International Commercial Arbitration

Practitioner's Guide

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least in theory, this creates the risk that a Contracting State could thwart its obligation to enforce foreign arbitral awards (and to recognize arbitration agreements, *cf. supra* mn. 124) under the NYC simply by making a large range of legal disputes non-arbitrable under its national law. The question thus arises whether the NYC does not at least impose limitations to the kinds of dispute a Contracting State may legitimately consider to be non-arbitrable.[518] However, it is hardly possible to derive from the NYC – which, after all, leaves the definition of arbitrability to the Contracting States – any workable criteria to establish limitations to what should be considered "acceptable" cases of non-arbitrability. In particular, the defence of article V(2)(a) is not limited to "internationally accepted" grounds of non-arbitrability.[519] In any case, a Contracting State is always free to avail itself of the commercial dispute reservation and thus exclude the applicability of the NYC with regard to all disputes that are not considered as commercial under its law (*supra* mn. 75). – Since the current trend among Contracting States is to reduce the barriers of non-arbitrability (*infra* mn. 295), the danger of Contracting States imposing unusual, excessive barriers to arbitrability is becoming less disturbing.

292 The application of forum law with regard to the arbitrability of a dispute may appear doubtful in cases that have no or little objective connection with the country of enforcement (apart from the presence of assets of the award debtor) or, inversely, intensive connections with a particular foreign country (be it the situs of arbitration or, in the case of a neutral situs, a third state). Such lack of a sufficient connection to the forum state may be a reason to define the borders of arbitrability (under forum law) in a more liberal manner;[520] in that respect, the analogy to the public-policy defence is helpful, where the intensity of the connections to the forum is recognized as a relevant factor in determining the availability of the defence (*infra* mn. 309). A common way of reflecting that consideration, taken up most prominently in the United States,[521] is to apply a more liberal standard of arbitrability in international cases than in domestic cases (*cf. infra* mns 295, 297, 298).

293 Since arbitrability is determined under forum law, the defence of article V(2)(a) cannot be refuted by showing that the dispute would be considered arbitrable under some foreign law, be it the substantive law applicable to the dispute or the *lex arbitri*. However, the fact that the dispute would be arbitrable under these laws may be a consideration for the jurisdiction of enforcement to be more hesitant in asserting its contrary notions of arbitrability (*cf. supra* mn. 292). – On the other hand, non-arbitrability under a foreign law (particularly, again, the law applicable to the substantive claim or the *lex arbitri*) *per se* is no defence under article V(2)(a). However, this need not necessarily imply that the enforcing jurisdiction is generally precluded from taking foreign law restrictions on arbitrability into account. If the country of enforcement shares the policy pursued by these restrictions of foreign law, it may arguably vindicate this policy by a corresponding limitation of arbitrability[522] (*cf. infra* mn. 311 with regard to the public-policy defence).

294 The technical means of implementing a restriction of arbitrability under national law is to make an agreement to submit the respective disputes to arbitration invalid or ineffective. As a consequence, the question arises whether the arbitrability of a particular

[518] See, in particular, *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. I, 299 *et seq.*, 611 *et seq.*

[519] *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 444.

[520] Cf. *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 438 *et seq.*

[521] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (*infra* mn. 298); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (*infra* mn. 297); also cf. *van den Berg*, The New York Arbitration Convention of 1958, 1981, 362.

[522] Also cf. *Otto/Elwan*, in: Kronke *et al.* (eds), Recognition and Enforcement of Foreign Arbitral Awards, 2010, 349; Switzerland: *BGE* 118 II, 193 (196 *et seq.*) = YCA XVIII (1993), 143 (145 *et seq.*).

