

PUBLIC POLICY AS GROUND FOR REFUSAL OF RECOGNITION OF FOREIGN ARBITRAL AWARDS WITH SPECIAL FOCUS ON AUSTRIA AND HUNGARY

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Abstract

Commercial arbitration is the preferred method of international business due, inter alia, to the worldwide enforceability of awards guaranteed by the New York Convention. However, such universal enforceability is not limitless: Recognition and enforcement may be refused for some narrow grounds. The ground most often invoked is the violation of public policy. Since public policy differs from state to state, there is no uniform worldwide practice on its application. This significantly thwarts the effectiveness of arbitration. Such lack of uniformity can be diminished by clear universal concepts of the application of public policy. In this thesis, I address this lack of universality and establish clear concepts for the application of public policy by comparatively analyzing the general international understanding and the nationally varying implementations using the examples of Austria and Hungary. In doing so, I propose a definition of public policy and establish specific concepts for its application. On this basis, I suggest improvements in the Austrian and Hungarian applications of public policy as a ground for refusing the recognition and enforcement of foreign arbitral awards.

To Zuzana, Amelie and Philip

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1 Introduction

Arbitration, as an impartial, highly professional, discrete, fast, non-formalistic and cost saving mechanism of dispute resolution, has been adopted as the favorite dispute settlement form of international business over the past decades. One of the decisive advantages of arbitration over court proceedings concerns universal enforceability. There is no international standard on the mutual recognition and enforcement of decisions by state courts: these are mostly regulated, if at all, by bilateral or regional conventions. In contrast, the recognition and enforcement of arbitral awards is almost universally secured by a UN Convention which comprises 146 state parties (as of March 30, 2012)¹, including every country of relevance in international commerce: The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards² (hereinafter “Convention”). The state parties to the Convention, often also referred to as the “New York Convention”, undertake to recognize and enforce arbitral awards rendered in other states.³ This clear obligation reflects the Convention’s pro-arbitration bias.⁴

The almost universal acceptance of the Convention is a welcome development: Already the 1958 conference resolution on the Convention stated that “greater uniformity of national laws would further the effectiveness of arbitration in the settlement of private law disputes”.⁵ Such effectiveness of dispute resolution is of utmost importance for international business in a globalized world: A contract is worth nothing if a violating party cannot be held accountable.

¹ See for actual status United Nations Treaty Collection, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (visited on Mar. 30, 2012).

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (visited on Mar. 30, 2012).

³ Convention Art. III.

⁴ Nigel Blackaby/Constantine Partasides, *Redfern and Hunter on International Arbitration* (2009) 658.

⁵ *Resolution of the Conference adopting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, Point 5, reprinted in Pieter Sanders (gen. rapp.), *International Commercial Arbitration* (1960) 289, 291.

A clearcut and effective dispute resolution mechanism lowers the danger of a breach of contract by the parties. Thereby the risks of business transactions and the therewith connected costs diminish. This leaves more capital for further business transactions or investments which raises economic productivity. It contributes to a more productive use of resources and lowers the costs of production. This, in turn, decreases the prices to be paid by consumers and/or increases the profits of business entities. All in all, arbitration as a dispute resolution mechanism producing globally enforceable decisions in a worldwide uniform framework provides security from which the whole economy profits. The framework for that is provided by the Convention.

However, the mere acceptance of the Convention by states does not in itself create such desirable uniform enforceability. It is still state courts acting according to state laws which decide on the recognition and enforcement of awards. Divergence in the state practice in the statutory and judicial implementation of the Convention endangers the goal of uniform enforceability. This is particularly true for an exception to the duty to recognize and enforce foreign awards, laid down in Convention Art. V (2) (b): violation of public policy. The public policy exception is probably the most often invoked ground for opposing the recognition or enforcement of awards. The reason for this might be the blurry nature of public policy which allows every lawyer to reasonably argue (or at least construct) a public policy violation in any award. Nevertheless, this reason is very rarely accepted by courts.⁶

Public policy has a different content in each and every state. As one of the drafters and most authoritative commentators on the Convention, Pieter Sanders pointed out already in 1960: “Of course the Courts in different countries can interpret the public policy-exception

⁶ Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (1981) 366s; Jean-Baptiste Racine, *L'arbitrage commercial international et l'ordre public* (1999) 441; Dirk Otto/Omaia Elwan, *Article V(2)*, in Herbert Kronke *et al.* (eds.), *Recognition and Enforcement of Foreign Awards: A Global Commentary on the New York Convention* (2010) 345, 365.

differently. This presents disadvantages [...].”⁷ Half a century later, the discrepancies in the content of public policy, as understood by different states, still persist, as noted by the International Law Association’s Committee on International Arbitration in 2002: “The New York Convention’s goal was to provide uniform procedures for enforcing foreign arbitral awards, while minimising [*sic*] the effect of discrepancies between the laws of different countries. [*footnote omitted*] Fifty years on, public policy remains the most significant aspect of the Convention in respect of which such discrepancies might still exist. [...] Greater consistency would lead to a better ability to predict the outcome of a public policy challenge, irrespective of the court in which enforcement proceedings are brought. This, in turn, should discourage speculative challenges and facilitate the finality of arbitral awards.”⁸

Such discrepancies in the application of public policy stem from the fact that the Convention does not regulate this issue in its details. Conceptual questions as to the definition or content of public policy or as to the scope of control to be applied by state courts when assessing an alleged violation of public policy are left open. The aim of the present work is to eliminate such lack of conceptual clarity and thereby overcome differences in the national applications of public policy. For this purpose, I comparatively analyze the general international understanding of the Convention’s public policy provision and its national implementation using the examples of Austria and Hungary. These two neighboring states have large cultural, historical and legal similarities which would point to a similar application of the public policy rule. Both Austria and Hungary are long standing member states to the Convention and both have adopted legislation essentially in accordance with the UNCITRAL Model Law on

⁷ Pieter Sanders, *The New York Convention*, in Pieter Sanders (gen. rapporteur), *International Commercial Arbitration* (1960) 323.

⁸ International Law Association Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, Conference Report New Delhi (2002) 5s, mn. 23, downloadable from <http://www.ila-hq.org/en/committees/index.cfm/cid/19> (visited on Mar. 30, 2012).

International Commercial Arbitration⁹ (hereinafter “Model Law”) which mirrors the Convention. However there is also one striking difference between the two states: Whereas, after World War II, Austria developed a strong democracy and market economy, Hungary experienced 40 years of communism; only from 1989 on Hungary has embraced democracy and market economy. Such different national background is precisely the reason for lack of uniformity in the application of public policy. With the aim of bringing both Austria and Hungary, despite their national variations, in line with the international standards I establish a comparative guideline for the practical application of public policy in these countries.

The present work is structured as follows: First I establish what the international common consensus on the application of the public policy ground contained in Convention Art. V (2) (b) is or should be (chapter 2). While doing so, I also suggest a novel definition of public policy. Then I examine the application of public policy in Austria (chapter 3) and in Hungary (chapter 4). In all chapters I identify contentious issues and suggest solutions to them. Chapter 5 provides a summary of the results.

⁹ UNCITRAL Model Law on International Commercial Arbitration, UN General Assembly Resolution 61/33 of Dec. 4, 2006, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (visited on Mar. 30, 2012).

2 Public Policy in the Convention

This chapter analyzes the notion, scope and application of public policy as a ground for refusal of recognition and enforcement of foreign arbitral awards as laid down in the Convention, *i.e.* the public policy exception. A detailed discussion of all aspects of the public policy exception is not possible in the concise limits of the present work. Nevertheless, it is important to be aware of the internationally accepted rules and practices on this issue since they constitute the benchmark at which the legislation on and application of the public policy exception in both Austria and Hungary is measured in chapters 3 and 4 below.

In this chapter, I first define public policy (section 2.1). Thereafter I identify the provision on public policy in the Convention itself together with parallel provisions in the Model Law (section 2.2) and elaborate on general concepts of the application of these legal norms (section 2.3). This is followed by the examination of certain special aspects in the application of the public policy exception: the different standards of public policy (domestic, international and supranational) and their applicability (section 2.4) and the applicable scope of review by the recognizing and enforcing courts (section 2.5). Subsequently, I provide an overview over rules, both substantive and procedural, which fall under public policy (section 2.6). Finally, I summarize my findings (section 2.7).

2.1 Definition of Public Policy

It is natural to define public policy first in order to clarify the concept and apply it correctly. However, despite countless efforts undertaken by courts and scholars, this notion remains versatile and hard to precisely circumscribe. The following section analyzes such various approaches and provides, on this basis, a definition of public policy.

I begin with a clarification of the terminology surrounding public policy as (supposedly) opposed to *ordre public* and principles of law: Despite some views to the contrary, today's prevailing legal opinion treats the notions of "public policy" and "*ordre public*" as equivalent and interchangeable.¹⁰ In addition, a traditional distinction used to be made between fundamental principles of law and public policy.¹¹ Accordingly, such distinction was foreseen in the drafts of the Convention. However, it was agreed that the notion of fundamental principles does not add to the scope of public policy, the former being part of the latter - although some continue to make such distinction.¹² In light of the above, I do not distinguish between these notions but use public policy as incorporating both *ordre public* and (fundamental) principles of law.

There is an obvious difficulty in defining public policy as evidenced by the numerous definitions proposed by courts and scholars. Though these provide meaningful insight into the notion, they fail to grasp the whole meaning of it. To give just a few examples, public policy has been described as the "fundamental moral convictions of legal order in the country concerned", the "hard core" of its legal and moral values or "the forum state's most basic notions of morality and justice".¹³ These are conceptual descriptions. They give a good idea of public policy but they fail to point out any factors which would help to delineate public policy rules from "normal" law. The same is true for the approach chosen by the International

¹⁰ Van den Berg, *supra* note 6, 359; Franz Schwarz/Helmut Ortner, *Procedural Ordre Public and the Internationalization of Public Policy in Arbitration*, in Christian Klausegger *et al.* (eds.), *Austrian Arbitration Yearbook* (2008) 133, 138s; see also Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *Official Journal of the European Union* L 177, July 4, 2008, 6-16, Art. 21, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0006:en:PDF> (visited on Mar. 30, 2012) and its predecessor, the Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, Art. 16, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41980A0934:EN:HTML> (visited on Mar. 30, 2012), both using the terms "*public policy (ordre public)*".

¹¹ See *e.g.* 1927 Geneva Convention Art. 1 (e) and section 2.3 below.

¹² See most prominently International Law Association, *Resolution 2/2002, Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards*, Art. 2, 29 *YBCA* (2004) 345, 347.

¹³ See for a compilation of definitions and further references Schwarz/Ortner, *supra* note 10, 136.

Law Association in its 2002 Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards¹⁴ (hereinafter “ILA Recommendations”) which defines (international) public policy as

“the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).”¹⁵

This is a functional definition: It concentrates on the function of public policy, *i.e.* what it is good for, without, however, answering the question what, *i.e.* which abstractly defined set of rules it is. This was deliberately done so by the ILA committee arguing that each state should have the capacity to determine what it considers as its public policy.¹⁶ Thereby, the committee implicitly acknowledged that a conceptual definition of public policy is impossible to achieve.

The inadequacies of the above definitions (inadvertently) demonstrate one determinant character of public policy: versatility. Public policy constitutes and protects the basis of the respective national legislations. As legislation differs from country to country, so does public policy.¹⁷ In addition, public policy is also subject to temporal changes just as notions of morality (which public policy is expected to protect) develop from time to time.¹⁸ Moreover, the determination of a public policy violation always depends on the concrete factual circumstances¹⁹ so that case law provides more ad hoc decisions than a coherent system. Also, no legislation has ever defined public policy or the precise content of it. All this contributes to

¹⁴ ILA Recommendations, *supra* note 12.

¹⁵ ILA Recommendations, *supra* note 12, Art. 1 (c).

¹⁶ Pierre Mayer/Audley Sheppard, *Recommendations of the International Law Association on Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards: Presentation*, 29 YBCA (2004) 339, 341.

¹⁷ Van den Berg, *supra* note 6, 376; Schwarz/Ortner, *supra* note 10, 137s.

¹⁸ Schwarz/Ortner, *supra* note 10, 137s; Otto/Elwan, *supra* note 6, 367s.

¹⁹ Van den Berg, *supra* note 6, 376.

the vagueness and ambiguity inherent in public policy to such a degree that according to some commentators a conclusive abstract definition of the notion is not possible at all.²⁰

This view is certainly reasonable: the notion of public policy is inherently vague and subject to discrepancies based on geography, time and circumstances. For these reasons, it is in fact impossible to provide a definition of public policy which incorporates all present and future aspects of the notion. Nevertheless, there is room for improving the existing attempts to define public policy: Both approaches, the conceptual and the functional, have merits and are validly used. However, all existing definitions take either one or the other approach and thereby necessarily neglect certain aspects of public policy which are covered by one approach but not the other. It only seems logical to condense the two approaches and thereby cover all acknowledged aspects of public policy. Such a definition combines both conceptual and functional elements of public policy and grasps aspects of both approaches in one compact definition – aspects which are otherwise left out in attempts dealing with the content only or the function only. Thus, I propose the following combinatory definition of public policy in the context of international commercial arbitration:

Public policy is the set of rules representing the fundament of the legal and moral order of the forum state the violation of which by the recognition or enforcement of a foreign arbitral award may bar such recognition or enforcement.

This combinatory definition fills gaps left out by standard definitions applying only one of public policy's elements and, thus, provides a standard which is capable of being applied universally and uniformly. It is the starting point for my examination of the application of the

²⁰ Klaus Peter Berger, *International Economic Arbitration* (1993) 676, 670s; ILA Report, *supra* note 8, 4, mn. 12; Schwarz/Ortner, *supra* note 10, 136s; Bernard Hanotiau/Olivier Caprasse, *Public Policy in International Commercial Arbitration*, in Emmanuel Gaillard/Domenico Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice* (2008) 787, 788.

public policy exception which is dealt with in the following sections. I begin with the applicable international provisions.

2.2 International Provisions on Public Policy

Convention Art. V (2) (b) is the determinative provision on the public policy exception to the recognition and enforcement of foreign arbitral awards. It is introduced, together with its predecessor, in subsection 2.2.1. Other provisions of interest also concerning the public policy exception are contained in the Model Law. These, *i.e.* Model Law Art. 36 (1) (b) (ii) respectively Model Law Art. 34 (2) (b) (ii) are identified in subsection 2.2.2.

2.2.1 Convention Art. V (2) (b)

Convention Art. V (2) (b) reads as follows:

“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: [...] The recognition or enforcement of the award would be contrary to the public policy of that country.”

However, the Convention is not the first international convention on the recognition and enforcement of foreign arbitral awards: This was the Geneva Convention of 1927²¹ (hereinafter “1927 Geneva Convention”) which was superseded by the Convention. In its here relevant part, the 1927 Geneva Convention Art. 1 (e) provided as follows:

“[A]n arbitral award [...] shall be recognised [*sic*] as binding and enforced [...]. To obtain such recognition or enforcement, it shall, further, be necessary [...] that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.”

²¹ Convention on the Execution of Foreign Arbitral Awards, Sep. 26, 1927, downloadable from <http://www.newyorkconvention.org/new-york-convention/history> (visited on Mar. 30, 2012).

2.2.2 Other provisions on public policy

The Model Law contains a provision on the refusal of recognition and enforcement of arbitral awards, Model Law Art. 36 (1) (b) (ii), as well. Due to the drafters' ambition for worldwide uniform legal standards, Model Law Art. 36 follows Convention Art. V not only with respect to public policy but also with respect to the entire structure and content of Art. V which it was modeled on.²² Model Law Art. 36 (1) (b) (ii) reads as follows:

“Recognition or enforcement of an arbitral award [...] may be refused only [...] if the court finds that [...] the recognition or enforcement of the award would be contrary to the public policy of that state.”

In addition, the Model Law also provides for the setting aside of an award, again based on a violation of public policy, in Model Law Art. 34 (2) (b) (ii). As demonstrated by national legislative trends,²³ norms on setting aside and recognition/enforcement proceedings are essentially the same and provide for identical application of public policy. In fact, the grounds for setting aside contained in Model Law Art. 34 were, just as with Model Law Art. 36, taken over from Convention Art. V.²⁴ Model Law Art. 34 (2) (b) (ii) reads as follows:

“An award may be set aside by the court [...] only if [...] the court finds that [...] the award is in conflict with the public policy of this state.”

