] (i.e., if it is not a type of dispute that has been specifically reserved for resolution by domestic courts notwithstanding an arbitration agreement between the parties). National laws usually restrict

4 See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (ICSID Convention), Article 52 and ICSID Arbitration Rules, Rule 50. The limited grounds for annulment in the Convention do not include arbitrability and public policy grounds as such, but those grounds for challenges may come into play with respect to the specific grounds for annulment under Article 52.

5 See ICSID Convention, Article 54(1). However, in accordance with Article 54(3): 'Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.' Article 55 of the Convention further provides that applicable laws on state immunity may not be derogated from.

6 Some regional investment agreements that provide for arbitration of investor-state disputes have also opted for specific enforcement mechanisms, similar to the ICSID Convention; for instance, the Agreement on Promotion, Protection and Guarantee of Investments amongst Member States of the Organisation of the Islamic Conference, 1981, Article 17,1.2(d), and the Unified Agreement for the Investment of Arab Capital in the Arab States, 1980, Article 34; see also Nigel Blackaby et al., 'Recognition and Enforcement of Arbitral Awards' (Chapter 11) in Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (6th ed.) (OUP, 2015) (*Redfern and Hunter*), ¶ 11.139.

7 In this chapter, we consider arbitrability and public policy challenges in set-aside and recognition and enforcement contexts simultaneously, despite it being 'unclear' whether the concepts and application of 'arbitrability' and 'public policy' are the same in both contexts. Indeed, some courts have considered that the concept of public policy is identical in the context of set-aside or recognition and enforcement proceedings, whereas others have taken the view that public policy in the context of recognition and enforcement under the New York Convention 'should be even more circumscribed' than in set-aside. See also Gary Born, 'Annulment of International Arbitral Awards' (Chapter 25) in *International Commercial Arbitration* (3rd ed.) (Kluwer, 2021) (Born, Chapter 25), p. 57.

8 New York Convention, Article V(2)(a); and Model Law, Articles 34(2)(b)(i) and 36(1)(b)(i).

access to arbitration for specific types of disputes on account of either the wider public interest involved in the consideration of the dispute, or because the dispute involves the rights of specific individuals that require additional protection by the state.

The question of arbitrability may be raised during an arbitration or after an award has been issued.

Arbitral tribunals are empowered to determine the arbitrability of a dispute should the issue be raised during an arbitration. The silence of international arbitration conventions and national laws as to the law applicable to such a determination has resulted in conflicting views. It is generally accepted that arbitrators should assess arbitrability pursuant to the law applicable to the merits of the dispute. However, arbitrators have occasionally considered the question from the perspective of the law of the seat, on the basis that arbitrators derive their powers from that law.[9] It is even argued by some that the law of the personal jurisdiction of the parties ought to apply.[10]

As regards the issue of arbitrability raised during any post-award challenge, or recognition or enforcement stage, that issue is considered by the competent domestic courts. In those circumstances, the New York Convention is clear that arbitrability is to be assessed under 'the law of that country' where recognition or enforcement is sought.[11] Thus, any non-arbitrability question will be resolved based on the laws of that jurisdiction. Similarly, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 (as amended in 2006) (the Model Law), which has been adopted by more than 80 countries as the applicable arbitration law,[12] provides that the applicable law is the law of the state where the award is challenged or where recognition or enforcement is sought.[13]

Most New York Convention contracting states have set out in their national laws the matters that are arbitrable and the matters that fall under the exclusive jurisdiction of the national courts, while also providing for general standards to assist with determining which matters are arbitrable.[14] In common law jurisdictions, 'the standards for arbitrability appear to be established by the courts through precedent'.[15] As such, each country has its own approach to arbitrability and domestic courts have assisted with creating and developing standards that are specific to each jurisdiction.

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9 A Barraclough and J Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration', 6(2), *Melbourne Journal of International Law*, 205, 223, (2005).

10 L Boo and A Ong, 'Mandatory Law: Getting the Right Law in the Right Place' in N Kaplan et al. (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (Wolter Kluwer, 2018), p. 209.

11 New York Convention, Article V(2)(a).

12 See footnote 2, above.

13 Model Law, Articles 34(2)(b)(i) and 36(1)(b)(i).

14 Pascal Hollander, 'Report on the concept of "Arbitrability" under the New York Convention', International Bar Association (IBA), Subcommittee on Recognition and Enforcement of Arbitral Awards (September 2016) (IBA Report), ¶¶ 50–61. See also UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) (ed. 2016) (New York Convention Guide), p. 231, ¶ 15.