dispute must also be determined pursuant to the law applicable to the validity of the arbitration agreement under article V(1)(a) (*cf. supra* mns 201, 213). Some courts and commentators have advocated such an approach, arguing that provisions of non-arbitrability render an agreement to arbitrate invalid which in turn establishes a defence under article V(1)(a).[523] However, the mere fact that certain aspects will entail the invalidity of an arbitration agreement does not imply that the respective law must necessarily be determined by the conflicts rule established by article V(1)(a) with regard to the substantive validity of that agreement in general.[524] Thus, article V(1)(a) itself provides for a separate treatment of the capacity of the parties to conclude an arbitration agreement (*supra* mn. 211). With regard to the arbitrability of the dispute, it must be taken into account that the seat of the arbitration as such is of little relevance to these issues, particularly where the parties have chosen a neutral venue for their arbitration. Consequently, it is preferable to distinguish between the substantive validity of the agreement in general and the separate jurisdictional requirement that the dispute must be capable of settlement by arbitration; the latter, also due to its close proximity to public-policy concerns, should be determined exclusively pursuant to the limits established by the law of the country of enforcement under article V(2)(a).[525]

295 **bb) Specific applications.** Since the NYC does not restrict the kinds of dispute that Contracting States may consider to be arbitrable under their law (*supra* mn. 291), there is basically a wide range of possible grounds of non-arbitrability.[526] However, recent decades have seen a general tendency in a large number of jurisdictions to liberalize the limits to arbitrability, in the course of which matters that used to be reserved for adjudication by national courts have become arbitrable, either generally[527] or at least in cases involving international commerce[528] (also *cf. infra* mns 297, 298). One frequent approach is to provide that all claims involving an economic interest may be submitted to arbitration, without any further restrictions;[529] under such systems, the "classic" cases of antitrust and competition law (*infra* mn. 297) and intellectual property law (*infra* mn. 299) or consumer cases (*infra* mn. 301) will generally be arbitrable. Under another common approach, arbitrability is linked to the power of the parties to dispose of the respective right or their power to conclude a settlement on the dispute.[530]

296 A question of general relevance has arisen with regard to rules allocating the exclusive jurisdiction to adjudicate certain disputes to a particular State.[531] Here, it is widely

[523] *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. II mns 160–163; *Bernardini*, in: Gaillard/Di Pietro (eds), Enforcement of Arbitration Agreements and International Arbitral Awards, 2008, 516; Italy: *CA Genoa*, Riv. arb. 1994, 505 = YCA XXI (1996), 594 (599).

[524] But see *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. II mn. 161.

[525] *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 425–426, 447; Germany: *OLG Hamm*, IPRax 1985, 218 = YCA XIV (1989), 629 (631); Switzerland: *BGE* 118 II, 353 = YCA XX (1995), 766 (767 *et seq.*).

[526] For a detailed overview see *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 450–479.

[527] *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 430–431; *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, 2003, mn. 9–36.

[528] *van den Berg*, The New York Arbitration Convention of 1958, 1981, 369; *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 438–439; *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, 2003, mns 9–35, 9–36; *Gaillard/Savage*, International Commercial Arbitration, 1999, mn. 1707.

[529] See, e. g., Belgium: article 1676(1) s. 2 CJ; Germany: § 1030(1) s. 1 ZPO; Switzerland: article 177(1) IPRG.

[530] See, e. g., Belgium (regarding disputes not involving an economic interest): article 1676(1) s. 2 CJ; Brazil: article 1 Arbitration Act 1996 ("disputes related to patrimonial rights over which they may dispose"); Croatia: article 3(1) Arbitration Act 2001; Germany: § 1030(1) s. 1 ZPO (regarding disputes not involving an economic interest); Italy: article 806(1) CPC.

[531] See, e. g., article 24 Brussels I Regulation (recast).

accepted that such provisions are only exclusive regarding the relationship between national courts but do not impose any limits to arbitrability.[532] The result may be different where the respective rules provide for the exclusive jurisdiction of a particular adjudicative body or public agency[533] (*cf. infra* mn. 299 in intellectual property rights).