However useful, identifying the legal norms is only the first step in establishing the concepts applicable to the public policy exception since the provisions do not deal with questions of detail. Such questions are examined in the following.

²² Christian Hausmaninger, §§ 577-618, in Hans Walter Fasching/Andreas Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, 2nd edition (2007) Section 614, mn. 8; Schwarz/Ortner, *supra* note 10, 133, 142, 146, 166-170 with further references.

²³ Berger, *supra* note 20, 675.

²⁴ Hausmaninger, *supra* note 22, Section 611, mn. 8, 13, 52, 79.

2.3 General Concepts of Application of Public Policy

In this section I establish some basic concepts of public policy based on the text and the drafting history of the relevant provisions identified above.

The 1927 Geneva Convention, though important, suffered from major drawbacks which hampered its success: For example, it still required recognition in both the country of the place of arbitration and the enforcing country (double *exequatur*) and the burden of proof for the non-existence of grounds for refusal to recognize and enforce (such as a public policy violation) was on the party seeking enforcement.²⁵ The 1927 public policy provision was already very similar to the one retained in the Convention with one major difference: The 1927 provision refers not only to public policy but also to “the principles of law” of the country in which it is sought to be relied upon. The Convention’s 1955 draft²⁶ also contained such reference but this was abandoned by the 1958 conference adopting the Convention.²⁷ Correspondingly, a proposal to reintroduce “principles of law” into the text of Convention Art. V (2) (b) was rejected by the conference.²⁸

The omission of “principles of law” reflects the conference’s intent to narrow the scope of Convention Art. V (2) (b) as far as possible, to certain most fundamental issues.²⁹ Such most limited application of the public policy exception is in line with the Convention’s general concept of pro enforcement bias or *favor arbitrandum*³⁰, i.e. the Convention’s underlying policy of generally obliging state parties to recognize and enforce foreign arbitral awards.

²⁵ Sanders, *supra* note 6, 295, also pointing out further drawbacks of the 1927 Geneva Convention.

²⁶ *Report of the Committee on the Enforcement of International Arbitral Awards*, UN DOC E/2704, E/AC.42/Rev.1 (Mar. 28, 1955), <http://www.uncitral.org/pdf/english/travaux/arbitration/NY-conv/e-ac/eac424r1-N5508097.pdf> (visited on Mar. 30, 2012).

²⁷ Sanders, *supra* note 6, 323.

²⁸ Otto/Elwan, *supra* note 6, 365.

²⁹ Sanders, *supra* note 6, 323; Otto/Elwan, *supra* note 6, 365s.

³⁰ Van den Berg, *supra* note 6, 361; Blackaby/Partasides, *supra* note 4, 658; Hanotiau/Caprasse, *supra* note 20, 801.

This is reflected also in the state parties' unambiguous obligation to "recognize arbitral awards as binding and enforce them"³¹ unless the Convention explicitly provides for an exception. As a result it is universally accepted that the public policy exception (just as the other grounds for non-recognition) is to be construed narrowly.³²

This principle of narrow construction has far-reaching consequences: This is one of the main arguments in favor of the interpretation of Convention Art. V (2) (b) as meaning not any kind of public policy but only international public policy, as shown in more detail in section 2.4 below. It has led to court decisions interpreting public policy so narrowly that fears have arisen that the public policy exception would be rendered useless – a fear, however, proven unfounded by practice.³³ Also it gives the wording of Convention Art. V (2) (b) according to which the "recognition or enforcement" of the award must be contrary to public policy in order to justify non-recognition or non-enforcement a narrow meaning: It does not suffice that the award or the procedure leading to it violates public policy but it must be the recognition or enforcement, *i.e.* the result of the award which must violate public policy.³⁴

With respect to such maxim of narrow interpretation, it should be noted that the 1955 draft of the Convention³⁵ required the award's recognition or enforcement to be "clearly incompatible" with public policy. With the drafting committee's wording "clearly" it was

³¹ Convention Art. III.

³² Van den Berg, *supra* note 6, 361s; Albert Jan van den Berg, *New York Convention of 1958, Consolidated Commentary, Cases reported in Vol. XXII (1997)-XXVII (2002)*, 28 *YBCA* (2003) 665; Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, in Emmanuel Gaillard/Domenico Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice* (2008) 63; Hanotiau/Caprassé, *supra* note 20, 801s; Julian D. M. Lew/Loukas A. Mistelis/Stefan M. Kröll, *Comparative International Commercial Arbitration* (2003) 720s; Blackaby/Partasides, *supra* note 4, 658s; Emmanuel Gaillard/John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 996s.

³³ Van den Berg, *supra* note 6, 367s.

³⁴ Stefan Michael Kröll, § 1061, in Karl-Heinz Böckstiegel *et al.* (eds.), *Arbitration in Germany, The Model Law in Practice* (2007) 553s; Racine, *supra* note 6, 523-527; Otto/Elwan, *supra* note 6, 365s.

³⁵ *Report of the Committee on the Enforcement of International Arbitral Awards*, Annex, Art. IV(h), UN DOC E/2704, E/AC.42/Rev.1 (Mar. 28, 1955), <http://www.uncitral.org/pdf/english/travaux/arbitration/NY-con/v/e-ac/eac424r1-N5508097.pdf> (visited on Mar. 30, 2012).

“intended to limit the application of this clause [*on the public policy exception*] to cases in which the recognition or enforcement of a foreign arbitral award would be distinctly contrary to the basic principles of the legal system of the country where the award is invoked”³⁶. This requirement of clear incompatibility with public policy was omitted in the final wording of Convention Art. V (2) (b) which simply speaks of contrariety to public policy. This could point to a slightly broader scope of the public policy exception than originally proposed. However, as explained above, the Convention was meant to make the scope of the public policy exception as narrow as possible, so that no broadening of the scope can be interpreted into this amendment. Still, this change can be relevant for the question of the scope of review to be applied by the recognizing or enforcing court.³⁷

Furthermore, the wording and structuring of Convention Art. V reveals which grounds of this provision can to be applied by the court on its motion: Para. 1 provides that “recognition and enforcement of the award may be refused, *at the request of the party* against whom it is invoked” (emphasis added) whereas para. 2 provides that the “recognition and enforcement of an arbitral award may also be refused if *the competent authority [...] finds [...]*”(emphasis added) a public policy violation. Thus, only the two grounds of Convention Art. V (2), one of them being the violation of public policy, can be taken up by the court *ex officio*.³⁸

Further on, it is to be noted that public policy encompasses procedural rules too: Although this was long disputed, it is universally accepted today.³⁹ This also means that the specific

³⁶ *Ibid.*, 13, mn. 49.

³⁷ See below section 2.5.

³⁸ Sanders, *supra* note 6, 295; Van den Berg, *supra* note 6, 359.

³⁹ ILA Recommendations, *supra* note 12, Art. 1 (c); Ulrich Haas, *New York Convention*, in Frank-Bernd Weigand (ed.), *Practitioner's Handbook on International Arbitration* (2002) 399, 521, mn. 108; Schwarz/Ortner, *supra* note 10, 144-151; Matti S. Kurkela/Santtu Turunen/Conflict Management Institute, *Due Process in International Commercial Arbitration*, 2nd ed. (2010) 21s; opposing the inclusion of procedural issues in public policy while acknowledging the prevailing view: Berger, *supra* note 20, 676s.

procedural grounds listed in Convention Art. V are not conclusive but Convention Art. V (2) (b) brings in further procedural aspects into the recognition or enforcement of arbitral awards.

Another fundament of the application of public policy is that the violation of “simple” mandatory rules (and even less that of non-mandatory rules) does not amount to a public policy violation.⁴⁰ Only mandatory rules which protect public, not private interests belong to public policy.⁴¹

Finally, it should be clarified which country’s law (or public policy) is applicable to the public policy assessment: This is answered by the wording of Convention Art. V (2) (b) which speaks of the “public policy of that country”. “That” country is the one referenced in the beginning of the same provision, *i.e.* “the country where recognition and enforcement is sought”. Thus, according to the clear wording of Convention Art. V (2) (b), the applicable notion of public policy is that of the state where the recognition or enforcement proceedings are conducted.⁴²

To conclude, the wording and drafting history of Convention Art. V (2) (b) confirm that the public policy exception is to be interpreted narrowly, that only the result of the award is relevant, that also procedural rules may qualify as public policy rules, that a mere violation of mandatory laws does not in itself amount to public policy violation and that the applicable law is the public policy of the state where recognition or enforcement is sought. These basic concepts have significant consequences in the application of Convention Art. V (2) (b), as the following section shows, first and foremost on the applicable standard of public policy.

⁴⁰ ILA Recommendations, *supra* note 12, Art. 3 (a); Van den Berg, *supra* note 6, 365; Berger, *supra* note 20, 678; Kröll, *supra* note 34, 553; Gaillard/Savage, *supra* note 32, 996s.

⁴¹ Racine, *supra* note 6, 487f; Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd ed. (2001) 503.

⁴² ILA Report, *supra* note 8, 5, mn. 21; Blackaby/Partasides, *supra* note 4, 658; Gaillard/Savage, *supra* note 32, 996; Otto/Elwan, *supra* note 6, 369.

2.4 Applicable Standard of Public Policy: Domestic, International or Supranational?

On the first sight it might seem confusing that a state would have different sets of public policy defending its most basic legal and moral principles to a different degree depending on the circumstances. But, as shown below, this is exactly what is discussed by courts and commentators in the case of arbitral awards. In this section, I provide a short overview of the three different standards of public policy (first: domestic, second: international, third: supranational) and determine the standard applicable for foreign awards. These descriptions are vague by their nature. The concrete content of the applicable standard which provides further insights into the applicable standard's nature is detailed below in section 2.6.

First, domestic public policy: This is the widest set of rules. It incorporates all rules the violation of which may lead to the refusal to recognize or enforce a *domestic* award, *i.e.* an award rendered in that state. Since the issue of the present treatise is the recognition and enforcement of *foreign* awards, *i.e.* awards rendered in a state other than the state where recognition or enforcement is sought, domestic public policy will not be further dealt with.

Second, international public policy: This set of rules is a narrower part of domestic public policy.⁴³ It comprises the more important rules of domestic public policy, deemed so paramount by the state that it upholds them not only in domestic but also in international contexts.⁴⁴ Today it is generally accepted that it is this narrower standard of public policy that

⁴³ Van den Berg, *supra* note 6, 360; Van den Berg 2003, *supra* note 32, 665; Pierre Mayer, *Effect of International Public Policy in International Arbitration*, in Loukas A. Mistelis/Julian D.M. Lew, *Pervasive Problems in International Arbitration* (2006) 61; Racine, *supra* note 6, 485; ILA Report, *supra* note 8, 3, mn. 11; Schwarz/Ortner, *supra* note 10, 153-156; Otto/Elwan, *supra* note 6, 366.

⁴⁴ Rubino-Sammartano, *supra* note 41, 505s.

is to be applied in the context of recognition or enforcement of foreign arbitral awards.⁴⁵ Whereas such interpretation is generally not reflected in the wording of the respective provisions but it is merely explicitly or implicitly recognized by courts and commentators,⁴⁶ the French Code of Civil Procedure explicitly confirms the applicability of international public policy.⁴⁷ Such result is certainly in line with the maxim of interpreting the public policy exception narrowly.⁴⁸ It is further argued that this result is justified by the necessities of international commerce which needs an effective international dispute settlement method, thus favoring arbitration.⁴⁹ Furthermore, the principle of comity also requires states to respect each other's legislation and not to impose their own laws upon cases decided under the laws of another state.⁵⁰ Despite this international function, it must be emphasized, as done above, that international public policy is part of and exclusively footed in domestic law.

Third, supranational public policy: This concept, also called truly international or transnational public policy, is said to be detached from domestic law (as opposed to domestic and international public policy) and exclusively footed in international law.⁵¹ It is argued to better suit the international or even non-national character of arbitration and to comprise principles universally accepted by all nations, such as the prohibition of corruption or trafficking.⁵² This concept has been endorsed by some scholars and a few court decisions in France, Switzerland and Italy,⁵³ but has otherwise been rejected.⁵⁴ It is objected to the

⁴⁵ Van den Berg, *supra* note 6, 361s; Kurkela/Turunen/CMI, *supra* note 39, 21s; Racine, *supra* note 6, 475-482; ILA Report, *supra* note 8, 3, paras. 10s; Schwarz/Ortner, *supra* note 10, 153-155; Hanotiau/Caprassé, *supra* note 20, 789-791; Blackaby/Partasides, *supra* note 4, 658s; Otto/Elwan, *supra* note 6, 366.

⁴⁶ Racine, *supra* note 6, 475-482; Schwarz/Ortner, *supra* note 10, 153-155; Hanotiau/Caprassé, *supra* note 20, 789-791.

⁴⁷ French Code of Civil Procedure (“*Code de procédure civile*”) Art. 1514., <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070716> (visited on Mar. 30, 2012).

⁴⁸ See above section 2.3.

⁴⁹ Racine, *supra* note 6, 485.

⁵⁰ Haas, *supra* note 39, 399, 521.

⁵¹ Mayer, *supra* note 43, 62s; Racine, *supra* note 6, 460-462; Haas, *supra* note 39, 399, 521; Schwarz/Ortner, *supra* note 10, 156-159.

⁵² Mayer, *supra* note 43, 63; Hanotiau/Caprassé, *supra* note 20, 794s; Racine, *supra* note 6, 473s.

⁵³ Racine, *supra* note 6, 460-471; Schwarz/Ortner, *supra* note 10, 157.

existence of such supranational public policy that it has no legal basis whatsoever (not even *de lege lata*)⁵⁵, its content is already covered by international public policy⁵⁶ and thus it amounts to unnecessary hair-splitting.⁵⁷ These objections deserve merit: First, it cannot be seen what subject matters would be covered by supranational public policy in addition to those already covered by international public policy. Second and more importantly, the Convention clearly refers to the public policy of the country where recognition and enforcement is sought. Consequently, any application of a public policy which is not footed in the law of a country but is detached from it is not covered by the Convention's wording. Therefore, the notion of supranational public policy is to be rejected.

The result of the above examination is the following: The standard to be applied in the context of recognition or enforcement of foreign arbitral awards is that of international public policy. Domestic public policy determines the recognition or enforcement of domestic arbitral awards and is, thus, not relevant in the international context. Supranational public policy has no legal basis and no practical advantages.

2.5 Scope of Court Review

The previous section describes the standard to which arbitral awards are to be held by the recognizing or enforcing court. However, this does not answer the question how and to what extent the court will assess the award's conformity with such standard. There seems to be no agreement on an international level on one correct approach. Therefore, I shortly examine the

⁵⁴ Van den Berg, *supra* note 6, 361; Berger, *supra* note 20, 675; Haas, *supra* note 39, 399, 521; Mayer/Sheppard, *supra* note 16, 340s; ILA Report, *supra* note 8, 9, mn. 43; Schwarz/Ortner, *supra* note 10, 158s; Gaillard/Savage, *supra* note 32, 996; Stefan Kilgus, *Zur Anerkennung und Vollstreckbarerklärung englischer Schiedssprüche in Deutschland* (1995), 164s.

⁵⁵ Haas, *supra* note 39, 399, 521; Kilgus, *supra* note 54, 164.

⁵⁶ Van den Berg, *supra* note 6, 361; Berger, *supra* note 20, 675.

⁵⁷ Hans Dolinar/E.R. Lanier, *Public Policy Objections to the Recognition and Enforcement of Foreign Arbitral Agreements and Awards: Perspectives on Austrian and American Law*, in Peter Jabornegg/Karl Spielbüchler (eds.), *Festschrift für Rudolf Strasser zum 70. Geburtstag* (1993) 35, 81.

two major views on this issue and establish which limits the courts' power should have when reviewing an award for its public policy conformity.