15 IBA Report, op. cit. note 14, ¶ 52.

In general, commercial disputes are deemed arbitrable in the vast majority of countries,[16] whereas criminal matters[17] and matters dealing with 'the authority to commence and administer bankruptcy proceedings'[18] are considered to be non-arbitrable. Disputes relating to competition, succession, employment and insolvency, on the other hand, are considered as non-arbitrable in some jurisdictions but deemed arbitrable in others.[19]

On the whole, challenges to awards based on inarbitrability are infrequent. Indeed, there has been a 'relatively small number of cases' dealing with challenges to an award based on arbitrability, and national courts have refused recognition and enforcement of an award in 'only a handful of instances' on the basis of the arbitrability exception.[20]

That is because in applying laws and precedents on arbitrability, where they exist, national courts have adopted a narrow interpretation of the exception, favouring a pro-arbitration and pro-enforcement approach championed by the New York Convention itself.[21] That said, it is still important that parties 'anticipate problems by attempting to envisage which types of disputes may arise out of their agreement, and subsequently verify whether such disputes could give rise to issues of arbitrability under the law of the contract, the law of the seat and (if known) the law of (likely) enforcement'.[22]

Public policy

Neither the Model Law (on which many jurisdictions have based their domestic arbitration laws)[23] nor the New York Convention provide a definition of public policy. Article V(2)(b) of the New York Convention refers to 'the public policy of that country', indicating that a determination on the meaning of 'public policy' is to be made from the perspective of the jurisdiction where recognition or enforcement is sought.[24] The Model

16 New York Convention Guide, op. cit. note 14, p. 232, ¶ 20.

17 IBA Report, op. cit. note 14, ¶ 59.

18 New York Convention Guide, op. cit. note 14, p. 235, ¶ 28.

19 ibid., pp. 234–36, ¶¶ 26–29.

20 ibid., p. 228, ¶ 5.

21 ibid., p. 230, ¶ 12, and p. 232, ¶ 18. See also IBA Report, op. cit. note 14, ¶ 63.

22 IBA Report, op. cit. note 14, ¶ 66.

23 See footnote 2, above.

24 New York Convention, Article V(2)(b). Public policy issues may also arise within the context of the specific grounds listed as barring recognition and enforcement under Article V(1) of the Convention. Although some jurisdictions, such as Hong Kong, allow the public policy defence to be raised under both Paragraph (1) and Paragraph (2) of Article V, others, such as Switzerland, consider that the public policy exception in Article V(2)(b) cannot apply when more specific grounds exist under other articles of the Convention: see Margaret L Moses, 'Public Policy under the New York Convention: National, International, and Transnational' (Chapter 11) in Katia Fach Gomez et al. (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer, 2019) (Moses), p. 177; and New York Convention Guide, op. cit. note 14, pp. 254–56, ¶¶ 42–46.

Law offers the same formulation in Articles 34(2)(b)(ii) and 36(1)(b)(ii), both referring to the public policy of the state in which a set-aside application has been lodged and where recognition or enforcement is sought.[25]

Accordingly, states have adopted and developed their own formulations of public policy in legislation or through jurisprudence. Not surprisingly, it appears that each state's fundamental economic, religious, social and political standards that define its legal system inform its definition of public policy. Courts the world over review awards by referring to 'the core values of [their] legal system or [their] own local domestic standards of morality, justice, and the public interest'.[26] In exercising their control over the post-award process, they therefore attempt to strike a balance between the parties' 'right to autonomy . . . [and] the state's own interest in the preservation and safeguard of those fundamental values that fall under the scope of public policy'.[27] Inevitably, this renders public policy a rather flexible concept, which will have to be assessed based on the specific facts of each case.

For example, the Supreme Court of England and Wales once described it as 'that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good'.[28] Likewise, in the well-known *Parsons* case, the US courts defined public policy to encompass the 'forum state's most basic notions of morality and justice'.[29] According to the International Law Association, '[i]nfringements of mandatory rules/*lois de police*; breaches of fundamental principles of law; actions contrary to good morals; and actions contrary to national interests/foreign relations'[30] are integral to the public policy exception – but this is not an exhaustive list. In other words, it is impossible to provide a uniform and universally accepted definition of what constitutes 'public policy'.[31]

One word of caution here. Given that public policy is understood to encompass these most fundamental norms from which no court can depart, public policy also goes beyond the 'mandatory laws' concept.[32] By way of context, although they are not uniformly agreed and applied around the world, rules on competition law, bankruptcy,[33] consumer

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25 Model Law, Articles 34(2)(b)(ii) and 36(1)(b)(ii).

26 Moses, op. cit. note 24, pp. 173–74.

27 Zena Prodromou, 'The Public Policy Exception in International Commercial Arbitration' (Chapter 6) in *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes*, International Arbitration Law Library, Vol. 56 (Kluwer, 2020) (Prodromou, Chapter 6), p. 169.

28 *Egerton v. Brownlow* [1853] 4 HLC 1, [1843 to 1860] All ER Rep 970 at 995 (England and Wales).

29 *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (1974) (U.S.) (*Parsons*), in New York Convention Guide, op. cit. note 14, p. 240, ¶ 5.

30 Prodromou, Chapter 6, op. cit. note 27, pp. 153–54.

31 See *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v. Shell International Petroleum Co. Ltd* [1990] 1 AC 295 ('[c]onsiderations of public policy can never be exhaustively defined') in New York Convention Guide, op. cit. note 14, p. 242, ¶ 10.

32 Moses, op. cit. note 24, pp. 178–79. See also New York Convention Guide, op. cit. note 14, p. 244, ¶ 18 and pp. 246–47, ¶ 26.

33 New York Convention Guide, op. cit. note 14, p. 246, ¶ 23.

protection,[34] offshore future transactions,[35] foreign exchange[36] and export prohibitions[37] can often be regarded as 'mandatory' by states.[38] Hence, they need to be considered when reviewing, recognising or enforcing an arbitral award to the extent that the dispute triggers, or the parties involved invoke, the application of these 'mandatory' laws.