Antitrust and competition law were traditionally held to be non-arbitrable due to the **297** strong public interest involved in these areas of the law. However, there has been an increasing tendency towards liberalization, with the result that such disputes are now held to be arbitrable in a considerable number of jurisdictions,[534] for example in the United States, where the Supreme Court in 1985 lifted the traditional exclusion of arbitrability for international cases,[535] an approach that was later extended to domestic cases.[536] In this decision, the Supreme Court expressly reserved the possibility of a later review of the award at the enforcement stage.[537] Such a subsequent review ("second look") always remains possible, and is particularly important, in cases where a State decides to abandon limitations of arbitrability in areas involving the public interest. However, such review can then no longer be based on non-arbitrability, but only on the public-policy defence, operating on a case-by-case basis[538] (*cf. infra* mn. 327).

A similar development has occurred in the area of securities law: Here as well, there is **298** an international trend towards liberalization,[539] and again, the U.S. Supreme Court has provided a prominent example in a case involving an international commercial transaction,[540] which was later extended to domestic cases.[541]

Non-arbitrability has a somewhat stronger hold on disputes concerning intellectual **299** property rights, particularly where they involve the participation of public agencies for the purpose of obtaining the necessary registration of the respective rights.[542]

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[532] *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 430; *Perales Viscasillas*, in: Mistelis/Brekoulakis (eds), Arbitrability, 2009, mns 14–23 *et seq*. But see *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, 2003, mn. 9–39 (fn. 47).

[533] *Perales Viscasillas*, in: Mistelis/Brekoulakis (eds), Arbitrability, 2009, mn. 14–23.

[534] See *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 455–457; *Otto/Elwan*, in: Kronke *et al.* (eds), Recognition and Enforcement of Foreign Arbitral Awards, 2010, 356 *et seq.*; *Radicati di Brozolo*, (2011) 27 Arb. Int'l 1 (3 *et seq.*); Australia: *Stericorp. Ltd v. Stericycle Inc.*, [2005] VSC 700 = YCA XXXI (2006), 549 (556); Switzerland: *BGE* 118 II, 193 (198) = YCA XVIII (1993), 143 (148). For EU law: ECJ Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, [1999] ECR I-3055 (mns 31 *et seq.*). Regarding ICSID arbitration: New Zealand: *The Governement of New Zealand v. Mobil Oil New Zealand Ltd*, YCA XIII (1988), 638 (650 *et seq.*).

[535] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, Inc., 473 U.S. 614 (631 *et seq.*) (1985).

[536] See, e. g., *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437 (1441) (9th Cir. 1994); *Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp.*, 271 F.3d 6 (11) (1st Cir. 2001).

[537] See the often-quoted "fn. 19" in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (634) (1985).

[538] *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 457; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (638) (1985); also see *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. I, 980 *et seq.*

[539] See *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 477–478; *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. I, 985 *et seq.*

[540] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (515 *et seq.*) (1974).

[541] *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (232) (1987); *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (482 *et seq.*) (1989); also see *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, 2003, mns 9–49 *et seq.*

[542] Cf. *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 470–472; *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, 2003, mns 9–64 *et seq.* – However, here as well, there are markedly liberal approaches in some jurisdictions, e. g. Switzerland: *Dessemontet*, in: Gaillard/Di Pietro (eds), Enforcement of Arbitration Agreements and International Arbitral Awards, 2008, 556; USA: 35 U.S.C. § 294; *Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566 (571 *et seq.*) (4th Cir. 1998).

300 In the area of insolvency law, there are quite diverging approaches to the arbitrability of disputes.[543] Usually, the administration of insolvency proceedings as such ("core" insolvency issues) is considered to be non-arbitrable.[544] Greater diversity exists with regard to the effects on individual claims by or against the insolvent party, particularly the question whether the opening of insolvency proceedings renders the arbitration agreement invalid, suspends arbitration, or leaves the arbitration agreement and arbitral proceedings unaffected.[545] With regard to the possible effects of the insolvency on the arbitration agreement and/or arbitral proceedings, it will often be necessary to determine, on the basis of a careful analysis of the national provisions involved, whether they refer to the objective arbitrability of the dispute, the capacity of the parties to arbitrate (*supra* mns 210–211), or the validity of the arbitration agreement in general.[546]