The first approach can be described as the minimalist approach: According to this view, a review of the arbitral award is to be restricted as far as possible. This is said to be in line with the Convention's pro-enforcement bias and its maxim of narrow interpretation of the public policy exception which forbid a review of the award on its merits.⁵⁸ Therefore, and also because it is the result of the award but not the award itself which is to be tested for public policy violation,⁵⁹ the court should not look into the facts established, the law applied or in general the reasoning but only into the dispositive (operative) part of the award.⁶⁰ The degree of minimalism varies among the proponents of this view: Some would restrict the control only to the question whether the arbitral tribunal has considered the relevant public policy provision, others would limit it to the assessment of the public policy conformity of the award's solution only whereas a third view would refuse recognition or enforcement only if the public policy violation is obvious, effective and concrete.⁶¹

The second approach is the maximal approach: According to this view the court may subject the arbitral award to a total control. Consequently, the court is not bound by the arbitral tribunal's reasoning or assessment of facts or law (and thus it is also not restricted to review the dispositive part only) but may reassess all circumstances freely.⁶² This is also the position adopted by the International Law Association, with the restriction that the court should reassess the facts only in case forceful *prima facie* circumstances pointing to a public policy

⁵⁸ Otto/Elwan, *supra* note 6, 367.

⁵⁹ See above 2.3.

⁶⁰ Kröll, *supra* note 34, 555.

⁶¹ See for a good overview Hanotiau/Caprassé, *supra* note 20, 811-815.

⁶² Racine, *supra* note 6, 543-555; Haas, *supra* note 39, 399, 520; Hanotiau/Caprassé, *supra* note 20, 805-811.

violation exist.⁶³ The reason proposed for such extensive control is practicability: If public policy control was restricted to the dispositive part of the award or be bound by the factual or legal assessment by the arbitral tribunal, this would render the public policy control ineffective and overall meaningless.⁶⁴ Also, total control of the award is not unknown in this field: it is to be applied *e.g.* to the assessment control of the arbitral tribunal's competence.⁶⁵

I start with the examination of the minimalist approach. This approach suffers from major drawbacks: First, the prohibition of review on the merits does not provide answers as to the scope of control of possible public policy violations: The former rule protects the parties' choice of arbitration as a method of dispute resolution whereas the latter protects the basic legal and moral interests of the state. The decision of the arbitral tribunal on the merits is in no way affected by a total control exclusively directed at public policy violations. Second, the maxim of narrow interpretation of the public policy exception is irrelevant in this respect: It only concerns the content of public policy but not the procedure of assessment by the court, such procedure not even being regulated by the Convention. Third, a control limited to the dispositive part of the award only would render the public policy control meaningless in most cases: The order directed to a party to pay a certain amount of money to the other party or the declaration on the existence of a legal relationship cannot *per se* violate public policy. Such violation can only be established by the court if it has the power to reassess the established facts, applied law or reasoning of the award. Finally, whereas the Convention's 1955 draft⁶⁶ required the recognition or enforcement to be "clearly" incompatible with public policy, the final version requires only "simple" contrariety to public policy. This change disallows

⁶³ ILA Recommendations, *supra* note 12, Art. 3 (c); ILA Report, *supra* note 8, 11, mn. 52.

⁶⁴ Hanotiau/Caprassé, *supra* note 20, 815-817.

⁶⁵ Hanotiau/Caprassé, *supra* note 20, 816.

⁶⁶ Committee Report, *supra* note 35.

interpretations according to which a public policy violation would have to be obvious without further inquiries into the award in order to justify non-recognition or non-enforcement.

Compared to the minimalist approach, the maximal approach addresses the practical need for an efficient public policy control more adequately: Certainly, the danger of a court review of the merits through the backdoor of public policy exists but it can be countered by the very strict restriction of the total control to public policy issues. Only the maximal approach makes a meaningful control of public policy and, thus, an effective implementation of Convention Art. V (2) (b) possible. Therefore, this is the concept to be adopted.

All in all it can be established that the court called upon to recognize or enforce an arbitral award should have the power of total review over the award insofar as public policy violations are concerned. The court is not bound by any aspects of the award and its review is not limited to any specific part (such as the dispositive part) of the award. Only this approach ensures an effective application of Convention Art. V (2) (b).

2.6 Content of Public Policy

With each state having its own basic legal and moral principles, it would be illusory to attempt to establish a conclusive, world-wide applicable list of public policy rules. However, despite different views on the exact boundaries of public policy, there is a well established common understanding of some core principles which every state recognizes. I present these principles divided into two parts: First I deal with substantive public policy (subsection 2.6.1) and then with procedural public policy (subsection 2.6.2). Thereby I fill the abstract notion of public policy with content which further clarifies its meaning and established practice of application.

Since any thorough examination of the views in even a few representative states would dramatically exceed the limits of the present work, I provide only concise lists of the core issues of public policy. For the same volume reasons, reference is made only to scholar works summing up case law and not to individual court decisions. Also, only issues of relevance for commercial arbitration are mentioned (*e.g.* family matters not, though they often produce decisions on public policy⁶⁷).

2.6.1 Substantive Public Policy

The following cases are generally accepted to constitute a violation of substantive public policy:

- Violation of the principle *pacta sunt servanda*.⁶⁸
- Violation of the principle of good faith and the prohibition of abuse of rights.⁶⁹
- Criminal offense, being sanctioned by arbitral award, *e.g.* fraud, bribery, corruption, terrorism, trafficking.⁷⁰
- Violation of the protection of proprietary rights, *e.g.* expropriation without adequate compensation or, in some civil law countries, punitive damages (though this is highly controversial).⁷¹

⁶⁷ Public policy considerations on family matters often concern principles such as personal freedom, right to equal treatment, prohibition of discrimination or freedom of marriage.

⁶⁸ ILA Report, *supra* note 8, 6, mn. 28; Kröll, *supra* note 34, 556; Schwarz/Ortner, *supra* note 10, 204s.

⁶⁹ ILA Recommendations, *supra* note 12, Art. 1 (e), 346; ILA Report, *supra* note 8, 6, mn. 28.

⁷⁰ ILA Report, *supra* note 8, 6, mn. 28; Kröll, *supra* note 34, 555; Simon Greenberg/Christopher Kee/J. Romesh Weeramantry, *International Commercial Arbitration, An Asia-Pacific Perspective* (2011) 462; Racine, *supra* note 6, 494-499; Otto/Elwan, *supra* note 6, 372s.

⁷¹ ILA Report, *supra* note 8, 6, mn. 28; Kröll, *supra* note 34, 556s; Racine, *supra* note 6, 492-494; Otto/Elwan, *supra* note 6, 403.

- Violation of anti-trust and competition laws, including, in European Union (hereinafter “EU”) member states, basic EU provisions on the common market.⁷²
- Violation of fiscal laws, *e.g.* tax laws, currency control laws.⁷³
- Violation of social protection laws, *e.g.* consumer protection laws.⁷⁴
- Violation of laws enforcing foreign policy or other direct international obligations, *e.g.* export/import restrictions, embargoes, sanctions in UN Security Council resolutions.⁷⁵
- Subject matter not capable of being settled by arbitration, *i.e.* Convention Art. V (2) (a) (which remains a separate legal provision only due to historic reasons).⁷⁶

As can be seen again from the above list, public policy comprises only mandatory rules which protect interests of the public, of society as a whole. Correspondingly, the specific rules covered by public policy are footed in and protect fundamental principles such as the rule of law and a functioning economy. The case law presented confirms the general concepts established in section 2.3 above. Nevertheless, it is to be stressed that even in the areas listed above not all rules form part of public policy but only those fulfilling the general criteria of public policy, in particular being mandatory norms of fundamental importance.

2.6.2 Procedural Public Policy

As in most civil proceedings and particularly in arbitral proceedings (being based on the agreement of the parties), the parties have directing and control of the proceedings in their

⁷² ILA Report, *supra* note 8, 7, mn. 30; Kröll, *supra* note 34,, 555s; Haas, *supra* note 39, 399, 523s; Otto/Elwan, *supra* note 6, 382-384; Schwarz/Ortner, *supra* note 10, 160-166.

⁷³ ILA Report, *supra* note 8, 7, mn. 30; Kröll, *supra* note 34, 555s; Haas, *supra* note 39, 399, 523s; Otto/Elwan, *supra* note 6, 382-384.

⁷⁴ ILA Report, *supra* note 8, 7, mn. 30; Kröll, *supra* note 34, 555s; Otto/Elwan, *supra* note 6, 384.

⁷⁵ ILA Report, *supra* note 8, 7, mn. 30s; Kröll, *supra* note 34, 555s; Otto/Elwan, *supra* note 6, 384.

⁷⁶ Sanders, *supra* note 6, 323; Van den Berg, *supra* note 6, 360, 368s; Hanotiau/Caprassé, *supra* note 20, 800s.

own hands. Consequently, a party cannot legitimately claim any public policy violation which results from its own behavior, such as negligence or deliberate non-participation in the proceedings.⁷⁷ Similarly, many jurisdictions deem parties to have waived the right to oppose recognition or enforcement on grounds which they could have raised earlier, *i.e.* during the arbitral proceedings, but failed to do so.⁷⁸

In light of the above and without the intention or pretension to provide an exhaustive list, the following issues are generally considered to be part of procedural public policy:

- Violation of the right to be heard, including the right to fair notice, the right to present the party's case (together with supporting evidence), the right to address the case of the opponent and the right that the party's submission is given consideration by the arbitral tribunal.⁷⁹
- Violation of the requirement of effective neutrality and impartiality of the arbitrators (meaning that there are not only circumstances questioning the arbitrator's impartiality but that furthermore this has a practical effect on the proceedings).⁸⁰
- Violation of the right to the parties' equal footing in the appointment of the arbitrator(s), *i.e.* predominance of a party in the composition of the arbitral tribunal.⁸¹
- Conduct of arbitral proceedings despite pending insolvency proceedings if these require automatic stay of all other proceedings.⁸²

⁷⁷ Rubino-Sammartano, *supra* note 41, 514s; Otto/Elwan, *supra* note 6, 387-391.

⁷⁸ Otto/Elwan, *supra* note 6, 406s.

⁷⁹ Rubino-Sammartano, *supra* note 41, 514; Kröll, *supra* note 34, 557-561; Schwarz/Ortner, *supra* note 10, 187-189; Hanotiau/Caprassé, *supra* note 20, 799-801; Otto/Elwan, *supra* note 6, 387-391.

⁸⁰ ILA Report, *supra* note 8, 7, mn. 29; Van den Berg, *supra* note 6, 377s; Van den Berg 2003, *supra* note 32, 667s; Van den Berg 2008, *supra* note 32, 65; Rubino-Sammartano, *supra* note 41, 516s; Haas, *supra* note 39, 399, 522, mn. 109; Schwarz/Ortner, *supra* note 10, 196-198; Otto/Elwan, *supra* note 6, 369-371, 387-394.

⁸¹ ILA Report, *supra* note 8, 7, mn. 29; Rubino-Sammartano, *supra* note 41, 522s; Haas, *supra* note 39, 399, 522, mn. 109; Hanotiau/Caprassé, *supra* note 20, 799-801.

- Unacceptability of proceedings, *e.g.* acts of war making it impossible for a party to participate in the proceedings which are nevertheless conducted.⁸³
- Lack of valid arbitration agreement.⁸⁴
- Malicious use of process, bad faith, *e.g.* preventing a party from voluntarily complying with an award, obtaining an award despite a prior out of court settlement.⁸⁵
- Criminal offense affecting the making of the arbitral award, *e.g.* fraud, bribery, corruption.⁸⁶
- Violation of the principle of *res judicata*.⁸⁷
- Violation of party-agreed time limits.⁸⁸
- Lack of reasons in the award or reasons so contradictory as if there were no reasons: This is generally held to be a public policy violation only if reasons are required both at the place of arbitration and at the place of recognition or enforcement, though even this is disputed.⁸⁹

The above list of violations of law which qualify as public policy violations is not and cannot be exhaustive. Still, it certainly shows that recognition or enforcement based on procedural public policy grounds may only be denied in extreme cases. Also, it fills the vague definition

⁸² Racine, *supra* note 6, 499, 505; Otto/Elwan, *supra* note 6, 378-382.

⁸³ Haas, *supra* note 39, 399, 522, mn. 109.

⁸⁴ Haas, *supra* note 39, 399, 522, mn. 109; Hanotiau/Caprassé, *supra* note 20, 799-801.

⁸⁵ Haas, *supra* note 39, 399, 522, mn. 109; Otto/Elwan, *supra* note 6, 387-394.

⁸⁶ ILA Report, *supra* note 8, 7, mn. 29; Schwarz/Ortner, *supra* note 10, 198-202; Otto/Elwan, *supra* note 6, 374s.

⁸⁷ ILA Report, *supra* note 8, 7, mn. 29; Schwarz/Ortner, *supra* note 10, 212-215; Otto/Elwan, *supra* note 6, 387-394.

⁸⁸ Otto/Elwan, *supra* note 6, 377.

⁸⁹ Van den Berg, *supra* note 6, 381s; Van den Berg 2003, *supra* note 32, 665-668; Van den Berg 2008, *supra* note 32, 65; Kröll, *supra* note 34, 561s; Rubino-Sammartano, *supra* note 41, 518-520; Schwarz/Ortner, *supra* note 10, 205-207; Otto/Elwan, *supra* note 6, 375-377.

of public policy with content and provides a benchmark which serves as an orientation guide for the national implementation of public policy,

2.7 Conclusion

Legislation, jurisdiction and literature on public policy is abundant, especially if examined on a global level. This chapter focused on internationally accepted principles with regard to the application of public policy in order to establish an international standard based on the very fundament of public policy's role in international commercial arbitration – Convention Art. V (2) (b). While acknowledging the connected difficulties, I proposed a definition of public policy combining conceptual and functional elements. Based on the wording and drafting history of the provision I presented certain general concepts of its implementation. I rejected the application of domestic or supranational public policy in the framework of the Convention and established that the applicable standard of public policy is that of international public policy. Subsequently, concerning the scope of review to be applied by the recognizing or enforcing court insofar as public policy violations are concerned I argued in favor of a total court review over the award. Finally, I provided a non-exhaustive list of substantive and procedural violations of law which are generally agreed upon to constitute public policy violations. All in all, these established international standards serve to establish a clear international concept of public policy as a benchmark for the national applications of the public policy exception. Such national implementations and their compliance with the established benchmark are examined using the examples of Austria and Hungary in the following chapters.

3 Public policy in Austria

In the preceding chapter, I identified the rules, concepts and practices of the public policy exception, as universally understood in the international arena. In the present chapter, I analyze the same issues with respect to Austria. In doing so, I concentrate on the problematic issues, *i.e.* those issues where the Austrian legislation and/or practice deviates from the international understandings, while not neglecting an overall presentation of the general Austrian public policy perceptions.

The chapter follows the concept of the preceding chapter in order to facilitate comparisons between international and Austrian understanding of the relevant topics. However, the section numbering does not fully mirror that of the preceding chapter: There is no separate section on the definition of public policy. The reason for this is that the basic idea of public policy, as defined in the international context, is the same in all legislations. Only the content and the practical application of public policy might differ – this is what I focus on. Therefore, this chapter is structured as follows: First I present the Austrian provision on the public policy exception and other relevant provisions on public policy (section 3.1) as well as the therewith connected general concepts (section 3.2). Next, I deal with the applicable standard of public policy (section 3.3) and applicable scope of review (section 3.4). Subsequently, I provide an overview over the substantive and the procedural issues held to be covered by public policy in Austria (section 3.5). Finally, I sum up my findings and conclusions (section 3.6).

3.1 Austrian Provisions on Public Policy

As in section 2.2, this section first identifies the provision on the public policy exception (subsection 3.1.1) and then other relevant provisions on public policy (subsection 3.1.2).

3.1.1 Section 614 (1) Austrian Code of Civil Procedure

The relevant public policy provision in Austria is Section 614 (1) of the Austrian Code of Civil Procedure⁹⁰ (“*Zivilprozessordnung*”, hereinafter “ACCP”) which was introduced with the Arbitration Law Reform Act 2006⁹¹ („*Schiedsrechtsänderungsgesetz 2006*“, hereinafter „2006 Reform Act“). It reads, in its relevant parts, as follows:

„The recognition and declaration of enforceability of foreign arbitral awards shall be governed by the provisions of the Enforcement Act unless otherwise provided in international law or in legal instruments of the European Union. [...]“

This provision was introduced from the scratch in 2006 and, thus, there are no predecessors. The provisions of the Austrian Enforcement Act⁹² (“*Exekutionsordnung*”, hereinafter “AEA”) referred to in this norm are reproduced immediately below.