However, despite their 'mandatory' character regulating matters that may overlap with the public policy exception, not all mandatory rules of a state fall within the scope of the public policy exception.[39] As is widely accepted, only very clear and serious violations of a mandatory law resulting in a conflict with 'fundamental notions of what is decent and just'[40] do so.

Domestic, international and transnational public policy and transnational public perspective

As noted above, given the lack of definition in the New York Convention and the Model Law as to what exactly ought to be understood by 'public policy', different concepts have emerged under national laws and in national courts' practice around the world. For example, depending on the jurisdiction, it is possible to encounter the following variations of the concept applied by national courts or adopted in national legislation:

- domestic public policy, which is comprised of 'the fundamental rules and values which are of utmost importance for [the] state's society';[41]
- international public policy, which is 'a subset'[42] of domestic public policy that invites courts to approach the challenge to an award from an international standpoint, but still however 'through the lens of the state's own laws or standards'[43] of public policy;
- transnational public policy or 'truly international' public policy, which was described by the International Law Association as a 'public policy—which it found to be of "universal application—comprising fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as civilised nations"'.[44] In that respect, it is thought to represent values that transcend the rules of any national system and are so essential that no state or party can contract out of them. It is said that the existence of

34 ibid., pp. 248–49, ¶ 32.

35 ibid., p. 246, ¶ 25.

36 id.

37 id.

38 For example, insolvency rules are not regarded as mandatory rules in Germany; see New York Convention Guide, op. cit. note 14, p. 246, ¶ 23.

39 Moses, op. cit. note 24, pp. 178–79.

40 Born, Chapter 25, op. cit. note 7, pp. 55–56, quoting *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981).

41 Moses, op. cit. note 24, pp. 173–74.

42 id.

43 id.

44 *Redfern and Hunter*, op. cit. note 6, Chapter 10, p. 600, ¶ 10.87, referring to International Law Association, 'Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2000).

a rule of this nature may be identified through international conventions, comparative law, and arbitral awards. Examples of transnational public policy include conducts such as 'slavery, bribery, piracy, murder, terrorism, and corruption',[45] among others; and

- 'a transnational perspective' to public policy, which differs from transnational public policy as it is not a set of universally accepted principles but an approach taken by states and their courts to widen the scope of their international public policy by adopting a transnational perspective and taking into account the standards that are basic to most just and decent societies when reviewing foreign awards.[46]

Some jurisdictions, such as India and Hong Kong, favour the domestic public policy concept in recognition and enforcement cases. Indeed, the Supreme Court of India held that public policy should be considered from the enforcement forum's perspective and not through a transnational definition of the concept, as the latter was unworkable.[47] The Hong Kong courts, which have shared similar views,[48] have defined an award that violates public policy as an award that is 'so fundamentally offensive to [the enforcement jurisdiction]'s notions of justice that, despite it being a party to the Convention, it cannot reasonably be expected to overlook the objection'.[49]

Other jurisdictions clearly distinguish between domestic public policy and international public policy. For instance, Portuguese law reviews foreign awards only from an international public policy perspective.[50] In certain civil law countries, such as France and Italy, the concept of international public policy (*ordre public international* in French) has been specifically incorporated into the practice of the national courts and legislation.

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45 Moses, op. cit. note 24, p. 180. See, further, Gary Born, 'Recognition and Enforcement of International Arbitral Awards' (Chapter 26) in *International Commercial Arbitration* (3rd ed.) (Kluwer, 2021), pp. 104–06; Zena Prodromou, 'Revisiting the Debate on Transnational Public Policy' (Chapter 8) in *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes,* International Arbitration Law Library, Vol. 56 (Kluwer, 2020), pp. 215–20.

46 Moses, op. cit. note 24, pp. 179–82. In *Tampico Beverages Inc. v. Productos Naturales de la Sabans S.Z. Alqueria*, SC9909-2017, Case No. 11001-02-03-000-2014-01927-00 (Colombia), in Moses, op. cit. note 24, p. 175, the Supreme Court of Colombia, when reviewing an award in enforcement proceedings, considered the transnational context for determining the proper application of international public policy, referring to international authorities and practices.

47 *Renusagar Power Co. Ltd. v. General Electric Company & anor.*, Supreme Court, 7 October 1993, 1994 AIR 860 (India), in New York Convention Guide, op. cit. note 14, pp. 243–44, ¶ 14.

48 *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.* [1999] 2 HKC 205 (Hong Kong), in New York Convention Guide, op. cit. note 14, pp. 243–44, ¶ 14.

49 id., in New York Convention Guide, op. cit. note 14, p. 241, ¶ 6. Dutch courts have also followed suit, as evidenced by the ruling of the Amsterdam District Court in *Stati v. Kazakhstan*, 9 January 2023, Case No. C/13/7 12678 / KG RK 22-65 MDvH/MV, which ruled that the New York Convention calls for application of national – rather than international – public policy in which enforcement is sought.

50 See Moses, op. cit. note 24, pp. 173–75, at p. 175, and fn. 20, citing the Portuguese Law on Voluntary Arbitration, DR I (14 December 2011), 5726 et seq.