301 Divergent approaches also exist with regard to consumer disputes. In some jurisdictions, such disputes are considered non-arbitrable.[547] In other countries, consumer disputes are generally arbitrable, but the arbitration agreement may be considered invalid for reasons of substantive unfairness or unconscionability, particularly if they are imposed on the consumer by way of general contract terms.[548] Such provisions may then become applicable under article V(1)(a) or, as a last resort, under the public-policy defence of article V(2)(b) (also *cf. supra* mn. 123). – A similar situation exists in the area of employment law disputes.[549]

302 Family and succession law is still largely a domain of non-arbitrability.[550] However, the question whether such matters are arbitrable only becomes relevant under the NYC if the respective Contracting State has not made the commercial dispute reservation (*supra* mn. 75). Sometimes, non-arbitrability primarily affects status disputes (divorce, parentage), while economic disputes (matrimonial property, maintenance) are considered arbitrable.[551]

303 **h) Violation of public policy, article V(2)(b) NYC.[551a] aa) General principles. (1) Notion of public policy and applicable law.** Under article V(2)(b), recognition or

[543] See *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 467–469; *Otto/Elwan*, in: Kronke *et al.* (eds), Recognition and Enforcement of Foreign Arbitral Awards, 2010, 355; *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. I, 894 *et seq*.

[544] *Otto/Elwan*, in: Kronke *et al.* (eds), Recognition and Enforcement of Foreign Arbitral Awards, 2010, 355; *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, 2003, mn. 9–55; USA: *In re U.S. Lines, Inc.*, 197 F.3d 631(640 *et seq.*) (2nd Cir. 1999).

[545] For an overview of possible provisions see *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. I, 895 *et seq*.; *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, 2003, mns 9–61 *et seq.* Also cf. the much-discussed proceedings in the *Vivendi* case: UK: *Syska v. Vivendi Universal SA*, [2009] EWCA Civ. 677 = [2009] Bus. L.R. 1494; Switzerland: *BG*, YCA XXXIV (2009), 286 (292).

[546] Cf. USA: *Société Nationale Algerienne pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v. Distrigas Corp*, 80 B.R. 606 (610 *et seq.*) (D.Mass. 1987); *In re U.S. Lines, Inc.*, 197 F.3d 631 (640 *et seq.*) (2nd Cir. 1999); *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, 2003, mns 9–57 *et seq*.

[547] E. g. Turkey: *Bayata Canyas*, Bull. ASA 2013, 537 (554); also see *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. I, 1014 *et seq*.

[548] Cf. *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 459, 461. See, in particular, ECJ Case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, [2006] ECR I-10421; ECJ Case C-40/08 *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, [2009] ECR I-9579. Also see Brazil: article 4(2) Arbitration Act 1996. In some jurisdictions, the parties are limited to post-dispute agreements; e. g. Austria: § 617 ZPO.

[549] Cf. *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 476; *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. I, 1009 *et seq*.

[550] *Quinke*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 463.

[551] See, e. g., Germany: *Trittmann/Hanefeld*, in: Böckstiegel *et al.* (eds), Arbitration in Germany, 2nd ed., 2015, § 1030 mn. 21.

[551a] Also see *Maurer*, The Public Policy Exception under the New York Convention, Rev. ed. 2013.

enforcement of the award may finally also be refused if it would be contrary to the public policy ("*ordre public*") of the country of enforcement. The NYC does not provide any autonomous or more specific definition of "public policy"; instead, public policy is left to be defined by the law of the State where enforcement is sought[552] (as for the possible relevance of the public policy of another State, see *infra* mn. 311). Accordingly, the enforcement State is free to determine what constitutes public policy in its jurisdiction. At least as a matter of principle, however, it is almost universally accepted that article V(2)(b) must be interpreted narrowly (also *cf. supra* mn. 173): Thus, "public policy" is understood to encompass not any mandatory law of the enforcement forum[553] but only its most fundamental notions of morality and justice,[554] including constitutional rights and guarantees.[555] The public-policy defence thus operates as a "safety valve"[556] as against the general obligation assumed by the Contracting States to recognize and enforce foreign arbitral awards under article III NYC. It may encourage States to join the Convention by giving them the assurance that awards which are irreconcilable with the most fundamental values of their respective legal system may still be denied enforcement.