3.1.2 Other provisions on public policy

The relevant provisions of the AEA referred to in Section 614 (1) ACCP are 79-86 AEA. They concern, as the title of this part of the AEA clarifies, the “declaration of enforceability and recognition of acts and documents established abroad”. Among them, the following two norms are relevant here:

Section 81 (3) AEA:

“The declaration of enforceability is [...] to be denied [...] if by the declaration of enforceability a legal relationship is to be recognized or a claim is to be realized

⁹⁰ RGBl. No. 113/1895, <http://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=18950004&seite=00000365> (visited on Mar. 30, 2012).

⁹¹ BGBl. No. I 7/2006, English translation, http://www.ris.bka.gv.at/Dokumente/ErV/ERV_2006_1_7/ERV_2006_1_7.pdf (visited on Mar. 30, 2012). The provisions introduced by the 2006 Reform Act are the current provisions of the ACCP on arbitral proceedings.

⁹² RGBl. No. 79/1896, <http://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=18960004&seite=00000269> (visited on Mar. 30, 2012).

which is denied domestic validity or actionability by the domestic law due to public order or morality.”⁹³

Section 86 (1) AEA:

“The preceding provisions are inapplicable insofar as international law or legal acts of the European Union provide otherwise.”⁹⁴

Furthermore, Section 6 of the Austrian Private International Law Act⁹⁵ (“*Internationales Privatrechtsgesetz*”, hereinafter “APILA”) also contains a reference to public policy. Section 6 APILA reads, in its relevant parts, as follows:

“A provision of the foreign law is inapplicable if its application would lead to a result which conflicts with the fundamental values of the Austrian legal system. [...]”⁹⁶

Finally, as with the Convention and the Model Law, the Austrian provision on the setting aside of arbitral awards provides further insight. This is Section 611 (2) (5) and (8) ACCP which reads as follows:

“An arbitral award shall be set aside if [...] (5) the arbitral proceedings were conducted in a manner that conflicts with the fundamental values of the Austrian legal system (*ordre public*); [...] (8) the arbitral award conflicts with the fundamental values of the Austrian legal system (*ordre public*).“

As mentioned above, Section 614 (1) ACCP, the provision on the recognition and enforcement of foreign awards has no predecessor. Only the provision on setting aside, Section 611 (2) (5) and (8) ACCP, has a predecessor with Section 595 (1) (6) ACCP as

⁹³ Translation by the author.

⁹⁴ Translation by the author.

⁹⁵ BGBl. No. 304/1978, https://www.ris.bka.gv.at/Dokumente/BgblPdf/1978_304_0/1978_304_0.pdf (visited on Mar. 30, 2012).

⁹⁶ Translation by the author.

introduced by the Austrian Civil Procedure Amendment 1983⁹⁷ (“*Zivilverfahrensnovelle 1983*”, hereinafter “1983 Reform Act”) and in force until the 2006 Reform Act:

The arbitral award is to be set aside [...] if the arbitral award conflicts with the fundamental values of the Austrian legal system or violates mandatory legal norms the application of which cannot be contracted out of by a choice of law of the parties even in circumstances with foreign connections according to Section 35 APILA.”⁹⁸

It is to be noted that this provision introduced in 1983 has no predecessor.

3.2 General Concepts of Application of Public Policy

This section deals with general perceptions of the public policy exception derived from the respective provisions’ wording and history. It demonstrates these general perceptions through three specificities of Austrian law: the direct applicability of Convention Art. V (2) (b), the (former) qualification of all mandatory norms as public policy and the explicit recognition of procedural issues as part of public policy in a separate provision. Other more specific issues are dealt with in the subsequent sections.

At the outset, it is to be noted that (in line with the requirement of uniform interpretation of legal provisions within a legal system) the notion of public policy is regarded to have the same meaning and scope in the different Austrian provisions on public policy described above.⁹⁹ Thus, legal opinions by courts and scholars on any of these provisions can be used with respect to the others as well. This is all the more true in the present case as Section 611

⁹⁷ BGBl. No. 135/1983, https://www.ris.bka.gv.at/Dokumente/BgblPdf/1983_135_0/1983_135_0.pdf (visited on Mar. 30, 2012).

⁹⁸ Translation by the author.

⁹⁹ Austrian Supreme Court (hereinafter “ASC”) decision of Mar. 31, 2005, 3 Ob 35/05a; Dolinar/Lanier, *supra* note 57, 82s; Hausmaninger, *supra* note 22, Section 611, mn. 77; Werner Schütz, § 81, in Peter Angst (ed.), *Kommentar zur Exekutionsordnung*, 2nd ed. (2008) mn. 5; Christian Gamauf, *Aktuelle Probleme des ordre public im Schiedsverfahren, insbesondere im Hinblick auf Eingriffsnormen*, in *Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht* (2000) 41; Schwarz/Ortner, *supra* note 10, 170s; Dietmar Czernich, *New Yorker Schiedsübereinkommen: Kurzkomentar* (2008) Art. V, mn. 73.

ACCP on the setting aside of arbitral awards implements Model Law Art. 34, including the public policy exception contained therein.¹⁰⁰ Therefore, the present treatise avails itself of the more extensive court decisions and commentaries on the other public policy provisions, in particular on Section 611 ACCP.

The first apparent specificity of Austrian law is that the provision on the recognition and enforcement of foreign awards, Section 614 (1) ACCP, does not follow the Model Law Art. 36 in providing itself for rules on recognition or enforcement.¹⁰¹ Instead, Section 614 (1) ACCP refers to rules of the AEA. However, Section 614 (1) ACCP at the same time provides that the AEA is superseded by pertinent EU law or international law. Presently, there is no EU legislation on this issue. However, there is a prominent relevant instrument of international law: the Convention. Austria has acceded to and implemented the Convention in 1961.¹⁰² Thus, the Convention supersedes the AEA.¹⁰³ This result is re-confirmed by the AEA itself: Though it contains a public policy exception of its own in its Section 81 (3), it provides in its Section 86 (1) that international law supersedes the AEA (only with respect to the recognition and enforcement of foreign acts and documents). In fact, such priority of international law follows already from principles of Austrian law and Section 86 (1) AEA; Section 614 (1) ACCP was only introduced to clarify this legal situation, in particular for foreign users of arbitration in Austria.¹⁰⁴ Moreover, under Austrian law the Convention is self-executing and is to be applied directly.¹⁰⁵ Consequently, recognition and enforcement of foreign arbitral awards is directly governed by Convention Art. V (2) (b) in Austria. This *per se* guarantees

¹⁰⁰ Hausmaninger, *supra* note 22, Section 611, mn. 1.

¹⁰¹ For the reasons see Hausmaninger, *supra* note 22, Section 614, mn. 9s.

¹⁰² BGBl. No. 200/1961, https://www.ris.bka.gv.at/Dokumente/BgblPdf/1961_200_0/1961_200_0.pdf (visited on Mar. 30, 2012).

¹⁰³ Christoph Liebscher/Andreas Schmid, *Country Report on Austria*, in Frank-Bernd Weigand (ed.), *Practitioner's Handbook on International Arbitration* (2002) 585; Dolinar/Lanier, *supra* note 57, 87; Hausmaninger, *supra* note 22, Section 614, mn. 34-40; Alfred Burgstaller/Johann Höllwerth, §§ 79-86a, in Alfred Burgstaller *et al.* (eds.), *Exekutionsordnung Kommentar* (2001) Section 79, mn. 6.

¹⁰⁴ Hausmaninger, *supra* note 22, Section 614, mn. 31s.

¹⁰⁵ Dolinar/Lanier, *supra* note 57, 87.

that Austrian practice is by and large in line with international practice (though not completely, as shown in particular in section 3.3 below).

As a second specificity, though the Convention has been directly applicable, Austrian jurisdiction held until 1983 that every violation of mandatory norms amounts to a public policy violation.¹⁰⁶ The Austrian legislator decided to specifically address this issue in the 1983 Reform Act with the intention of narrowing the control of arbitral awards by courts.¹⁰⁷ It introduced a new provision, Section 595 (1) (6) ACCP on the setting aside of arbitral awards which clarified that the public policy exception comprised only violations of “fundamental values of the Austrian legal system or of mandatory legal norms the application of which cannot be contracted out of by a choice of law of the parties even in circumstances with foreign connections according to Section 35 APILA”. As a result, Austrian courts have quickly come to display a vastly pro-arbitration and pro-enforcement attitude.¹⁰⁸ They have ever since recognized that the violation of mandatory norms in itself does not suffice to constitute a public policy violation and that the public policy exception is to be construed as narrow as possible.¹⁰⁹ The 2006 Reform Act re-numbered Section 595 (1) (6) ACCP (now Section 611 (2) (5) and (8) ACCP) and modified it to refer to “fundamental values of the Austrian legal system (ordre public)” only. Any reference to mandatory legal norms, however qualified, was abandoned in order to render the provision’s wording clearer and in line with the Model Law.¹¹⁰

¹⁰⁶ See as one of the last examples ASC decision of May 11, 1983, 3 Ob 30/83.

¹⁰⁷ Ignaz Seidl-Hohenveldern, *Austrian Public Policy and the Enforcement of Foreign Arbitral Awards*, in *Arbitration International*, Vol. 4/1 (1988) 322, 322, 328-330; Paul Oberhammer, *Gemeinschaftsrecht und schiedsrechtlicher ordre public*, in *Recht der Wirtschaft* (1999) 62, 62s.

¹⁰⁸ Dolinar/Lanier, *supra* note 57, 48.

¹⁰⁹ Legal formula of the ASC RS0110743, referring *inter alia* to: ASC decisions of Sep. 24, 1998, 6 Ob 242/98a; ASC decision of Sep. 13, 2000, 4 Ob 199/00v; ASC decision of Jan. 26, 2005, 3 Ob 221/04b; ASC decision of Apr. 10, 2008, 2 Ob 50/08d.

¹¹⁰ Hausmaninger, *supra* note 22, Section 611, mn. 200-202.

A third specificity of Austrian law is to be mentioned: In deviation from the Model Law, Austrian law explicitly splits the public policy ground in violation of procedural public policy (Section 611 (2) (5) ACCP) and violation of substantive public policy (Section 611 (2) (8) ACCP). The reason for this is that before the adoption of the 2006 Reform Act it was disputed whether procedural issues could be part of public policy: older court decisions denied it, newer ones admitted it.¹¹¹ This dispute was decided for good by the explicit and separate mentioning of procedural public policy.¹¹² Thus, Austria recognizes the violation of certain procedural rules as violation of public policy. (Nevertheless, procedural issues still do not enjoy exactly the same level of protection as substantive issues: According to Sections 611 (3) and 613 ACCP an award may be set aside *ex officio* if it violates substantive public policy – something not foreseen for procedural issues. However, this distinction only applies for setting aside procedures, not for procedures on recognition or enforcement.)

Based upon the above, the following fundamental concepts can be established for the Austrian practice: Today it is generally recognized that not every violation of mandatory norms amounts to a public policy violation,¹¹³ though only the violation of a mandatory rule may qualify as public policy violation.¹¹⁴ In other words, mandatory nature is a necessary but not sufficient condition for a norm to be regarded as part of public policy. For that, a norm must in addition protect the basic fundaments of society, public and economic life or justice, short:

¹¹¹ Nikolaus Pitkowitz, *Die Aufhebung von Schiedssprüchen* (2008) 85s, mn. 320s; Alfred Burgstaller, *Vollstreckung ausländischer Schiedssprüche in Österreich*, in *Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht* (2000) 83.

¹¹² For the reasons leading to such legislative solution see Hausmaninger, *supra* note 22, Section 611, mn. 167-169.

¹¹³ Legal formulae of the ASC RS0110743, RS0110125, RS0110126 and RS0084878; Hausmaninger, *supra* note 22, Section 611, mn. 203s; Dolinar/Lanier, *supra* note 57, 80s; Claudia Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards* (2010), 38; Bea Verschraegen, *IPRG*, in Peter Rummel (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd ed. (2007) Section 6, mn. 1; Seidl-Hohenveldern, *supra* note 107, 328; Pitkowitz, *supra* note 111, 100, mn. 397s; Czernich, *supra* note 99, mn. 68

¹¹⁴ Pitkowitz, *supra* note 111, 100, mn. 397s; Czernich, *supra* note 99, mn. 68; Gamauf, *supra* note 99, 41.

crucial public, not private interests.¹¹⁵ In line with the maxim of narrow interpretation, the public policy ground is to be used most sparingly.¹¹⁶ The Austrian Supreme Court sums up as follows:¹¹⁷

“Since the public policy clause represents an exception contrary to the system, most sparing use of it is required in general, neither a simple inequity of the result nor a simple contradiction to mandatory Austrian norms being sufficient. Rather, fundamental values of the Austrian legal order must be the subject matter of the violation. The second essential condition for the reservation clause to intervene is that the result of the application of the foreign substantive law and not merely the law itself is offensive and furthermore a sufficient domestic connection is given.”

And further on, still in the words of the Austrian Supreme Court:¹¹⁸

“The ‘fundamental values of the Austrian legal system’ in the sense of Section 595 (1) (6) ACCP [*now Section 611 (2) (5) and (8) ACCP*] are understood to encompass in particular the primary fundamentals of the federal constitution, of criminal law, of private law and of procedural law but also of public law. Not the reasoning but the result of the arbitral award is decisive for the review by the ordinary courts in this framework. The circle of the fundamental values protected by the legal order is also narrower than the area of mandatory law.”

All this shows that despite some legislative peculiarities the Austrian provisions on the recognition and enforcement of foreign arbitral awards are in line with the Convention and the Model Law. The same is true for the general ideas of the application of the public policy exception: The ground is to be interpreted narrowly, it does not comprise all mandatory norms but only those of fundamental importance to the Austrian legal system and it covers procedural issues too.

¹¹⁵ Hausmaninger, *supra* note 22, Section 611, mn. 203s; Verschraegen, *supra* note 115, mn. 1; Alfons, *supra* note 115, 38s; Czernich, *supra* note 99, mn. 67.

¹¹⁶ Hausmaninger, *supra* note 22, Section 611, mn. 205; Czernich, *supra* note 99, mn. 67; Schütz, *supra* note 99, mn. 4s.

¹¹⁷ Legal formula of the ASC RS0110743.

¹¹⁸ Legal formula of the ASC RS0110125.

3.3 Applicable Standard of Public Policy: Domestic, International or Supranational?

After having clarified in the previous section that Austrian law is applicable to the public policy assessment, the question arises what kind of public policy Austria applies to the control of foreign awards. I have shown above in section 2.4 that there is a distinction to be made between domestic and international public policy and that only the latter is to be applied to the recognition or enforcement of foreign awards, whereas supranational public policy is not (yet) established and thus not to be applied. Does Austria follow this international concept?

At first sight, considering only the provision on the recognition and enforcement of foreign arbitral awards, the answer should be clearly affirmative: Section 614 (1) ACCP renders Convention Art. V (2) (b) directly applicable in Austria.¹¹⁹ Thus, one might be inclined to think that Austrian jurisdiction follows the established view on the Convention's respective provision that not domestic, but a narrower, international public policy is to be applied. However, this is not the case: In a leading case,¹²⁰ the Austrian Supreme Court rejected any distinction between domestic public policy and international public policy and found that there is one and only (domestic) public policy which is to be applied also to foreign awards. Despite some criticism,¹²¹ the majority of commentators¹²² has reproduced and implicitly accepted this view without going into details.

It is worth citing the relevant part of the ASC decision:

¹¹⁹ See above subsection 3.2.

¹²⁰ ASC decision of May 11, 1983, 3Ob30/83.

¹²¹ Seidl-Hohenveldern, *supra* note 107, 325-328; Rubino-Sammartano, *supra* note 41, 532.

¹²² Burgstaller/Höllwerth, *supra* note 103, Section 81, mn. 14; Czernich, *supra* note 99, mn. 66; Christoph Liebscher, *The Healthy Award, Challenge in International Commercial Arbitration* (2003) 417; Burgstaller, *supra* note 111, 83; Dolinar/Lanier, *supra* note 57, 79-81.