Indeed, Article 1514 of the revised French Code of Civil Procedure explicitly refers to *ordre public international* for the recognition or enforcement of foreign awards.[51] The Court of Appeal of Paris has defined international public policy as 'the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character'.[52] In the famous *Lautour* case, the French Court of Cassation also referred to *ordre public international* as the 'principles of universal justice regarded in France as having an absolute international value'.[53] Italian courts have likewise considered that public policy refers to 'a body of universal principles shared by nations of the same civilisation, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions',[54] essentially leaning more towards what is considered to be 'transnational public policy'.

Similarly, in *Parsons*, the US Second Circuit Court of Appeals not only adopted a narrow construction of 'public policy' with the view that '[e]nforcement of foreign arbitral awards may be denied . . . only where enforcement would violate the forum state's most basic notions of morality and justice', but also adopted 'international public policy' as the applicable public policy concept by refusing to equate the national policy of the United States with that referenced in the New York Convention.[55] The Court stated: 'To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of "public policy"'.[56]

In contrast, because some national courts (such as those of Norway and Sweden) 'consistently view public policy quite narrowly, and construe it restrictively across the board, it may [therefore] not matter whether the decision is based on domestic public policy or international public policy'.[57] Although refraining from strict classifications, English courts, on occasion, have similarly approached the issue more holistically, holding that enforcement can be denied if 'the enforcement of the award would be clearly injurious

51 See Revised French Code of Civil Procedure, Article 1514, which refers to *ordre public international*, available at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000023450551 (last accessed 3 February 2023).

52 New York Convention Guide, op. cit. note 14, p. 241, ¶ 8, quoting *Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar v. M. N'DOYE Issakha*, Court of Appeal of Paris, 16 October 1997 (France).

53 French in the original: '*principes de justice universelle considérés dans l'opinion française comme doués de valeur internationale absolue*', Court of Cassation, Civ. 1, 25 May 1948, Bull. civ. 1948, I, No. 163, RCDIP, p. 89 (France).

54 New York Convention Guide, op. cit. note 14, pp. 243–44, ¶ 14, quoting *Allsop Automatic Inc. v. Tecnoski snc*, Court of Appeal of Milan, 4 December 1992, *XXII Yearbook Commercial Arbitration* 725 (Italy).

55 Moses, op. cit. note 24, pp. 173–76, at p. 175.

56 New York Convention Guide, op. cit. note 14, p. 240, ¶ 5, fn. 1053.

57 Moses, op. cit. note 24, pp. 173–76, at p. 175.

to the public good or, possibly, 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'.[58]

EU public policy and arbitrability under EU law

In addition to their domestic laws, the Court of Justice of the European Union (CJEU) has taken the firm position that EU Member States must take EU law into account in determining what constitutes public policy within their legal orders. The CJEU has long proclaimed that EU Member States must, on their own accord, review arbitral awards from an EU public policy perspective.[59] Although the exact contours of EU public policy remain undefined, the CJEU's jurisprudence to date suggests that depending on whether the public interest underlying an EU law norm has 'the nature and importance' sufficient to justify its violation being treated as necessarily a violation of EU public policy, EU public policy might be engaged.[60] So far, the CJEU has held that EU competition policy, practically as an entire field, is entitled to public policy treatment in the context of annulment and enforcement of arbitral awards at the national level.[61] This is because the Court regards the protections under EU law against anticompetitive conduct to be 'fundamental' and 'essential for the accomplishment of the tasks entrusted to the [European Union] and, in particular, for the functioning of the internal market'.[62] The Court has also invoked EU public policy for arbitration agreements contravening the provisions of Council Directive 93/13/EEC on unfair clauses in consumer contracts.[63]

In recent years, the issue on EU public policy was revived in the context of setting aside and enforcement of investment arbitration awards. Various EU Member States have faced the possibility of contravening EU competition law – in particular its rules on state aid – with the payment of investment incentives to investors or compensation awarded by arbitral tribunals reinstating the value of those incentives in favour of foreign investors.[64]

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58 New York Convention Guide, op. cit. note 14, p. 242, ¶ 10, quoting *Deutsche Schachtbau v. Shell*.

59 *Eco Swiss China Time Ltd. v. Benetton International NV*, Case C-126/97, EU:C:1999:269 [1999] E.C.R. I-03055, ¶¶ 36–41 (Court of Justice of the European Union (CJEU)) (*Eco Swiss*); see also *Redfern and Hunter*, op. cit. note 6, Chapter 10, ¶ 10.86.

60 *Mostaza Claro v. Centro Móvil Milenium SL*, Case C-168/05, EU:C:2006:675 [2006] E.C.R. I-10421, ¶ 38 (CJEU) (*Mostaza*).

61 *T-Mobile Netherlands BV et al. v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Case C-8/08, EU:C:2009:343 [2009] E.C.R. I-4529, ¶ 49 (CJEU); *Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al.*, Joined Cases C-295-98/04, EU:C:2006:461 [2006] E.C.R. I-06619, ¶¶ 31, 39 (CJEU).

62 *Eco Swiss*, op. cit. note 59, ¶ 36; see also New York Convention Guide, op. cit. note 14, p. 245, ¶ 19.

63 *Mostaza*, op. cit. note 60, ¶ 38.