Even though the restrictive interpretation of the public-policy defence seems to be **304**
generally accepted as a matter of principle, there is always the danger that national courts, in individual cases, may go beyond what would normally be considered the proper scope of review.[557] Thus, the "safety valve" of article V(2)(b) may turn into a gateway for tendencies that are hostile to the generous enforcement of foreign arbitral awards envisaged by the NYC.[558] It would help to limit this danger if it were possible to derive from the NYC at least some limitations to what may legitimately be invoked as public policy by Contracting States.[559] This, however, would run counter to the very purpose of the public-policy defence, that is, to assure each Contracting State of the

[552] Germany: *BayObLG*, IHR 2004, 81 (82) = YCA XXIX (2004), 771 (773); *OLG Saarbrücken*, SchiedsVZ 2012, 47 (50); Russia: *D.Ct. Moscow*, YCA XXIII (1998), 735 (736).

[553] *Otto/Elwan*, in: Kronke *et al.* (eds), Recognition and Enforcement of Foreign Arbitral Awards, 2010, 365.

[554] Australia: *Traxys Europe SA v. Balaji Coke Industry Ltd (no. 2)*, 201 FCR 535 (555); Austria: *OGH*, JBl 2005, 661 (664) = YCA XXX (2005), 421 (428); *OGH*, SZ 2011, no. 106, 163 (174 *et seq.*) = YCA XXXVIII (2013), 317 (mn. 41); Brazil: *Sup. Trib. Just.*, YCA XXXII (2007), 271; Germany: *BGHZ* 98, 70 (73 *et seq.*) = NJW 1986, 3027 (3028) = YCA XII (1987), 489 (490); *BGHZ* 110, 104 (107) = NJW 1990, 2199 (2199) = YCA XVII (1992), 503 (505); *BGH*, NJW-RR 1991, 757 (758) = YCA XVII (1992), 513 (514 *et seq.*); *OLG München*, SchiedsVZ 2006, 111 (112) = YCA XXXI (2006), 722 (726 *et seq.*); *OLG Thüringen*, SchiedsVZ 2008, 44 (45) = YCA XXXIII (2008), 534 (538); *OLG Saarbrücken*, SchiedsVZ 2012, 47 (50 *et seq.*); USA: *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (973 *et seq.*) (2nd Cir. 1974); *Ackerman v. Levine*, 788 F.2d 830 (841 *et seq.*) (2nd Cir. 1986); *Telenor Mobile Communications AS v. Storm LLC*, 524 F.Supp.2d 332 (356) (S.D.N.Y. 2007); *Kaliroy Produce Co., Inc. v. Pacific Tomato Growers, Inc.*, 730 F.Supp.2d 1036 (1042) (D.Ariz. 2010); *Republic of Argentina v. BG Group PLC*, 764 F.Supp.2d 21 (39) (D.C.Cir. 2011).

[555] See, e. g., Austria: *OGH*, JBl 2005, 661 (664) = YCA XXX (2005), 421 (428); *OGH*, SZ 2011, no. 106, 163 (175) = YCA XXXVIII (2013), 317 (mn. 42).

[556] *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 481, 490; also *cf. Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. III, 3647 ("escape device").

[557] Cf., e. g., India: In 2008, the Supreme Court of India had extended the public-policy defence regarding *domestic* awards to foreign awards; as a consequence, enforcement of foreign awards could be refused if they were found to be "patently illegal"; *Venture Global Engineering v. Satyman Computer Services Ltd*, (2008) 4 SCC 190 = YCA XXXIII (2008), 239 (240 *et seq.*). However, that decision was recently overruled by *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 = YCA XXXVII (2012), 244 (246). Also cf. *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 510.

[558] Cf. *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 491; *van den Berg*, The New York Arbitration Convention of 1958, 1981, 366.