“The attempts of the appellant, relying on foreign authors, to construct a distinction between two kinds of public policy, a kind of domestic *ordre public* (‘domestic public policy’) and a kind of supranational *ordre public* (‘international public policy’) must fail. According to Art. V, para. 2, lit. b of the [New York Convention] what matters beyond any doubt is if enforcement is contrary to the public order of the country where enforcement of the award is sought.”¹²³

It is obvious already from the above citation that the ASC based its conclusion on two misconceptions: First, as Seidl-Hohenveldern¹²⁴ has correctly pointed out, the ASC mistook international public policy for supranational public policy: This is clear not only from the wording “*supranational ordre public (‘international public policy’)*” which reflects a confusion of both concepts but also from the rejection of the idea, based on the wording of Convention Art. V (2) (b), that any other public policy than that of the country of enforcement could be relevant. Second, the ASC incorrectly relied on the Convention’s reference to the public policy of the country where recognition and enforcement is sought for concluding that there is no distinction between domestic and international public policy: In reality, this provision’s wording does not say anything about the applicable standard of public policy, *i.e.* whether the broader domestic or the narrower international public policy is to be applied. This question is only decided by the interpretation principles detailed in sections 2.3 and 2.4 above according to which a narrow interpretation, and thus the notion of international public policy must prevail.

A different way to interpret this ASC decision could be the following: What the ASC clearly, and correctly, rejected based on Convention Art. V (2) (b)’s wording was the notion of supranational public policy. It seems that due to its confusion of the two notions, it inadvertently also rejected international public policy. That the ASC was not aware of such second rejection can be concluded from the fact that the ASC recognized that for enforcement

¹²³ ASC decision of May 11, 1983, 3Ob30/83, translation in Seidl-Hohenveldern, *supra* note 107, 324.

¹²⁴ Seidl-Hohenveldern, *supra* note 107, 326.

in Austria the public policy of Austria is applicable – of which international public policy is part. One could interpret the ASC’s rejection of “*supranational* ordre public (*‘international public policy’*)” as a negligible unlucky choice of words and only referring to public policy not rooted in national law, *i.e.* supranational public policy. This way one had to arrive to the conclusion that the ASC only stated the obvious (Austrian public policy is applicable) without at the same time making any decision on which Austrian public policy (domestic or international) is applicable. With such interpretation, the 3Ob30/83 decision would not even had to be necessarily overturned but it could be continued (as rejecting supranational public policy) and further specified in a question left open – a certainly lower barrier for the Supreme Court for correcting this mistake.

If, however, one sticks to the standard interpretation of this decision as rejecting the notion of international public policy, then this decision (and the thereupon established general Austrian approach) must be dismissed as clearly incorrect. The Convention was already directly applicable in Austria at the time the judgement was rendered (1983). As such, the Supreme Court would have had to take into account the drafting history of and the authoritative foreign commentaries on the Convention. Had it done so, it would have certainly arrived at the correct conclusion, as also established in section 2.4 above, *i.e.* that the Convention refers to international public policy.

Certainly, it should not be forgotten that this unfortunate decision was made based upon provisions of the ACCP which have been changed twice since, by the 1983 and the 2006 Reform Acts. However, though these reforms narrowed the scope of the ground for non-recognition or non-enforcement, they still did not recognize the applicability of international public policy for foreign awards as opposed to domestic public policy for domestic awards:

Contrary to Seidl-Hohenveldern's suggestion,¹²⁵ the 1983 Reform Act, in the new Section 595 (1) (6) ACCP, only restricted the public policy violation from previously all violations of mandatory rules to violations of "fundamental values of the Austrian legal system or [of] mandatory legal norms the application of which cannot be contracted out of by a choice of law of the parties". Such wording clearly did conform to the Convention but still did not overrule the jurisdictional rejection of international public policy. Also the 2006 Reform Act did not amend this insufficiency: Though it was suggested in the drafting procedure to introduce a wording making clear reference to international public policy, the legislator chose the final wording "*fundamental values of the Austrian legal system (ordre public)*" in Sections 611 (2) (5) and (8) ACCP.¹²⁶ This, again, indicates a very narrow view of public policy, not comprising all mandatory legal norms, but it does not recognize the notion of international public policy and, thus, fails to correct the Austrian Supreme Court's approach.

Still, it should be noted that the Austrian refusal to recognize the concept of international public policy for foreign awards does not make Austrian jurisdiction parochial or anti-arbitration. Even more, it has hardly any practical significance: As is shown in section 3.5 below, Austrian courts interpret public policy in general very narrowly and in compliance with the Convention's substantive requirements. Thus, Austria might nominally apply its "domestic" public policy also to foreign awards but in fact, by aligning its domestic public policy concept with the international one, it applies international public policy to foreign and domestic awards. Thus, the "damage" caused by the 3Ob30/83 decision is limited to unnecessary terminological and theoretical confusion.

All in all, it is to be concluded that despite the direct applicability of the Convention, Austrian practice rejects the notions of supranational public policy (correctly) and of international

¹²⁵ Seidl-Hohenveldern, *supra* note 107, 328s.

¹²⁶ Hausmaninger, *supra* note 22, Section 611, mn. 200.

public policy (incorrectly) and applies a single domestic public policy standard to all arbitral awards, domestic and foreign. This goes back to a single misguided but almost unquestioned decision of the Austrian Supreme Court. Though due to the general narrow application of the public policy exception there are no practical disadvantages and Austrian practice complies *de facto* with the Convention, the rejection of the notion of international public policy creates confusion and should be abandoned.

3.4 Scope of Court Review

In section 2.5 above, I have established that, in the international arena, total control of awards with respect to public policy is appropriate. The reason given for this was practical considerations: If the court was restricted in any way in its assessment of public policy conformity, the public policy control could be easily rendered meaningless. The same practicability aspect must apply to Austria, irrespective of the legislation. Whether, as a result, Austrian practice supports such total review is addressed in the following.

As a starting point, it should be clarified how Austrian law categorizes the proceedings for recognition and enforcement of foreign arbitral awards since this determines the applicable procedural rules. In Austria, foreign awards are recognized *ipso iure*, without further procedure.¹²⁷ In contrast, for a foreign award to be enforced, it must be first declared enforceable in a separate procedure.¹²⁸ Jurisdiction¹²⁹ and doctrine¹³⁰ both agree that though this procedure is to be conducted according to Austrian law by Austrian courts, it is an independent procedure *sui generis* forming an addition to the foreign procedure on the merits.

¹²⁷ Hausmaninger, *supra* note 22, Section 614, mn. 41.

¹²⁸ Section 79 (1) AEA.

¹²⁹ Legal formula of the ASC RS0118766, referring to ASC decision of Mar. 25, 2004, 3Ob175/03m.

¹³⁰ Werner Jakusch, § 79, in Peter Angst (ed.), *Kommentar zur Exekutionsordnung*, 2nd ed. (2008) mn. 2; Hausmaninger, *supra* note 22, Section 614, mn. 42.

As a consequence, this procedure does not qualify as an enforcement procedure and, thus, unlike in enforcement procedures, the parties may raise new evidence¹³¹ (though certainly not on the merits but limited to the issue of declaration of enforceability). This in turn implies that, as far as public policy is concerned, the court is not bound by the factual and legal assessment in the arbitral award (otherwise the raising of new evidence would be meaningless) but has to assess the award's compliance with public policy independently.¹³² The very nature of such factual and legal control indicates that the court review is not restricted to any specific parts of the award, such as the operative parts, but the whole award, including the parties' underlying legal relationship and the award's reasoning, is to be examined.¹³³ At the same time, the only relevant aspect for the public policy control is not the reasoning or legal assessment itself in the award but the result of the award.¹³⁴ This is understanding in line with the public policy exception's function not to assess the public policy conformity of the award itself but only that of its enforcement.

As in the international field, it is to be stressed that the total control of the award's result is strictly to be limited to the area of public policy and may under no circumstances amount to a *révision au fonds*, i.e. a review of the award by the court on the "simple" merits.¹³⁵

¹³¹ Hausmaninger, *supra* note 22, Section 614, mn. 42; Reiner, *supra* note 113, 326.

¹³² Hausmaninger, *supra* note 22, Section 611, mn. 206; Burgstaller/Höllwerth, *supra* note 103, Section 81, mn. 10, 16; Pitkowitz, *supra* note 111, 102, mn. 402; Reiner, *supra* note 113, 326.

¹³³ Legal formula of the ASC RS0045074, referring to ASC decision of Jan. 15, 1929, 1 Ob 1104/28; Legal formula of the ASC RS0045127, referring to ASC decision of Feb. 9, 1955, 3Ob37/55; Hausmaninger, *supra* note 22, Section 611, mn. 206; Pitkowitz, *supra* note 111, 101s, mn. 401, 406.

¹³⁴ Legal formula of the ASC RS0110125, referring *inter alia* to ASC decision of Jan. 26, 2005, 3Ob221/04b and recently to ASC decision of Aug. 24, 2011, 3Ob65/11x; Hausmaninger, *supra* note 22, Section 611, mn. 206; Pitkowitz, *supra* note 111, 101s, mn. 401; Verschraegen, *supra* note 115, mn. 3.

¹³⁵ Legal formula of the ASC RS0045124; Hausmaninger, *supra* note 22, Section 611, mn. 3, 205; Schütz, *supra* note 99, mn. 4; Pitkowitz, *supra* note 111, 102, mn. 402; Czernich, *supra* note 99, mn. 64; Reiner, *supra* note 113, 326; Oberhammer, *supra* note 107, 62s.

It can be concluded from the above that Austria allows the total control of the award with respect to public policy compliance. This is in line with the somewhat disputed but correct international maximal approach to the question of scope of review.

3.5 Content of Public Policy

In the following, I provide a list of issues which have (or have not) been qualified as public policy violations by Austrian courts. I first deal with substantive public policy (subsection 3.5.1) and then with procedural public policy (subsection 3.5.2). As in section 2.6 above, the below lists concentrate on issues relevant for international commercial arbitration and do not pretend to be exhaustive.

3.5.1 Substantive Public Policy

The following issues have been qualified as public policy violations in Austria:

- Violations of the principle of personal freedom, equal rights, prohibition of discrimination based on descent, race or religion.¹³⁶
- Violations of fundamental rules of contract law, such as compulsion or fraud.¹³⁷
- Violation of the prohibition to exploit an economically or socially weaker party.¹³⁸
- Violations of the principle of equal treatment of creditors of the same class in insolvency proceedings.¹³⁹

¹³⁶ ASC decision of Jul. 10, 1986, 7Ob600/86.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ ASC decision of Nov. 24, 1926, 1 Ob 798/26.

- Violations of Section 16 Austrian General Civil Code, which provides that each human has inherent rights and must be regarded as a person and which prohibits slavery; through this provision the general ideas of fundamental constitutional rights are incorporated into matters of civil law.¹⁴⁰
- Violations of fundamental EU laws, *e.g.* of Art. 101s of the Treaty on the Functioning of the European Union¹⁴¹ (hereinafter “TFEU”) on free competition in the common market.¹⁴² With this 2007 decision (correctly) restricting public policy to the *fundaments* of EU law, the Austrian Supreme Court seems to have abandoned (though not explicitly overruled) its heavily criticized¹⁴³ 1998 decision¹⁴⁴ in which it held that the violation of *any* legal act of the EU (in that case: on value added tax) amounts to a violation of Austrian public policy due to the mandatory nature of EU law and its precedence over Austrian law.
- Application of an excessive interest rate of 107,35% *p.a.*:¹⁴⁵ The ASC denied enforcement of the award with the argument that at such rate the interests exceed the principal amount within one year which violates Austrian morality and also public policy. In contrast, the ASC (correctly) did not find interest rates of 26% *p.a.* or 35% *p.a.* objectionable (see below).

¹⁴⁰ ASC decision of Aug. 31, 1995, 3 Ob 566/95.

¹⁴¹ Treaty on the Functioning of the European Union, Official Journal of the European Union, May 9, 2008, C 115/47, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF> (visited on Mar. 30, 2012).

¹⁴² Legal formula of the ASC RS0109633, referring to ASC decision of Feb. 22, 2007, 3Ob233/06w.

¹⁴³ Oberhammer, *supra* note 107, 64-66; Christoph Liebscher, *Aufhebung des Schiedsspruchs nach § 595 Abs 1 Z 6 ZPO und österreichisches öffentliches Recht*, in *Wirtschaftsrechtliche Blätter* (1999) 493; Gamauf, *supra* note 99, 41; Ralf Michaels, *Anerkennung internationaler Schiedssprüche und ordre public*, in *Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht* (1999) 5; Schwarz/Ortner, *supra* note 10, 161s; Pitkowitz, *supra* note 111, 105, mn. 410; Burgstaller/Höllwerth, *supra* note 103, Section 81, mn. 14s.

¹⁴⁴ ASC decision of May 5, 1998, 3Ob2372/96m.

¹⁴⁵ ASC decision of Jan. 26, 2005, 3Ob221/04b.

- Violations of consumer, employee and tenant protection laws in general,¹⁴⁶ the details being unclear due to the lack of corresponding case law.

It is also of interest to see which issues the ASC held to not violate public policy (in chronological order):

- Conclusion of *quota litis* agreements between an attorney-at-law and his client which is not permitted under Austrian law.¹⁴⁷
- Application of statute of limitation rules providing for other periods than Austrian law.¹⁴⁸
- Statutory exclusion of non-material damages.¹⁴⁹
- Granting of remuneration agreed upon in a contract to help a person flee a country under communist dictatorship.¹⁵⁰
- Decision of the arbitral tribunal whether to decide the dispute on basis of equity or by determining the damages one by one, this being a question of conduct of proceedings.¹⁵¹
- Ordering the payment of an advance on the costs of the arbitral proceedings by way of an arbitral award.¹⁵²
- Compensation for interest on credit taken because of the debtor's failure to pay his debt.¹⁵³
- Interest rates of 26% *p.a.*¹⁵⁴ or 35% *p.a.*¹⁵⁵

¹⁴⁶ Hausmaninger, *supra* note 22, Section 611, mn. 224.

¹⁴⁷ ASC decision of Apr. 4, 1951, 1Ob194/51.

¹⁴⁸ ASC decision of Apr. 1, 1960, 2 Ob 672/59; ASC decision of Jul. 28, 1998, 1Ob317/97t.

¹⁴⁹ ASC decision of Oct. 31, 1974, 2Ob240/74.

¹⁵⁰ ASC decision of Oct. 29, 1980, 7Ob688/80, published in *Juristische Blätter* (1981) 273.

¹⁵¹ ASC decision of Nov. 18, 1982, 8Ob520/82.

¹⁵² ASC decision of Oct. 30, 1985, 3Ob89/85.

¹⁵³ ASC decision of Dec. 5, 1985, 6Ob511/84.

- Application of rules differing from the Austrian ones on the fundamentals of business relations between more or less equally strong business partners.¹⁵⁶
- Recognition of the validity of a security assignment without publicity.¹⁵⁷
- Rejection of the possibility of set-off.¹⁵⁸
- “Simple” violations of the Act on Restitution of Works of Art (concerning the restitution of art works taken from their lawful owners during the Nazi regime).¹⁵⁹
- Conclusion of an arbitration agreement between an entrepreneur and a consumer is not *per se* against public policy but might be if Section 6 (2) (7) Austrian Consumer Protection Act, providing that an arbitration agreement between an entrepreneur and a consumer must be individually negotiated (thus cannot be contained in general terms and conditions), is violated.¹⁶⁰
- Punitive damages: Though the ASC has not yet addressed this issue in connection with arbitral awards, it has mentioned in a recent decision¹⁶¹ that punitive damages do not *per se* violate Austrian public policy since also Austrian law knows lump sum damages in form of contractual (liquidated) damages. However, at the same instance the ASC also founded its view on the fact that the amount of the punitive damages was not excessive in relation to the actual damage and the financial situation of the debtor. Such solution has

¹⁵⁴ *Ibid.*

¹⁵⁵ ASC decision of Sep. 15, 1998, 7Ob229/98x.

¹⁵⁶ ASC decision of Jul. 10, 1986, 7Ob600/86.

¹⁵⁷ ASC decision of Jul. 11, 1990, 1Ob648, 649/90, published in *Juristische Blätter* (1992) 189.

¹⁵⁸ ASC decision of Apr. 25, 2001, 3Ob84/01a.

¹⁵⁹ ASC decision of Apr. 1, 2008, 5Ob272/07x; Markus Schifferl, *Chapter III: The Award and the Courts – Recent Decisions of the Austrian Supreme Court on Arbitration*, in Christian Klausegger *et al.* (eds.), *Austrian Arbitration Yearbook* (2009) 421, 430-432.