64 See, for example, *Micula v. Romania*, Joined Cases T-624/15,T-694/15 and T-704/15, EU:T:2019:423 (CJEU) (*Micula*), in which ICSID arbitration proceedings were commenced against Romania for its withdrawal of certain investment incentives in the lead-up to its accession to the European Union, which were viewed as contrary to EU state aid rules.

Since 2021, however, the CJEU has made it clear that an enforcement or a set-aside court in an EU Member State should not uphold an arbitral award that is determined to have violated EU state aid rules by the European Commission and the CJEU; and, thus, EU public policy.[65]

In the same vein, with its decision in *Achmea* in 2018, the CJEU denied arbitrability of investment disputes between EU Member States and investors from EU Member States 'which may concern the application or interpretation of EU law'.[66] The CJEU reasoned that submitting those disputes to a body that is not part of the judicial system of the European Union would 'have an adverse effect on the autonomy of EU law',[67] adopting the policy views expressed by the European Commission in recent years. Subsequently, in 2021, the CJEU broadened the scope of its findings in *Achmea* through its decisions in *Komstroy*[68] and in *PL Holdings*, in which it ultimately held that EU Member States are precluded under EU law from entering into *ad hoc* arbitration agreements with EU-based investors, where such agreements would replicate the content of an arbitration agreement for the resolution of investment disputes between EU Member States.[69] Following these CJEU decisions, Member State courts in France, Sweden and Luxembourg have indeed

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The European Commission determined that satisfaction of the award by Romania would constitute illegal state aid under EU law, but the General Court at the CJEU found that EU state aid law could not apply retroactively in respect of events predating Romania's accession to the European Union. However, on 25 January 2022, the CJEU overturned the General Court's decision in *Micula* (Judgment of the Court (Grand Chamber), Case C-638/19 P, *Viorel Micula and others v. Romania*, ECLI:EU:C:2022:50, 25 January 2022) holding that EU state aid rules can be triggered at the time of payment of an arbitral award even though all the state measures that the ICSID award compensated the claimants for were taken before Romania's accession to the European Union. It means that Romania is now barred from complying with the award under EU law. Since the General Court's decision in *Micula*, other EU Member States, such as Spain, have been tackling the same issue on state aid with respect to multiple awards issued against it.

65 id.

66 *Slovak Republic v. Achmea BV*, Case C-284/16, EU:C:2018:158 (CJEU) (*Achmea*), ¶ 55.

67 *Achmea*, op. cit. note 66, ¶ 59.

68 *Republic of Moldova v. Komstroy*, Case C 741/19, ECLI:EU:C:2021:655, 2 September 2021 (CJEU).

69 *Republic of Poland v. PL Holdings S.à.r.l.*, Case C-109/20, ECLI:EU:C:2021:875, 26 October 2021 (CJEU).

set aside arbitral awards made in an intra-EU context[70] or denied their enforcement.[71] Others have given effect to and upheld the CJEU's ruling in *Achmea* on arbitrability even outside the set-aside or enforcement proceedings.[72]

Going forward, it seems unlikely that any intra-EU investment arbitration award, especially when rendered outside the ICSID Convention context, will survive a recognition and enforcement challenge before EU Member State courts on *Achmea* grounds. That said, the exact effect of the CJEU's rulings in the context of ICSID Convention proceedings involving EU Member States is yet to be clarified, given the varying approaches taken to date by Member State courts and institutions.[73]

Previously, non-arbitrability emanating solely from EU law has precluded courts in Austria, Belgium and Germany, *inter alia*, from upholding arbitration agreements. These courts, in particular, have denied arbitrability of disputes regarding contracts of commercial agency because 'EU agency law is deemed to be necessary for the achievement of the internal market'.[74]

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70 See *Poland v. Societe STRABAG SE et al.*, No. RG 20/13085, No. Portalis 35L7-V-B7E-CCLDI, Paris Court of Appeals, 19 April 2022; *Société SLOT GROUP AS C/O M. DAVID JANOSIK (administrateur à la faillite de la société SLOT AS) et al.*, No. RG 20/14581 – No. Portalis 35L7-V-B7E-CCPBD, Paris Court of Appeal, 19 April 2022; and *La République de Moldavie v. Komstroy et al.*, No. RG 18/14721 – No. Portalis 35L7-V-B7C-B52FG, Paris Court of Appeals, 10 January 2023. See also *Spain v. Novenergia II*, T 4658-18, Svea Court of Appeal, 13 December 2022 and *PL Holdings v. Poland*, T-1569-19, Svea Court of Appeal, 14 December 2022.

71 See *State of Romania v. Micula et al.*, Case No. 116 /2022 CAS No. 2021-00061, 14 July 2022, in which Luxembourg's Court of Cassation denied the enforcement of the *Micula* award owing to the lack of a valid arbitration agreement in view of the CJEU's finding in *Achmea* (op. cit. note 66).

72 Although not rendered in the context of recognition and enforcement, the German Supreme Court (Bundesgerichtshof, I ZB 16/21, 17 November, 2021) confirmed that *Achmea* (op. cit. note 66) will effectively be treated as a bar to any further arbitral proceedings based on intra-EU investment arbitrations and that any such proceedings seated in Germany are therefore extremely unlikely to succeed. Higher Regional Court of Cologne (Oberlandesgericht) has issued two parallel decisions [Case No 19_SchH_14_21 and 19_SchH_15_21] on 1 September 2022 relating to two ICSID arbitrations in *Uniper SE et al. v. the Netherlands* and *RWE AG and RWE Eemshaven Holding II BV v. the Netherlands*, declaring ICSID arbitrations inadmissible owing to their intra-EU nature.