[559] To that effect, see e. g. *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. III, 3662 *et seq.*

possibility to assert its most fundamental notions of justice and morality against the enforcement of decisions rendered by arbitral tribunals. Like with arbitrability (*supra* mn. 291), the Convention thus allows for wide leeway in the definition of public policy by Contracting States.[560]

305 The defence of public policy can arise with regard to fundamental principles of procedural law ("procedural public policy", *infra* mns 313–323) or of substantive law ("substantive public policy", *infra* mns 324–328).[561]

306 **(2) "International" public policy and sufficient connection to the forum.** The cautious use to be made of public policy as a defence against the enforcement of a foreign award is also reflected by the widely accepted distinction between "international public policy" ("*ordre public international*") and "domestic public policy" ("*ordre public interne*"). The distinction is derived from French law in particular (and the legal systems influenced by French law in that respect), where the "*ordre public interne*" traditionally designates the entirety of mandatory rules of a given legal system, while the "*ordre public international*" is used to designate the category of mandatory law that is considered indispensable to that legal system and is therefore asserted also against the application of foreign law and/or the recognition of foreign judgments or awards.[562] In that sense, the review under article V(2)(b) is therefore limited to "international public policy",[563] to reflect the more tolerant approach under which not any and all mandatory law of the enforcement jurisdiction will give rise to a public-policy defence, but only its most basic legal principles (*supra* mn. 303).

307 The term "international" public policy, however, is susceptible to misunderstanding: First, it does not imply that the public policy that may legitimately be asserted by a Contracting State must necessarily be derived from international or supranational sources of law or correspond to an internationally accepted standard. To be true, such a restriction of the public-policy defence has been advocated under the notion of a "truly international" or "transnational" public policy,[564] but for the above reasons (mn. 304), the NYC does not *impose* any such limitation.[565] The call for a "truly international" public policy is therefore merely a (legitimate) policy claim directed at national legislators and courts. In that respect, a Contracting State may (and should) of course seriously consider foreign and international standards when deciding on whether

[560] *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 501; *Gaillard/Savage*, International Commercial Arbitration, 1999, mn. 1712.

[561] See, e. g., *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 514; *Otto/Elwan*, in: Kronke *et al.* (eds), Recognition and Enforcement of Foreign Arbitral Awards, 2010, 389 *et seq.* – Contra: *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. III, 3688 (limitation to substantive public policy).

[562] Cf. *van den Berg*, The New York Arbitration Convention of 1958, 1981, 360 *et seq.*

[563] *van den Berg*, The New York Arbitration Convention of 1958, 1981, 361 *et seq.*; *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 496–498, 511; *Gaillard/Savage*, International Commercial Arbitration, 1999, mn. 1711; *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. III, 3655; France: *Cass.*, Rev. arb. 2008, 473 (475) = YCA XXXIII (2008), 489 (493); *CA Paris*, Rev. arb. 2004, 987; Germany: *BGH*, NJW-RR 2001, 1059 (1061) = YCA XXIX (2004), 700 (714); *BGH*, SchiedsVZ 2006, 161 (164) = YCA XXXII (2007), 328 (339); *OLG Karlsruhe*, SchiedsVZ 2012, 101 (104 *et seq.*); Singapore: *Hainan Machinery Import and Export Corp. v. Donald & McArthy Pte Ltd*, YCA XXII (1997), 771 (779); Switzerland: *BG*, YCA XXXVI (2011), 337 (339); *BG*, YCA XXXVI (2011), 340 (342 *et seq.*); USA: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (638) (1985); *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (973 *et seq.*) (2nd Cir. 1974).

[564] *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. III, 3657 *et seq.* Also see *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 496–497.

[565] *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. V mns 497–498; *Gaillard/Savage*, International Commercial Arbitration, 1999, mn. 1712.

any specific legal principle should be accorded the status of public policy under article V(2)(b). As a consequence, a State may be more hesitant to assert principles that are generally not shared by other jurisdictions[566] or, on the other hand, more willing to enforce legal principles that are also accepted by a large number of other jurisdictions.[567] In turn, not any mandatory rule derived from international or supranational law, in particular: not any mandatory rule of European law, is *per se* necessarily a rule of public policy, but only if it represents essential legal principles[568] (as for EU competition law, see *infra* mn. 327).