¹⁶⁰ ASC decision of Jul. 22, 2009, 3Ob144/09m; Markus Schifferl, *Decisions of the Austrian Supreme Court on Arbitration in 2009 and 2010*, in Christian Klausegger *et al.* (eds.), *Austrian Arbitration Yearbook* (2011) 257, 262.

¹⁶¹ ASC decision of Mar. 22, 2011, 3Ob38/11a.

already been suggested in the literature.¹⁶² It is, thus, appropriate to deduct that the ASC would enforce an arbitral award containing punitive damages as long as the amount not excessive.

Based upon the above list one can conclude that Austrian practice on substantive public policy complies with the general principles elaborated on in the preceding sections and applies this ground consistently and only exceptionally to fundamental violations of the basic values of its legal order. Though not all circumstances of the cases are known (as the ASC holdings do not necessarily detail all facts and submissions), it is fair to conclude that the above decisions of the ASC correctly applied substantive public policy.

3.5.2 Procedural Public Policy

As already detailed above in subsection 3.2 above, Austrian law used to refuse to recognize procedural issues as a part of public policy (but still accepted some procedural flaws as grounds for setting aside or non-recognition/non-enforcement of arbitral awards under specific provisions protecting the right to be heard). This stance has been abandoned by the Austrian Supreme Court in the 1990s.¹⁶³ Today, Section 611 (2) (5) ACCP explicitly recognizes procedural issues as belonging to public policy. As in general, also procedural public policy is only violated in case of “*very serious violations of the primary fundamentals of an orderly procedure*”¹⁶⁴. Below, I present first the issues held to violate Austrian procedural public policy and then those where such violation has not been accepted.

The following cases have been qualified as violations of procedural public policy in Austria:

¹⁶² Czernich, *supra* note 99, mn. 75.

¹⁶³ Legal formula of the ASC RS0110125, referring *inter alia* to the first such ASC decision of May 5, 1998, 3Ob2372/96m.

¹⁶⁴ Legal formula of the ASC RS0117294, referring *inter alia* to ASC decision of Dec. 18, 2002, 7Ob265/02z; Burgstaller/Höllwerth, *supra* note 103, Section 81, mn. 7; Hausmaninger, *supra* note 22, Section 611, mn 170s.

- Violation of the right to be heard: This issue additionally mentioned in Section 611 (2) (2) ACCP is interpreted very restrictively by the ASC: Public policy is only violated if the right to be heard was *completely* denied.¹⁶⁵ This is the case if a party is denied opportunity to present submissions and evidence supporting its case, to make comments on the outcome of the evidence taking or is not served some documents submitted by the opponent.
- Unequal influence of the parties on the composition of the arbitral tribunal.¹⁶⁶
- Self-contradicting and incomprehensible arbitral award.¹⁶⁷
- Violation of the principle of *res judicata*.¹⁶⁸
- Unfair and unequal treatment of the parties since Austrian law requires not only formal but also substantive fair and equal treatment.¹⁶⁹
- Obtaining or influencing an award by way of criminal offense or other acts against morality, *e.g.* fraud.¹⁷⁰
- No correct legal representation of a party lacking legal capacity.¹⁷¹
- Denial of the possibility of a party to be represented by a lawyer.¹⁷²

¹⁶⁵ Legal formula of the ASC RS0045092, referring *inter alia* to ASC decision of Sep. 6, 1990, 6Ob572/90.

¹⁶⁶ ASC decision of Mar. 17, 2005, 2Ob41/04z.

¹⁶⁷ Hausmaninger, *supra* note 22, Section 611, mn. 175.

¹⁶⁸ Hausmaninger, *supra* note 22, Section 611, mn. 176, 180; Schwarz/Ortner, *supra* note 10, 215; Czernich, *supra* note 99, mn. 74.

¹⁶⁹ Schwarz/Ortner, *supra* note 10, 193s.

¹⁷⁰ Hausmaninger, *supra* note 22, Section 611, mn. 177; Schwarz/Ortner, *supra* note 10, 200s; Burgstaller/Höllwerth, *supra* note 103, Section 81, mn. 8; Czernich, *supra* note 99, mn. 74.

¹⁷¹ Hausmaninger, *supra* note 22, Section 611, mn. 178; Schwarz/Ortner, *supra* note 10, 190.

¹⁷² Schwarz/Ortner, *supra* note 10, 192s.

- Participation of a party in the arbitral proceedings which lacks the capacity of being a party to legal proceedings.¹⁷³
- Severe violation of Section 617 (4) 2nd sentence ACCP according to which in consumer related arbitral proceedings the arbitral tribunal may only hold oral hearings and take evidence at a place different from the place of arbitration if the consumer agrees or the taking of evidence at the place of arbitration would be unduly burdensome.¹⁷⁴

In contrast, the below cases are regarded as not violating Austrian procedural public policy:

- Incomplete establishment of the facts and defective treatment of relevant facts, *e.g.* ignoring or rejection of a party's legal or factual submissions or of its motions to take evidence.¹⁷⁵
- Deliberations of the arbitrators on the award not in person but only over the telephone and merely between the president of the arbitral tribunal and one or the other arbitrator at the same time.¹⁷⁶
- A party has been heard by some but not all arbitrators.¹⁷⁷ This view, expressed in two ASC decisions of 1949 and 1955, seems to be outdated though it has neither been overruled nor confirmed ever since.
- Allegation of a party that a witness made a false witness statement in the arbitral proceedings, supported by a notarized written witness statement of the same witness now

¹⁷³ Hausmaninger, *supra* note 22, Section 611, mn. 179.

¹⁷⁴ Hausmaninger, *supra* note 22, Section 611, mn. 181, Section 617, mn. 48.

¹⁷⁵ Legal formula of the ASC RS0045092, referring *inter alia* to ASC decision of Sep. 6, 1990, 6Ob572/90 and ASC decision of Jul. 24, 1977, 6Ob186/97i.

¹⁷⁶ Legal formula of the ASC RS0121019, referring to ASC decision of Apr. 26, 2006, 3 Ob 211/05h and ASC decision of Apr. 13, 2011, 3 Ob 154/10h.

¹⁷⁷ ASC decision of Nov. 19, 1949, 1Ob1054/49; ASC decision of Jan. 13, 1955, 2Ob244/54.

distancing himself from his previous witness statement.¹⁷⁸ For the ASC, this is a simple case of two contradicting witness statements the re-assessment of which by the enforcing court would amount to a forbidden *révision au fonds*.

- No treatment of a claim for set-off by the arbitral tribunal due to the failure of the respective party to pay a cost advance where the demanding of a prior cost advance was permitted by the applicable rules of arbitration and also the applicable procedural law of the seat of arbitration.¹⁷⁹
- Decision by the arbitral tribunal on the claimant's claim in a first arbitral award, reserving decision on the respondent's counter-claim to a later award and thus enabling claimant to seek enforcement of its claim before respondent's counter-claim is decided upon.¹⁸⁰
- Lack of reasoning.¹⁸¹ Though it is certainly true, as *Pitkowitz*¹⁸² argues in favor of a public policy violation for such case, that Section 606 (2) ACCP requires an arbitral award to contain reasons and that an award without reasoning is difficult to subject to public policy control. Nevertheless, as established above in section 3.2, only mandatory rules can constitute public policy. Since Section 606 (2) ACCP provides that the parties may waive the requirement of reasoning and, thus, the norm is not mandatory, there is no ground to include this provision into the circle of public policy.

As can be seen from the above, the Austrian Supreme Court applies also procedural public policy with great restraint and certainly in line with the notions of the Convention. In fact, the ASC has even received some criticism for what these critics¹⁸³, especially *Reiner*¹⁸⁴, feel as a

¹⁷⁸ Legal formula of the ASC RS0119800, referring to ASC decision of Jan. 26, 2005, 3Ob221/04b.

¹⁷⁹ ASC decision of Oct. 20, 2004, 3Ob73/04p.

¹⁸⁰ Legal formula of the ASC RS0002405, referring to ASC decision of Jul. 8, 1981, 3Ob104/80.

¹⁸¹ Hausmaninger, *supra* note 22, Section 606, mn. 86.

¹⁸² Pitkowitz, *supra* note 111, 325.

¹⁸³ See for a good summary on the criticism Schwarz/Ortner, *supra* note 10, 191s.

too narrow interpretation of court control of compliance with public policy, in particular with respect to the European Court of Human Rights' jurisprudence on the protection of the right to be heard. Indeed, the ASC seems more often than not to simply cite its standing jurisdictional formulae on the extremely limited scope of the public policy exception only to find without much further elaboration that the respective case at hand does not involve the violation of such very fundamental notions of the legal order. This certainly fosters the ability of the parties to arbitral proceedings to rely upon arbitration and the finality of an arbitral award. However, unsanctioned grave procedural misconduct by arbitrators does neither advance the interests of the parties nor that of arbitration in general. Thus, in order to ensure the attractiveness of arbitration as a procedure leading not only to a final but also an (at least *grosso modo*) just resolution of disputes and, conversely, in order to not render the procedural public policy control meaningless, the ASC should cede to the above mentioned criticism and broaden its scope of public policy control. Certainly, such extension must be made very carefully and may under no circumstances amount to a *révision au fonds*. Finding the right balance in actual cases will be the greatest challenge for the ASC.

3.6 Conclusion

It has been shown above that Austria has a developed legislation and rich jurisprudence on the issue of public policy in the context of recognition and enforcement of arbitral awards. The presented specificities of Austrian law, such as the providing for the direct application of the Convention or the explicit statutory mentioning of the notion of procedural public policy separate from that of substantive public policy, serve their purposes well and provide for extensive compliance of Austrian practice with the Convention. Also, Austrian jurisprudence

¹⁸⁴ Andreas Reiner, *Schiedsverfahren und Rechtliches Gehör*, in *Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht*, No. 11 (2003) 52.

applies a total control of public policy compliance by the award, which is in line with the international opinion.

However, such Austrian compliance with the international concepts is not unrestricted: The Austrian practice stubbornly resists the internationally fully established notion of international public policy and applies its full domestic public policy also to foreign arbitral awards. Such resistance, based on a one-time (but never again questioned) confusion of international public policy with supranational public policy by the Austrian Supreme Court, should be given up. Fortunately, this has hardly any negative practical consequences on the recognition and enforcement of foreign awards since also the domestic public policy of Austria is drawn extremely narrowly so that it effectively complies with the Convention. In fact, public policy is interpreted so narrowly that some commentators validly plead for an extension of public policy control by the Austrian courts.

Nevertheless, it is to be held that despite this minor point of critique Austria applies Convention Art. V (2) (b) in a very satisfactory manner and thereby consistently furthers the aims of the Convention and arbitration in general.

In the next chapter I elaborate on the question whether the same conclusion can be drawn about Austria's culturally and historically similar but in the experience of communism different neighbor Hungary.

4 Public Policy in Hungary

In chapter 2 above I have established the international standard for the application of the public policy exception based on Convention Art. V (2) (b). Then, in chapter 3 above I examined the corresponding practice in Austria in the light of the results of chapter 2. Now I turn to the same task with respect to Hungary.

The major difference between Austria and Hungary is not in the legislation: as shown above in section 3.1 and below in section 4.1, both states have ratified the Convention and their arbitration laws follow the pattern of the Model Law. The difference lies in Hungarian history: Though Hungarian arbitration developed similarly to Western Europe until World War II, the communist rule in Hungary from 1948 to 1989 forced a major departure from international (Western) trends.¹⁸⁵ The 1952 communist Code of Civil Procedure, intolerant towards any private liberties, stopped only short of outlawing arbitration in general, permitting it only between Hungarian state entities and foreign persons or within the framework of the court of arbitration of the Hungarian Chamber of Commerce and Industry. In the following decades, this stance was softened step by step and the circle of arbitrable disputes was widened. Still, due to the lack of practice-oriented, detailed legislation and the remaining general communist skepticism towards this dispute resolution mechanism, arbitration continued to play a close to non-existent role in Hungarian practice: According to

¹⁸⁵ For an overview over the historical development of arbitration and arbitration laws in Hungary see Lajos Wallacher, *Előkészítő tanulmány a választottbíráskodásról szóló 1994. évi LXXI. törvény tervezetéhez*, in László Kecskés (ed.), *Választottbíráskodás. A választottbíráskodásról szóló 1994. évi LXXI. törvény, annak indoklása és előkészítő anyagai* (1995) 100, 100-103; László Kecskés, „Jó lovassal a nyeregben a zabolátlan ló is megfegyelmehető”. *A közrend fogalmáról két bírósági határozat alapján*, in István László Gál/Szabolcs Hornyák (eds.), *Tanulmányok Dr. Földvári József professzor 80. születésnapja tiszteletére* (2006) 129, 136s; László Kecskés/Zoltán Nemessányi, *Magyar közrend – nemzetközi közrend – közösségi közrend*, in *Európai Jog*, No. 3 (2007) 21, 27; István Varga, *Ungarn*, in Paul Oberhammer (ed.), *Schiedsgerichtsbarkeit in Zentraleuropa - Arbitration in Central Europe* (2005) 629, 635-642.

*Horváth*¹⁸⁶ not a single set aside procedure was initiated during the communist era. Selective arbitration friendly law amendments were only introduced during the political and economic reforms in the late 1980ies and the early 1990ies. This new pro-arbitration trend culminated in the adoption of the Hungarian Arbitration Act¹⁸⁷ (hereinafter “HAA”) in 1994 which was based on the Model Law and brought Hungarian legislation in line with international standards. However, the historical lack of experience, in particular the growing but still very restricted number of court decisions and scholar works on arbitration matters, renders Hungarian arbitration practice somewhat underdeveloped and unpredictable – an unpredictability which should be remedied by the following analysis.

It is these premises which have to be kept in mind when examining Hungarian practice on the refusal of recognition and enforcement of foreign arbitral awards. The following examination of this topic mirrors the structure of the preceding chapters: First I introduce the relevant Hungarian legal norms (section 4.1) and the general concepts of their implementation (section 4.2). Then I deal with the standard of public policy (section 4.3) and the scope of review (section 4.4) to be applied. Subsequently, I present a list of the substantive and procedural issues understood to be part of public policy in Hungary (section 4.5). Finally, I sum up my findings and conclusions (section 4.6).

¹⁸⁶ Éva Horváth, *Nemzetközi választottbíráskodás* (2010) 175; see also László Burián, *Gondolatok a közrend szerepéről*, in Daisy Kiss/István Varga (eds.), *Magister Artis Boni et Aequi. Studia in Honorem Németh János* (2003) 99, 99.

¹⁸⁷ Act LXXI of 1994 on Arbitration (“1994. évi LXXI. törvény a választottbíráskodásról”), http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=20965.582526 (visited on Mar. 30, 2012), English translation available in Zsolt Okányi, *Arbitration in Hungary in Domestic and International Matters* (2009) 51-59.

4.1 Hungarian Provisions on Public Policy

As do section 2.2 for the international arena and section 3.1 for Austria above, this section identifies the Hungarian provision on the public policy exception (subsection 4.1.1) and other relevant statutory provisions (subsection 4.1.2).

4.1.1 Section 59 (b) Hungarian Arbitration Act

The Hungarian norm on the public policy exception, Section 59 (b) HAA, reads as follows:

“The court shall refuse the enforcement of the award of the arbitral tribunal if, in its judgement [...] the award is contrary to the rules of Hungarian public order.”¹⁸⁸

4.1.2 Other provisions on public policy

Similarly to Austria and the Model Law, the Hungarian grounds for setting aside an arbitral award parallel those for the refusal to recognize and enforce a foreign arbitral award.¹⁸⁹ The respective Hungarian provision, Section 55 (2) (b) HAA, reads as follows:

“The setting aside of the arbitration award may also be requested alleging that [...] the award is in conflict with the rules of Hungarian public order.”¹⁹⁰

This provision has a predecessor, the 1973 introduced Section 362 (1) (c) of the Hungarian Code on Civil Procedure. However, this norm is omitted since, as noted in the introduction above, it has never been applied and has, therefore, no relevance.

¹⁸⁸ Translation in Okányi, *supra* note 189, 58.

¹⁸⁹ Horváth, *supra* note 188, 124.

¹⁹⁰ Translation in Okányi, *supra* note 189, 58.