73 For example, the Higher Regional Court of Berlin (Kammergericht) issued a decision in May 2022 dismissing Germany's application for a declaration that the *Mainstream et al. v. Germany* ICSID arbitration was inadmissible owing to its intra-EU nature. An appeal against this decision is currently pending before Germany's Supreme Court (BGH I ZB 43/22).

74 Giuditta Cordero-Moss, 'Court Control on Arbitral Awards: Public Policy, Uniform Application of EU Law and Arbitrability' (Chapter 12) in Axel Calissendorff et al. (eds), *Stockholm Arbitration Yearbook 2020*, Stockholm Arbitration Yearbook Series, Vol. 2 (Kluwer, 2020), at p. 205.

A word on Brexit

In light of these developments with respect to the CJEU's approach to arbitrability and public policy under EU law, the English courts' interpretation of arbitrability is likely to develop further following the United Kingdom's exit from the European Union in January 2021. We wait with interest to learn to what extent the CJEU's strict interpretation of EU public policy will continue to be upheld by the English courts in set-aside, recognition and enforcement proceedings in the United Kingdom. The ruling by the Supreme Court of England and Wales in 2020 in *Micula and others v. Romania*,[75] commenting that the EU treaties did not displace the United Kingdom's obligations under the ICSID Convention (pursuant to which the United Kingdom had a prior (pre-EU accession) obligation to enforce ICSID awards), is certainly significant. It appears that England may now be perceived as an even more favourable jurisdiction as a seat of arbitration and for enforcement of arbitral awards. That said, the European Commission has launched infringement proceedings against the United Kingdom in respect of the Supreme Court's *Micula* decision allowing the enforcement of the ICSID award against Romania.[76] The CJEU's decision on this referral is pending at the time of writing, and how the English courts will react in response to any future CJEU ruling is yet to be seen.

Arbitrability versus public policy

The concepts of arbitrability and public policy often go hand in hand.[77] For example, the arbitration laws of countries such as Tunisia, Zambia and Zimbabwe expressly incorporate public policy as a criterion for non-arbitrability.[78] Similarly, in Finland and Lebanon, non-arbitrable disputes must be simultaneously contrary to public policy to constitute a ground to deny recognition and enforcement of arbitral awards.[79]

During the drafting of the New York Convention, the French delegation proposed that Article V(2)(a) – dealing with non-arbitrability as a ground for refusing recognition and enforcement – be deleted 'on the grounds that it unduly attributed international importance to domestic rules and that "(international) public policy" would be sufficient a ground for resisting recognition and enforcement'. This proposal was not adopted by the majority.[80]

Although there may be instances when the non-arbitrability of a dispute would emanate from public policy concerns, it is perfectly conceivable for disputes to be deemed non-arbitrable, hence reserved for national courts' jurisdiction, even if the subject matter is not 'so sacrosanct' relating to a state's most basic notions of morality and justice as to be considered part of its public policy. Consistent with this view and in line with the

75 [2020] UKSC 5 (England and Wales), ¶ 89.

76 See https://ec.europa.eu/commission/presscorner/detail/en/IP_22_802 (last accessed 3 February 2023).

77 New York Convention Guide, op. cit. note 14, p. 229, ¶ 10.

78 Joseph Mante, 'Arbitrability and public policy: an African perspective', in William W Park (ed.), *Arbitration International* (Oxford University Press, 2017), Vol. 33 Issue 2, pp. 289–90.

79 IBA Report, op. cit. note 14, ¶ 25.

80 New York Convention Guide, op. cit. note 14, p. 229, ¶ 9.

objective of the New York Convention for swift and uniform enforcement of arbitral awards, most national courts 'have consistently addressed the grounds in Articles V(2)(a) and V(2)(b) separately, without questioning whether they refer to the same concept'.[81]

Examples of challenges based on public policy

Public policy objections can be raised in relation to the procedure leading to the award, or with respect to the substance of the award.

Procedural public policy

Procedural public policy is concerned with fundamental rules of procedure, including, for instance, due process,[82] the right to be heard,[83] *res judicata*,[84] independence of arbitrators,[85] the absence of procedural fraud or corruption in the arbitral process.[86] A causal link between the procedural violation and the arbitral tribunal's decision-making in the award is essential.[87]

Substantive public policy

Substantive public policy relates to the subject matter of the award and whether it violates the fundamental laws and principles of the state where it is challenged or where recognition or enforcement is sought, as discussed above. Substantive public policy challenges are the only defences that allow national courts to conduct a substantive, albeit, limited review of the award depending on the applicable national arbitration regime.[88] Most national courts do take a limited view of the public policy exception.

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81 ibid., p. 230, ¶ 11.

82 Judgment 200/2011 (Spanish High Court of Madrid) in Beverly Timmins, 'Minimising the Risk of Annulment or Refusal of Recognition of a Commercial Arbitration Award on the Grounds of Public Policy', in Carlos González-Bueno (ed. 2018), *40 under 40 International Arbitration*, pp. 425–40 (Timmins), p. 434 (violation of public policy in circumstances where an arbitrator was excluded from deliberations on the final ruling).