Furthermore, the notion of "international public policy" may be the cause of uncer- **308**
tainty or confusion for those jurisdictions that *generally* use the term "public policy" ("*öffentliche Ordnung*", "*ordre public*") as such to designate the restricted range of fundamental principles that may be asserted against the recognition of a foreign decision or the application of foreign law.[569] As a consequence, for such legal systems, there is no need, on a terminological level, to further restrict the notion of "public policy" to that of "international public policy" in order to contrast it to the larger range of mandatory law existing in the internal legal system.[570]

In some jurisdictions, the finding of a violation of public policy depends on the **309**
existence of a sufficient connection to the forum ("*Inlandsbeziehung*"):[571] Thus, in cases that have little connection to the enforcement forum, the standard of review may be quite lenient, while in cases that are more closely connected to that forum, it will be stricter. This approach also implements the idea of a more generous review in international cases where the connections to the forum are less intensive than in domestic cases.

(3) Prohibition of a review on the merits. It is widely accepted that enforcement **310**
courts will perform no "*révision au fond*", that is, they will not review the tribunal's decision on the merits (*supra* mn. 175). Mere mistakes in the application of the law on the merits are therefore not enough to refuse enforcement of the award for reasons of public policy (for the particular considerations that apply in cases of "manifest disregard of the law", see *infra* mn. 322).

(4) Foreign public policy. Based on the principle that public policy depends on the law **311**
of the enforcing state (*supra* mn. 303), it is often held that a violation of foreign public policy is generally irrelevant, regardless of the seriousness of the infringement of that policy and the existence of a close connection of the parties or the dispute to respective

[566] See, e. g., Australia: *Traxys Europe SA v. Balaji Coke Industry Ltd (No. 2)*, 201 FCR 535 (560) ("The public policy ground […] should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state.").

[567] Cf. Switzerland: *BGE* 120 II, 155 (167); *BGE* 132 III, 389 (394 *et seq.*).

[568] Austria: *OGH*, SZ 71, no. 26, 151 (159); Germany: *BGH*, NJW 1969, 978 (979 *et seq.*).

[569] See, e. g., Germany: Art. 6 EGBGB: "Public policy (ordre public). A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with civil rights.".

[570] See, in that respect, *Kröll*, in: Böckstiegel *et al.* (eds), Arbitration in Germany, 2nd ed., 2015, § 1061 mn. 136; *Kröll/Kraft*, *ibid.*, § 1059 mn. 79. – This fact was overlooked in Germany by *OLG Karlsruhe*, SchiedsVZ 2012, 101 (104), holding that "domestic" public policy was offended where the enforcement of the award was "clearly incompatible with essential principles of German law, in particular with constitutional civil rights", while "international" public policy constituted a more permissive standard that was affected only where the arbitral proceedings suffered from a serious defect touching the foundations of political and economic life in Germany. However, *both* definitions, in essence, relate to "international public policy". In particular, it is hardly conceivable that a German court would be willing (or, for that matter, justified) to enforce an award that was incompatible with constitutional civil rights, a matter that the court relegated to "mere" domestic public policy.

[571] Notably Germany: *BGH*, NJW 1986, 3027 (3028) = YCA XII (1987), 489 (490); *OLG Saarbrücken*, SchiedsVZ 2012, 47 (50). Also cf. *Landolt*, (2007) 23 Arb. Int'l 63 (71).

foreign country.[572] To support that position, it could be argued that the aggrieved party can always obtain an annulment of the award in the country of origin, which would then serve as a defence to the enforcement of the award elsewhere under article V(1)(e). However, this would only be a solution to the extent that the public policy of the arbitral situs is concerned, which will normally not be true where the parties have chosen a neutral place of arbitration. Thus, there may be situations where the enforcing jurisdiction may consider it appropriate to vindicate the public interests of a foreign State, e. g. its law on competition, foreign commerce or the protection of cultural property.[573] In such (exceptional) cases, it has been accepted by some courts and commentators that the public policy of the forum may incorporate public interests of a foreign country, as expressed in that countries mandatory law.[574] It must be noted that such an approach does not undermine the (exclusive) reference to forum law in article V(2)(b): A foreign public policy does not impose itself *per se* on the enforcement jurisdiction, but only to the extent that this jurisdiction is willing to incorporate and vindicate that policy, that is, where it is sympathetic of the policies pursued by the respective foreign State. In that respect, the determination of the relevant public policy to be asserted under article V(2)(b) still lies exclusively with the State where enforcement of the award is sought.