In addition to the HAA, also the Hungarian Private International Law Act¹⁹¹ (hereinafter “HPILA”) contains provisions on public policy which offer further statutory insight into the notion. These are two norms:

Section 7 (1) and (2) HPILA:

- “(1) The foreign law shall not be applied insofar as it would be in conflict with the rules of Hungarian public order.
- (2) The application of the foreign law may not be set aside solely because the foreign state’s socio-economic order differs from the Hungarian.”¹⁹²

Section 72 (2) (a) and (c) HPILA:

- “A foreign court decision may not be recognized if
- (a) its recognition would be in conflict with the rules of Hungarian public order; [...]
- (c) the court decision was made as a result of a procedure which was in severe conflict with fundamental principles of Hungarian procedural law[.]”¹⁹³

Finally, two provisions of the Hungarian Enforcement Act¹⁹⁴ (hereinafter “HEA”) confirm the applicability of international law, thus including the Convention, to the enforcement of foreign arbitral awards:

Section 205 HEA:

„The foreign court’s and the foreign arbitral tribunal’s decision (hereinafter together: foreign decision) may be enforced on the basis of law, international convention or reciprocity.“

Section 210 HEA:

¹⁹¹ Decree Law 13 of 1979 on Private International Law (“1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról”), http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=3557.582493 (visited on March 30, 2012).

¹⁹² Translation by the author.

¹⁹³ Translation by the author.

¹⁹⁴ Law 53 of 1994 on Court Enforcement (“1994. évi LIII. törvény a bírósági végrehajtásról”), http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=20827.584686 (visited on March 30, 2012).

„During the foreign decision’s enforcement provisions contained in a separate law and in international conventions must be applied too [...].“

4.2 General Concepts of Application of Public Policy

Despite the only recent re-birth of arbitration in Hungary and the therewith connected lack of voluminous judicial decisions on arbitral issues, the basic concepts of the public policy exception seem well established both with the courts and with scholars. This stems, among others, from the fact that public policy did remain a topic for lawyers, just in a different framework: private international law. Therefore, I also refer to treatises on public policy written in the context of private international law. This is justified by the fact that the public policy provisions of both the HAA and the HPILA are essentially similar. On this basis, I provide an overview over the basic concepts of the denial of recognition and enforcement of foreign arbitral awards due to a public policy violation in Hungary.

First, the public policy provisions in the HAA, just as the whole Act itself with only few exceptions,¹⁹⁵ follow the Model Law. This is clear already from the text and structure of these provisions. In addition, Hungary has acceded to the Convention as soon as in 1962.¹⁹⁶ Though Hungarian law does not contain an explicit reference to the Convention, the HAA’s *travaux préparatoires* clarify¹⁹⁷ that the recognition and enforcement of foreign awards is regulated by

¹⁹⁵ For the Explanatory Memorandum to the HAA see *Indoklás a választottbíráskodásról szóló törvényjavaslathoz*, in László Kecskés (ed.), *Választottbíráskodás. A választottbíráskodásról szóló 1994. évi LXXI. törvény, annak indoklása és előkészítő anyagai* (1995) 19, 21; Okányi, *supra* note 189, 47; Károly Kiss, *A Választottbíróság ítéletének érvénytelenítése közrendbe ütközésre való hivatkozással*, in *Gazdaság és Jog*, Vol. 13/12 (2005) 10, 10s.

¹⁹⁶ Decree Law 25 of 1962 on the Promulgation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York on June 10, 1958 (“1962. évi 25. törvényerejű rendelet a külföldi választottbírói határozatok elismeréséről és végrehajtásáról szóló, New Yorkban 1958. június 10-én kelt Egyezmény kihirdetéséről”), http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=667.1177 (visited on March 30, 2012).

¹⁹⁷ Explanatory Memorandum to the HAA, *supra* note 197, 43.

the Decree Law¹⁹⁸ which promulgates the Convention. This is confirmed by Sections 205 and 210 HEA (which refer to the applicability of international conventions), the Hungarian Supreme Court's (hereinafter "HSC") jurisdiction¹⁹⁹ and literature.²⁰⁰ Thus, similarly to Austria, the Convention directly regulates this area. In Hungary, this is even more emphasized than in Austria: The HAA, in its Section 59 (b), additionally (but in light of the above unnecessarily) incorporates Model Law Art. 36 (1) (b) (ii) which parallels the Convention on the public policy exception. Consequently, recognition and enforcement of foreign awards is directly regulated by the Convention which per definition renders the Hungarian legislation fully in line with the Convention.

Second, similarly to their peers in other legislations, the Hungarian legal norms neither define public policy in general nor its content in particular. However, the two sections of the HPILA introduced above provide two important clarifications: On the one hand, Section 7 (2) HPILA states that the sole fact that a foreign state's socio-economic order is different from the Hungarian one is no ground to exclude the application of the otherwise applicable law of that foreign state. Thus, different socio-economic order is in itself no public policy violation. Though this provision dates back to the time of communism in the context of which it makes more sense than today, it still shows a restrictive approach to the public policy exception. Indeed, it is well established that the public policy ground is to be interpreted narrowly and applied only exceptionally.²⁰¹ On the other hand, Section 72 (2) (c) HPILA explicitly incorporates also the violation of procedural laws in to the circle of public policy. There is no reason why the procedural aspect of public policy, recognized in one segment of Hungarian

¹⁹⁸ Decree Law 25 of 1962, *supra* note 198.

¹⁹⁹ Hungarian Supreme Court (hereinafter "HSC") decisions BH1996.375 and BH2007.139.

²⁰⁰ Horváth, *supra* note 188, 182.

²⁰¹ HSC decision BH1996.159; Wallacher, *supra* note 187, 114; László Burián/Dezső Tamás Czigler/László Kecskés/Imre Vörös, *Európai és magyar nemzetközi kollíziós magánjog* (2010) 129s, mn. 7.17; Ottóné Brávácz/Tibor Szócs, *Jogviták határok nélkül. Joghatóság, külföldi határozatok elismerése és végrehajtása polgári ügyekben* (2003) 210s, 216s; Kecskés, *supra* note 187, 137; Kecskés/Nemessányi, *supra* note 187, 27.

law (the HPILA), would not be recognized in another segment of it (the HAA). Thus, it is accepted²⁰² that Hungarian law recognizes the notion of procedural public policy.

Third, one deviation of the Hungarian norm on the public policy exception from the Model Law needs clarification: Whereas Model Law Art. 36 (1) (b) (ii) clearly provides for the refusal of recognition or enforcement if “the *recognition or enforcement* of the award would be contrary to the public policy” (emphasis added), the corresponding Section 59 (b) HAA speaks of the case when “the *award* is contrary to the rules of Hungarian public order” (emphasis added). Such deviation seems to be unintentional since the drafters of the HAA wanted to deviate from the Model Law only where specialties of Hungarian law required it²⁰³ which is clearly not the case here. Also scholars agree²⁰⁴ that it is not the award itself but its result, *i.e.* the consequences of its recognition or enforcement, which is scrutinized.

Fourth, due to the similarity of the Hungarian provisions to the international ones and due to the lack of meaningful Hungarian practice, scholars largely rely on foreign (mainly continental European) practice to establish the Hungarian framework for the application of the public policy exemption. Hence, it is no surprise that Hungarian literature and the jurisdiction relying thereupon follows the international perceptions in almost every respect: It is well established that the public policy ground is to be interpreted narrowly and applied only exceptionally.²⁰⁵ Consequently, only unbearable and obvious violations of the economic, societal, political or moral fundamentals which the state wants to protect under any

²⁰² Brávác/Szőcs, *supra* note 203, 215; Burián, *supra* note 188, 115; Kecskés, *supra* note 187, 132.

²⁰³ Explanatory Memorandum to the HAA, *supra* note 197, 21.

²⁰⁴ Ferenc Mádl/Lajos Vékás, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga* (2004) 121s; Brávác/Szőcs, *supra* note 203, 211.

²⁰⁵ HSC decision BH1996.159; Wallacher, *supra* note 187, 114; Burián/Czigler/Kecskés/Vörös, *supra* note 203, 129s, mn. 7.17; Brávác/Szőcs, *supra* note 203, 210s, 216s; Kecskés, *supra* note 187, 137; Kecskés/Nemessányi, *supra* note 187, 27.

circumstances (the “hard core” of the legal system) qualify as public policy violations.²⁰⁶ In case of doubt, the goal of the provision is decisive in determining whether it constitutes public policy or not.²⁰⁷ Only norms with the direct goal to protect the interests of the public, not of private individuals, may qualify as public policy.²⁰⁸ Accordingly, public policy does not comprise all mandatory norms²⁰⁹ – but only a mandatory norm may be part of public policy.²¹⁰ (However, this last point was disputed by a heavily criticized Supreme Court decision which is detailed in subsection 4.5.1 below). In any case, the court review may not amount to a *révision au fonds*, *i.e.* a review of the arbitral tribunal’s substantive solution of the dispute and a replacement of it with the substantive solution of the controlling court.²¹¹ The applicable law is Hungarian law.²¹²

It can be concluded that Hungarian legislation fully complies with the international standards, in particular with the Convention, since the former is taken over from the latter. But also the provisions of domestic origin, *i.e.* of the HPILA, correspond in their approach to the public policy exception and, in addition, clarify that also procedural issues fall within the notion of public policy. Also the Hungarian practice strongly relies on and incorporates the internationally accepted basic concepts of the public policy exception’s application, thus, quite naturally, rendering the Hungarian perceptions of basic public policy concepts in line with the international concepts.

²⁰⁶ HSC decisions BH1997.489, EBH1999.37 and EBH2006.1429; Mádl/Vékás, *supra* note 206, 119; Burián/Czigler/Kecskés/Vörös, *supra* note 203, 128s, mn. 7.15s; Kiss, *supra* note 197, 11; Brávác/Szőcs, *supra* note 203, 210; Horváth, *supra* note 188, 172.

²⁰⁷ HSC decisions BH1997.489 and EBH1999.37; Kiss, *supra* note 197, 10.

²⁰⁸ HSC decisions BH1997.488, BH1997.489 and EBH2006.1429; Kecskés, *supra* note 187, 138; Kecskés/Nemessányi, *supra* note 187, 28; Brávác/Szőcs, *supra* note 203, 210.

²⁰⁹ Gábor Palásti, *Közrendi, imperatív, kógens és diszpozitív szabályok*, in *Magyar Jog*, Vol. 53/2 (2006) 65, 66, 72; Brávác/Szőcs, *supra* note 203, 211; Kecskés, *supra* note 187, 138; Kecskés/Nemessányi, *supra* note 187, 28; Kiss, *supra* note 197, 11.

²¹⁰ Palásti, *supra* note 211, 72; Kecskés, *supra* note 187, 138-140; Kecskés/Nemessányi, *supra* note 187, 28.

²¹¹ HSC decisions BH1998.184, EBH1999.37, EBH1999.128, EBH2002.772, BH2003.505 and EBH2006.1525; Explanatory Memorandum to the HAA, *supra* note 197, 42.

²¹² See Section 59 (b) HAA’s explicit reference to Hungarian public policy.

4.3 Applicable Standard of Public Policy: Domestic, International or Supranational?

It has been shown in the previous section that the Hungarian statutory norms do not define public policy. Similarly, the question whether the standard of Hungarian public policy to be applied to the recognition or enforcement of foreign awards is a domestic, international or supranational one is left open. I have shown in section 2.4 above that the correct standard to be applied is the international one. Is Hungarian practice in line with this?

The application of any kind of supranational public policy, *i.e.* public policy not founded in national law, is already excluded by Section 59 (b) HAA's explicit reference to *Hungarian* public policy. Accordingly, there are no voices proposing the application of supranational public policy in Hungarian court practice or literature. This is no surprise since also the international literature, on which Hungarian literature often relies, does not (yet) accept such standard. Hence, the notion of supranational public policy is (correctly) not accepted in Hungary.

It is more difficult to decide whether the domestic or the international public policy standard is accepted. As with supranational public policy, this question is simply not treated at all by either court decisions or literature: There are only two published court decisions²¹³ on the recognition and enforcement of foreign awards where public policy was invoked. These decisions do not address the question of applicable public policy standard (which apparently was not raised by the respective parties either). In literature, only *Horváth*²¹⁴ and *Kecskés/Nemessányi*²¹⁵ mention briefly the notion of international public policy: They refer to

²¹³ HSC decisions BH2003.505 and BH2007.130.

²¹⁴ Horváth, *supra* note 188, 125.

²¹⁵ Kecskés/Nemessányi, *supra* note 187, 26.

the Convention as a concept narrower than domestic public policy in abstract and do not inquire any further as to the concept's applicability in Hungary.

To find an answer to this question, I depart from the fact that, unlike the Model Law, the HAA does not principally differentiate between domestic and international arbitral procedures but applies to both and foresees only some specific rules for the latter.²¹⁶ Second, it is recognized that the grounds for setting aside a (domestic) award and for the refusal to recognize or enforce a (foreign) award are the same.²¹⁷ Third, a systematic approach suggests that one notion, in this case that of public policy, is given the same meaning in different provisions within one legal system. All this leads to the conclusion that Hungarian courts would apply the public policy exception for the recognition and enforcement of foreign awards the same way as they apply it to the setting aside of domestic awards. This is not further problematic: As shown above in section 4.2, the Hungarian courts and scholars agree on an application of the general concepts of public policy which is basically in line with the Convention. In such case, the application of a domestic public policy (especially if not even designated like that) which complies with the standards of international public policy is in compliance with the Convention's demand for international public policy.

To conclude: Hungarian practice does not differentiate between domestic and international public policy but applies its domestic public policy also to international awards. This is conceptually incorrect but has little practical significance since the content given to public policy by Hungarian practice is so narrow that it complies with the requirements of international public policy. This practice might be stricter than necessary towards domestic awards (here Hungary could apply a broader, explicitly domestic notion of public policy) but

²¹⁶ Section 46 (1) HAA; Burián, *supra* note 188, 119; Varga, *supra* note 187, 646.

²¹⁷ Explanatory Memorandum to the HAA, *supra* note 197, 42; Horváth, *supra* note 188, 124.

it certainly complies with the Convention. In any case, an explicit designation of the standard as international public policy would help to remove any remaining doubts.

4.4 Scope of Court Review

In section 2.5 above, I have established that courts should apply total review to awards concerning the public policy exception. In section 3.4 above, I have also shown that Austrian practice follows this approach. This section deals with the Hungarian understanding of how deeply courts may look into awards to establish whether their recognition or enforcement would violate public policy.

As with the applicable standard of public policy (see above section 4.3), also this issue is not given any explicit consideration by either courts or literature in Hungary. In practice, Hungarian courts establish and assess facts and law without even raising the question if they were bound by the arbitral tribunal's assessment.²¹⁸ Similarly they do not restrict themselves to any part of the award, such as the operative part, but also look into the award's reasoning. Such approach is well reflected already in the first sentence of the reasoning of the Supreme Court's decisions which generally provide as follows or similarly: "The facts established in the first instance decision and relevant for the decision on the motion for review are the following[.]" This demonstrates that the court establishes the facts itself.

With such stance, Hungarian legal practice is in line with the international perceptions as detailed in section 2.5 above. Theoretical support of such Hungarian practice can first be found in the fact that arbitral tribunal and court do not decide the same question: Whereas the former decides on the substance of the parties' dispute, the latter deals neither with the substantive question decided in the award nor with the award itself but with the result of the

²¹⁸ See *e.g.* HSC decisions BH1997.489, EBH1999.128 and EBH2006.1525.

award, *i.e.* the recognition and enforcement (or, as the case may be, setting-aside) of the award. It is asked whether the recognition and enforcement of the award would violate public policy – an issue which cannot have been treated in the award. The fact that a *révision au fonds* is clearly inadmissible²¹⁹ further underlines that the court does not decide on the same issue(s) as the arbitral tribunal did. If the issues to be decided are different, then, by definition, the court cannot be bound by any legal or factual assessments made in the arbitral award.

Consequently, it can be concluded that although the theoretical foundations are not laid down either by the Hungarian courts or by the literature, courts apply a total control standard to awards under public policy scrutiny. This view is not only in line with the international approach but can also be well based on a theoretical basis.

4.5 Content of Public Policy

I have established the general concepts of public policy in section 4.2 above. However, it is difficult if not impossible to fill the notion of public policy, ever changing in time and space, with content in the abstract.²²⁰ It is all the more important to list issues which have been held to constitute public policy in practice. I provide such lists first on substantive (subsection 4.5.1) and then on procedural public policy (subsection 4.5.2) in the following. As above in sections 2.6 and 3.5, these lists concentrate on issues relevant for international commercial arbitration and do not pretend to be exhaustive. Also it should be noted that Hungarian court decisions on public policy in the framework of arbitration are rare, so that the below lists rely extensively on scholar works, thus on theory. Where critique or comment is necessary, it is formulated in connection with the respective court decision below.