83 See *Louis Dreyfus S.A.S. v. Holding Tusculum B.V.*, Superior Court of Quebec, 12 December 2008, 2008 QCCS 5903 (Canada), in New York Convention Guide, op. cit. note 14, p. 253, ¶ 36, fn. 1129 (where the court refused to recognise and enforce an award, in which the arbitral tribunal granted a remedy not requested by the parties).

84 Timmins, op. cit. note 82, p. 434.

85 *Soc. Excelsior Film TV v. Soc. UGC-PH*, Court of Cassation, 24 March 1998, *Rev. Arb.* 1999, p. 225 et seq. (France), in New York Convention Guide, op. cit. note 14, p. 253, ¶ 38, fn. 1131 (where an arbitrator provided false information to another arbitrator in a parallel proceeding on which he was also sitting, which affected that second tribunal's decision).

86 See also the decision for set-aside in *Siemens A.G. v. BKMI Industrienlagen GmbH*, Court of Cassation, 7 January 1992, *XVIII Yearbook Commercial Arbitration*, 140 (1993) (France) (*Siemens*), in New York Convention Guide, op. cit. note 14, p. 254, ¶ 40, fn. 1134. See, for more on procedural public policy, Prodromou, Chapter 6, op. cit. note 27, pp. 154–58.

87 Prodromou, Chapter 6, op. cit. note 27, p. 154.

88 Moses, op. cit. note 24, p. 177.

Examples of cases in which a substantive public policy challenge was upheld have involved the following:

- grant of unlawful relief, punitive damages[89] or excessive interests by the arbitral tribunal;[90]
- criminal offences such as bribery and corruption;[91]
- breaches of competition laws;[92]
- violations of rules on consumer protection, foreign exchange regulation or bans on exports;[93]
- violations of 'core constitutional values, such as the separation of powers and sovereignty of Parliament';[94] or
- when the award was regarded as 'contrary to the national interest of the forum State'.[95]

Burden of proof and standard of proof

Under the regimes of both the New York Convention and the Model Law, national courts can consider non-arbitrability and public policy defences *ex officio* in set-aside, recognition or enforcement proceedings. Yet the burden of proof lies with the award debtor.[96]

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89 Prodromou, Chapter 6, op. cit. note 27, pp. 159–60.

90 See Supreme Court, Case 3Ob221/04b, 26 January 2005, *XXX Yearbook Commercial Arbitration* 421 (2005) (Austria); *Ahmed Mostapha Shawky v. Andersen Worldwide & Wahid El Din Abdel Ghaffar Megahed & Emad Hafez Raghed & Nabil Istanboly Akram Instanboly*, Court of Appeal of Cairo, 23 May 2001 (Egypt); *Harbottle Co. Ltd. v. Egypt for Foreign Trade Co.*, Court of Cassation, 21 May 1990, 815/52 (Egypt); *Belaja Rus v. Westintorg Corp.*, Court of Cassation, 10 November 2008, 3K-3-562/2008 (Lithuania), in New York Convention Guide, op. cit. note 14, pp. 248–49, ¶ 32, fn. 1097. See also New York Convention Guide, op. cit. note 14, p. 246, ¶ 24. See, also, for additional examples on interest: Prodromou, Chapter 6, op. cit. note 27, pp. 159–60.

91 Prodromou, Chapter 6, op. cit. note 27, p. 161.

92 ibid., p. 161.

93 See *SNF SAS v. Cytec Industries B.V.*, Court of Appeal of Paris, 23 March 2006, *XXXII Yearbook Commercial Arbitration*, 282 (2008) (France); *Mostaza*, op. cit. note 60 and *Eco Swiss*, op. cit. note 59, in New York Convention Guide, op. cit. note 14, pp. 248–49, ¶ 32, fn. 1099; see, also, Prodromou, Chapter 6, op. cit. note 27, p. 161.

94 New York Convention Guide, op. cit. note 14, pp. 248–49, ¶ 32, referring at fn. 1100 to *BCB Holdings Limited and The Belize Bank Limited v. The Attorney General of Belize*, Caribbean Court of Justice, Appellate Jurisdiction, 26 July 2013, CCJ 5 (AJ).

95 New York Convention Guide, op. cit. note 14, pp. 248–49, ¶ 32, referring at fn. 1101 to *United World v. Krasny Yakor*, Federal Arbitrazh Court of the Volgo-Vyatsky Region, Case No. A43-10716/02-27-10, 17 February 2003 (Russian Federation) (where the courts held that an award that could result in the respondent's bankruptcy would affect the forum's regional economy and, therefore, was contrary to the forum's substantive public policy).