312 **(5) Extent of review of the arbitral award.** As a matter of principle, the enforcement court may make its own legal review as far as it is necessary to determine whether there has been a violation of public policy; in that respect, the court is bound neither by the factual findings of the tribunal nor by its legal reasoning[575] (also *cf. supra* mn. 197). However, in particular cases, the court may decide to defer to the findings of the tribunal, in particular where the tribunal had considered the objections raised by the respondent, had taken extensive evidence and given detailed reasons for its decision.[576] Such decisions may be explained by the fact that the burden of proof lies on the respondent also with regard to the establishment of a violation of public policy (*supra* mn. 182). Where there is no cause to doubt the findings and decision of the tribunal as to their conformity with the public policy of the enforcement forum, the respondent simply has not met its burden of establishing a defence under article V(2)(b).

313 **bb) Procedural public policy. (1) General considerations.** Many of the procedural safeguards that may amount to "procedural" public policy are also covered by other

[572] *Otto/Elwan*, in: Kronke *et al.* (eds), Recognition and Enforcement of Foreign Arbitral Awards, 2010, 369; Ireland: *Brostrom Tankers AB v. Factorias Vulcano SA*, [2004] IEHC 198 = YCA XXX (2005), 591 (596 *et seq.*); USA: *Ukrvneshprom State Foreign Economic Enterprise v. Tradeway, Inc.*, 1996 WL 107285, 6 (S.D.N.Y. 1996) = YCA XXII (1997), 958 (964).

[573] See, e. g. *Landolt*, (2007) 23 Arb. Int'l 63 (69–73).

[574] *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 493; *Born*, International Commercial Arbitration, 2nd ed., 2014, Vol. III, 3667. See, e. g., Germany: *OLG München*, SchiedsVZ 2012, 339 (341 *et seq.*) (regarding Ukrainian prohibition of contractual agreements in restraint of competition, particularly p. 342: "It is the purpose of the public-policy defence to ensure that economic regulations of a state cannot be disregarded by resorting to arbitration."); USA: *Victrix Steamship Co., SA v. Salen Dry Cargo A.B.*, 825 F.2d 709 (714 *et seq.*) (2nd Cir. 1987).

[575] *Wolff*, in: Wolff (ed.), New York Convention, 2012, Art. V mn. 517 (subject the *lex fori* of the enforcement court); *Hanotiau/Caprasse*, in: Gaillard/Di Pietro (eds), Enforcement of Arbitration Agreements and International Arbitral Awards, 2008, 787, 804 *et seq.*; Austria: *OGH*, SZ 2011, no. 106, 163 (174) = YCA XXXVIII (2013), 317 (mn. 41); France: *Cass.*, Rev. arb. 1987, 469 (470 *et seq.*) = YCA XIII (1988), 152 (153 *et seq.*); *CA Paris*, Rev. arb. 1994, 359 (365) = YCA XX (1995), 198 (201 *et seq.*); Germany: *BGH*, WM 1983, 1207 (1208); *OLG Bremen*, BB 2000, Beilage Nr. 12, 18 (19) = YCA XXXI (2006), 640 (657 *et seq.*); *OLG Düsseldorf*, IPRspr 2004, no. 195, 443 (445) = YCA XXXII (2007), 315 (318); UK: *Westacre Investments Inc. v. Jugoimport-SDRP Holding Co. Ltd*, [2000] QB 288 (299 *et seq.*).

[576] See, e. g., Germany: *OLG Hamburg*, IPRspr 1999, no. 178, 425 (429) = YCA XXIX (2004), 663 (668); *OLG Saarbrücken*, SchiedsVZ 2012, 47 (49 *et seq.*).