²¹⁹ HSC decisions EBH2006.1525 and EBH1999.37; Explanatory Memorandum to the HAA, *supra* note 197, 42; Horváth, *supra* note 188, 174.

²²⁰ Mádl/Vékás, *supra* note 206, 121; Burián/Czigler/Kecskés/Vörös, *supra* note 203, 131, mn. 7.19s.

4.5.1 Substantive Public Policy

The following issues have been qualified as substantive public policy violations in Hungary:

- Violation of fundamental contractual principles, *e.g.* violation of *pacta sunt servanda*, abuse of rights, violation of good faith.²²¹
- Violation of the prohibition of expropriation without compensation.²²²
- Violation of criminal prohibitions reflecting deep moral rejection, *e.g.* terrorism, piracy, genocide, drug trafficking, paedophilia, corruption.²²³
- Violation of the state's international obligations, *e.g.* violations of an embargo or international sanctions.²²⁴
- Recognition of a claim arising out of contract violating *bonos mores*.²²⁵
- Exclusion of damages for wilful or gross negligent acts in advance.²²⁶
- Violation of fundamental provisions on employee²²⁷ and consumer²²⁸ protection.
- Forcing a party to act illegally, *i.e.* a party cannot legally fulfil its obligation.²²⁹
- Violation of the prohibition of discrimination based on race, sex, nationality, age or religion.²³⁰

²²¹ Kecskés, *supra* note 187, 134; Kecskés/Nemessányi, *supra* note 187, 26.

²²² Kecskés, *supra* note 187, 134; Kecskés/Nemessányi, *supra* note 187, 26.

²²³ Kecskés, *supra* note 187, 135; Kecskés/Nemessányi, *supra* note 187, 26s.

²²⁴ Kecskés, *supra* note 187, 136; Kecskés/Nemessányi, *supra* note 187, 27.

²²⁵ Brávác/Szőcs, *supra* note 203, 213.

²²⁶ Brávác/Szőcs, *supra* note 203, 213.

²²⁷ Brávác/Szőcs, *supra* note 203, 213.

²²⁸ Burián/Czigler/Kecskés/Vörös, *supra* note 203, 53, 132s, mn. 7.23.

²²⁹ Brávác/Szőcs, *supra* note 203, 213.

²³⁰ Mádl/Vékás, *supra* note 206, 120-122; Kecskés, *supra* note 187, 134; Kecskés/Nemessányi, *supra* note 187, 26.

- Violation of fundamental EU norms, *e.g.* on competition in the EU common market.²³¹
- Prohibitively high costs awarded to the winning party.²³² This HSC decision, BH2003.127, deserves special attention since it is one of the very few actual cases where a public policy violation was recognized. The underlying dispute involved only Hungarian law, Hungarian parties and Hungarian attorneys and concerned claims in the amount of 32 billion HUF (appr. 130 million EUR at the decision's time). The resulting award granted attorney's fees to the winning party in the amount of 290 million HUF (appr. 1.2 million EUR at the decision's time) for 16 months of legal representation. The HSC set aside the award's cost decision, despite recognizing that the fees did not violate any mandatory law, arguing that the attorney's fees awarded are so prohibitively high as compared to the actual work done and also as an absolute figure that the losing party is inappropriately burdened, the access to justice is hindered and society's morals are violated. This decision has been heavily criticized mainly on the ground that only a violation of a mandatory rule, not given in the present case, may qualify as a public policy violation.²³³ Such criticism deserves merit as it is indeed a fundamental principle of public policy that only mandatory rules fall within its scope (see section 4.2 above). In addition, the HSC erred when it adopted (also) an absolute view of the amount: The absolute figure is irrelevant since it is not the award (the figure) itself which is to be examined but its enforcement in the concrete circumstances. Thus, the figure may only be examined in relation to the parties. In the present case the parties were economically potent companies for which such an amount is certainly important but not prohibitive. There is no reason why the payment of

²³¹ Burián/Czigler/Kecskés/Vörös, *supra* note 203, 53, 132s, mn. 7.23; Kecskés, *supra* note 187, 134; Kecskés/Nemessányi, *supra* note 187, 26, 33s.

²³² HSC decision BH2003.127.

²³³ László Kecskés, *Lehet-e közrendbe ütköző, ami nem jogellenes?*, in *Magyar Jog*, Vol. 54/9 (2007) 531, 532-534; Kecskés, *supra* note 187, 139-147; Kecskés/Nemessányi, *supra* note 187, 21-25, 28; Kiss, *supra* note 197, 12.

290 million HUF would inappropriately burden a big and financially strong company, hinder its access to justice and violate morality. Even if it did so, this does not touch upon the interests of the public. This approach was recognized by the HSC itself in a later decision²³⁴ – though in that case the awarded costs were much lower and also the award was a foreign award (see below). All in all, the HSC decision BH2003.127 is misguided and should be abandoned.

Further clarification is offered by a look at the issues which have been held to not violate substantive public policy:

- Violation of a provision stipulating a time limit for attacking a shareholders' decision of a limited liability company and (incorrect) application of a Civil Code provision instead.²³⁵ This is a leading and often referenced decision of the HSC since it is the first to deal with public policy in the control of arbitral awards in detail. The HSC held that the violated norm of the commercial code might well be of fundamental importance for the general commercial community but the concrete violation of the norm concerns only a very limited number of persons and, thus, it cannot violate general fundamental values. Similarly, the incorrect application of a Civil Code provision instead of the correctly applicable Commercial Code provision does not violate public policy.
- Violation of a Commercial Code provision and consequently holding the shareholders of a company jointly (and not only subsequently) liable for the company's debts since this is not a violation of the community of all citizens as a whole.²³⁶

²³⁴ HSC decision BH2007.130.

²³⁵ HSC decision BH1997.489; Horváth, *supra* note 188, 177.

²³⁶ Kiss, *supra* note 197, 12 with reference to court decision 9.G.40.302/2003/7.

- Violation of the Civil Code provisions on the compensation for contractual damages and the equality of rights held by several persons in an asset if not provided otherwise.²³⁷
- Incorrect interpretation of the internal legal relation of the parties.²³⁸
- Incorrect establishment of the amount of contractual or non-contractual damages or the establishment of damages within the court's discretionary power.²³⁹
- Costs awarded to the prevailing party in the amount of maximum 50.000 EUR in procedure with an amount in dispute of 210.000 EUR even if losing party thereby gets into a difficult financial situation.²⁴⁰

It is clear from the above list that the Hungarian perception of the content the substantive public policy is correct in general. However, most issues mentioned above have not been tested in practice, *i.e.* they have been mentioned in scholarly works only. The leading HSC case BH1997.489 laid down important fundamentals which have been consistently followed ever since – with the one major exception of the unfortunate HSC decision BH2003.127. Thus, the basics seem to be clear and accepted whereas the details remain unknown.

4.5.2 Procedural Public Policy

As mentioned in section 4.2 above, Hungarian law recognizes the concept of procedural public policy. The following issues are recognized to be part of Hungarian procedural public policy:

- Violation of the right to be heard.²⁴¹

²³⁷ HSC decision BH1999.37.

²³⁸ HSC decisions BH1997.488 and EBH2008.1796.

²³⁹ HSC decision EBH2008.1796.

²⁴⁰ HSC decision BH2007.130.

- Lack of impartiality or independence of the arbitral tribunal.²⁴²
- Lack of equal treatment of the parties.²⁴³
- Actions rendering the participation of a party in the proceedings impossible.²⁴⁴
- Violation of *res judicata*.²⁴⁵
- Reliance on evidence gathered by way of criminal offense.²⁴⁶

In contrast, the following cases are held to not violate Hungarian procedural public policy:

- Violation of simple procedural rules, *e.g.* on witness capability, consequences of disregard of time limits and burden of proof;²⁴⁷ the failure to clarify contradictions in an expert opinion and flaws in the tribunal's reasoning;²⁴⁸ or flawed establishment of facts and law²⁴⁹.
- Violation of the obligation to give reasons.²⁵⁰
- Difficulties of a party to participate in the proceedings due to lack of money or language skills.²⁵¹
- The arbitral tribunal's conduct of the proceedings in general, *e.g.* separate treatment of a claim, taking a decision despite a pending challenge proceedings against an arbitrator and

²⁴¹ Bráváczy/Szócs, *supra* note 203, 215.

²⁴² Bráváczy/Szócs, *supra* note 203, 215.

²⁴³ Bráváczy/Szócs, *supra* note 203, 215.

²⁴⁴ Okányi, *supra* note 189, 61.

²⁴⁵ HSC decision EBH2009.1969.

²⁴⁶ HSC decision EBH2008.1798.

²⁴⁷ Bráváczy/Szócs, *supra* note 203, 216s.

²⁴⁸ HSC decision EBH2006.1429.

²⁴⁹ HSC decision BH2007.193.

²⁵⁰ HSC decisions BH1996.159, BH1997.489, EBH1999.128 and EBH2006.1525; Horváth, *supra* note 188, 177.

²⁵¹ HSC decision BH1998.184.

a six month waiting period for a decision on a complaint²⁵² or denial of a party's request to reschedule a hearing.²⁵³

- Decision in the arbitral award on costs which the parties incurred in connection with a court procedure on the challenge of an arbitrator.²⁵⁴

The brevity of the above list should not be interpreted as meaning that other weighty issues (for examples see subsections 2.6.2 and 3.5.2 above) are not covered by Hungarian public policy. Instead, the list reflects the little number of court decisions and scholar works on the issue. In any case, the above items do find coverage under the international understanding of procedural public policy. Additionally, as shown above in section 4.2, the Hungarian general concepts are in line with the international standards. Also, Hungarian scholars extensively rely upon foreign court practice and scholar works and do not rely solely on Hungarian law (which is completely in line with the Convention anyway). On this basis I conclude that the interpretation of public policy in fields not covered yet in Hungary will stay in line with the Convention's international interpretation.

4.6 Conclusion

The 1994 Hungarian Arbitration Act brought the legislation fully in line with the international requirements and also the jurisdiction and literature have not failed to correctly establish the basic concepts of public policy in the field of arbitration. However, the legacy of communist anti-arbitration legislation is still reflected in the limited number of cases: According to my research, only four Hungarian Supreme Court decisions²⁵⁵ on the recognition and enforcement

²⁵² HSC decision BH2003.127.

²⁵³ HSC decision BH2003.505.

²⁵⁴ HSC decision BH2003.127.

²⁵⁵ HSC decisions BH1996.375, BH1998.184, BH2003.505 and BH2007.130.

of foreign arbitral awards have been published in the last eighteen years. There may be somewhat more decisions on public policy in setting aside proceedings but they are not abundant either and they do not treat all questions of relevance for the recognition and enforcement of foreign awards. Hence, the courts have not yet had the chance to establish a jurisdictional practice in every detail: The questions whether the standard of domestic or international (or possibly even supranational) public policy is to be applied and whether the court has the power of total control over facts and law in connection with the award's compliance with public policy has simply been ignored by Hungarian practice. I addressed these issues and proposed answers to them, favoring the application of international public policy and total control. The court practice already seems to accept these concepts, though only implicitly, so that insecurity remains. Also the contents of public policy are well established on a theoretical level but have not been sufficiently defined by case law. Here again, the simple quantity of court decisions might provide some further clarifying examples on what concretely is understood under public policy.

All in all, one can conclude that Hungarian practice is in line with the Convention in general but it remains unclear in some details.

5 Conclusion

In the present work, I provided insights into the application of the public policy ground for the refusal to recognize and enforce a foreign arbitral award, as stipulated in Convention Art. V (2) (b), in three areas: First on the international level, second in Austria and third in Hungary. Combining conceptual and functional elements, I suggested defining public policy as the set of rules representing the fundament of the legal and moral order of the forum state the violation of which by the recognition or enforcement of a foreign arbitral award may bar such recognition or enforcement.

Starting from this definition, I dealt with five main areas and arrived at the following results:

- **Legislation:** Convention Art. V (2) (b) is the fundament of all public policy provisions. Together with Model Law Art. 36 (1) (b) (ii) it heavily influences national legislation. This is certainly so in Austria and in Hungary: Not only have both states adopted arbitration acts in line with the Model Law, they both provide statutorily²⁵⁶ that recognition and enforcement of foreign arbitral awards is directly regulated by the Convention. Thus, legislation in these countries is fully in line with the Convention.
- **General concepts:** Also on the general concepts there is complete agreement between the international, the Austrian and the Hungarian views: The public policy ground is to be interpreted narrowly and only covers grave violations of the fundaments of the enforcing state's legal and moral order. Not all violations of mandatory norms amount to public policy violations, but only the violation of a mandatory norm can represent a public policy violation. The goal of the respective norm is decisive: it must protect the interests of the

²⁵⁶ Section 614 (1) ACCP and Section 86 (1) AEA for Austria; Section 59 (b) HAA and Sections 205 and 210 HEA for Hungary.

public as whole and not private interests. The relevant question for the public policy control is not whether the award itself violates public policy but its result, *i.e.* its enforcement. There is complete agreement on these abstract principles on all three levels examined. This is also fully justified based on the wording and drafting history of the Convention.

- Applicable standard of public policy: I analyzed whether the standard of domestic, international or supranational public policy is to be applied. I dismissed the supranational notion as possibly promising for the future *de lege ferenda*, but as not founded in the Convention, thus not applicable. Further I argued in favor of an application of international public policy which is narrower than domestic public policy. My position is in line with the majority view adopted by developed nations' courts and scholars. However, this concept is not followed in the two countries observed: In Austria, the Supreme Court explicitly dismissed this notion in 1983. However, as I detailed, this decision was flawed and should be abandoned. In Hungary, this question has not been raised in practice yet. Both Austria and Hungary apply their domestic public policy to the recognition and enforcement of foreign awards. This is, on a theoretical level, contrary to the Convention. However, in both states the content given to domestic public policy complies with the Convention's narrow concept of (international) public policy. Thus, both states' practices violate the Convention in theory, but comply with it in the substance. Nevertheless, for the sake of clarity I suggested that both Austria and Hungary should adopt the notion of international public policy without, however, changing the content they assign to it already.
- Scope of review: In this respect I argued in favor of a total review of the award, encompassing all parts of it, thus not limited to the operative part. Also the court, in my

opinion, must not be bound by the factual or legal assessment of the award. Any other solution would render the public policy control meaningless. This concept, not clearly established at the international level, is fully accepted in Austria. In Hungary, too, courts subject awards to a total control with respect of public policy, though the question has not been explicitly addressed. In any case, even if the theoretical foundations are left open, the practice of both Austrian and Hungarian courts are agreeable.

- Content of public policy: It is clear that the content of public policy cannot be specified in a comprehensive and conclusive manner since it always depends on the circumstances of the concrete case. Also, the understanding of public policy changes with time. The best example for that are procedural norms: Though it was traditionally rejected that public policy would cover also procedural norms, today this is fully accepted on an international level as well as in Austria and in Hungary. I established lists for all three levels of my examination. A comparison of these lists confirms that the jurisdictions of both Austria and Hungary treat the same issues as public policy violations. However, whereas such practice is well established in Austria, it is still insecure in the details in Hungary: This is due to the low number of recognition and enforcement proceedings as well as of setting aside proceedings conducted in Hungary.

With this comparative examination I established a good practice which serves as a benchmark for Austrian and Hungarian practice. Where appropriate I suggested improvements: the introduction of the notion of international public policy, a slightly broader appliance of the public policy control to protect the parties' right to be heard (thus the integrity of arbitral proceedings) and the abandonment of certain, in my view misguided Supreme Court precedents. This way I intended to contribute to the establishment of correct practices in Austria and in Hungary which serves the interests of the international business community.

Even if these suggestions are not adopted by the subsequent practice, the present comparative and analytical work helps to further unify the practice on public policy. Such unifying efforts strengthen the enforceability of arbitral awards, ensuring one main advantage of arbitration over courts: The near universal recognition and enforcement of arbitral awards. On this basis, I trust that the present work contributes to upholding and further expanding arbitration's dominant role in international business.

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