96 Prodromou, Chapter 6, op. cit. note 27, pp. 162–63.

The standard of proof[97] to succeed in raising a public policy defence is 'extremely high',[98] which is justified by the 'exceptional nature' of public policy.[99]

Some countries require 'compelling evidence' (Canada)[100] that the violations are 'manifestly contrary' to public policy (e.g., France and Lebanon),[101] that the award entails 'flagrant, effective and concrete' (France) or 'evident' violations (Mexico),[102] or 'clearly injurious' and 'wholly offensive' violations that 'shock the conscience' (Singapore).[103] Others require evidence that the award would result in 'real practical injustice or real unfairness' (Australia) or in an 'intolerable breach' of fundamental values (Austria) or that it 'offends in an "unbearable manner" the concept of justice' (Switzerland).[104]

Estoppel and waiver

There can also be issues of waiver and estoppel when a party fails to raise an arbitrability or public policy issue that exists during the course of the arbitration proceedings.[105] This is especially the case in circumstances where a party clearly had the opportunity to raise the defence during the proceedings and, as a result, that party will often be estopped from relying on a non-arbitrability or public policy defence in set-aside, recognition or enforcement proceedings or may be considered to have waived its right once the award

97 'There is limited authority on the standard of proof that must be satisfied in order to demonstrate that an arbitration agreement is invalid.' It is therefore suggested that a 'balance of probabilities' or a 'more likely than not' approach should be applied when reviewing the award. See Born, Chapter 25, op. cit. note 7, p. 13.

98 ibid., pp. 163–64. See also Born, Chapter 25, op. cit. note 7, p. 58: 'courts uniformly hold that a violation of public policy must be "blatant, effective and concrete", is available "only in extreme cases" and "must be clearly shown if an award is not to be enforced"', quoting respectively Court of Cassation, Civ. 1, 21 March 2000, 2001 *Rev. Arb.* 805 (France); Bayerisches Oberstes Landesgericht, 25 August 2004, 2004 *SchiedsVZ* 319 (Germany); and *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43 (U.S. S.Ct. 1987) (US).

99 New York Convention Guide, op. cit. note 14, p. 259, ¶ 58.

100 ibid., p. 259, ¶ 58, referring at fn. 1158 to *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and P.T. PLN (Persero)*, 24 October 2007, ABQB 616 (Canada).

101 Prodromou, Chapter 6, op. cit. note 27, pp. 163–64.

102 id.

103 id.

104 id. See also Timmins, op. cit. note 82, p. 436: '[T]he violation of public order must be either "clear" (Portugal), "concrete" (Nigeria), "evident" or "patent" (Mexico), "blatant" (Lebanon), "manifest" (China), "obvious and manifest" (Poland), "flagrant" (Turkey), "particularly offensive" (Sweden), "severe" (Germany), "intolerable" (Austria, Switzerland), "unbearable" (Switzerland), or "repugnant to the legal order" (Italy).'

105 Note that a party who fails to raise the issue before a tribunal will not always be barred absolutely from raising it at the enforcement stage. In England and Wales, for example, the courts require that a party explain fully why it was not able to run the argument before the tribunal. For further details, see *Alexander Brothers Ltd (Hong Kong SAR) v. Alstom Transport SA and another* [2020] EWHC 1584 (Comm) (England and Wales).

has been issued.[106] Courts in countries such as England, Switzerland, Germany and the United States have mostly allowed estoppel or waiver of rights arguments to succeed,[107] with French courts only allowing the defence if it had been raised before the arbitral tribunal and the relevant party had reserved its rights.[108] In one known case, however, the German courts considered that neither estoppel nor waiver applies to complaints raised under Article V(2)(b) of the New York Convention.[109]

Conclusion

It is clear that the law on arbitrability and public policy is evolving and there has been significant development in the interpretation of these two concepts in the arbitral practice of domestic courts around the world. Fortunately, and in line with the objectives of the New York Convention championing a pro-arbitration, pro-enforcement stance, there is a growing trend of national courts moving towards a narrow interpretation of public policy and non-arbitrability.

Nevertheless, uncertainties still remain as to the contours of these concepts and how they are understood within the context of individual disputes and jurisdictions. Thus, parties would be well advised to remain cautious when drafting their arbitration agreements and contemplating arbitration proceedings; and to consider the implications of these two concepts from the perspectives of the governing law of the dispute, the law of the seat and the laws of countries for potential recognition and enforcement. Additional consideration must be given if EU public policy could also be triggered. Arbitrators themselves also have a role during the proceedings in seeking to ensure, as far as is possible, that their awards cannot be deemed non-arbitrable or to violate public policy.

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106 New York Convention Guide, op. cit. note 14, pp. 256–57, ¶¶ 47–52.

107 See, e.g., *Soinco SACI & anor. v. Novokuznetsk Aluminium Plant & Ors* [1998] CLC 730 (England and Wales); Oberlandesgericht Saarbrücken, 4 Sch 03/10, 30 May 2011 (Germany), in New York Convention Guide, op. cit. note 14, p. 256, ¶ 49, fn. 1146; see, further, New York Convention Guide, op. cit. note 14, p. 257, ¶ 50. See, also, Born, Chapter 25, op. cit. note 7, p. 54, fn. 959.

108 *Siemens*, op. cit. note 86, in New York Convention Guide, op. cit. note 14, p. 257, ¶ 51, fn. 1151. See, further, New York Convention Guide, op. cit. note 14, p. 257, ¶ 52.

109 Bayerisches Oberstes Landesgericht, 4 Z Sch 17/03, 20 November 2003 (Germany), in New York Convention Guide, op. cit. note 14, p. 256, ¶ 48, fn. 1145.

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