

PREVENTING AND MANAGING INTERNATIONAL COMMERCIAL DISPUTES

ROME, ITALY
28 SEPT. 2007 - 29 SEPT. 2007

TRACK 11: *Challenge/Enforcement of Arbitration Awards and Public Policy*

Overview of Case Law

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This comment provides a brief overview of case law involving challenges of an arbitral award, either by a motion for setting aside or challenges to enforcement pursuant to Articles 34 and 36 respectively of the UNCITRAL Model Law on International Commercial Arbitration 1985 ('MAL'). As documented by the accompanying tables, the Case Law on UNCITRAL Texts (CLOUT) database maintained by the UNCITRAL Secretariat has been comprehensively reviewed. Focusing particularly on the use of public policy as a grounds for challenging the enforcement of an arbitral award, case law relating to Article V (2)(b) of the New York Convention 1958 and published in the International Council for Commercial Arbitration (ICCA) Yearbooks have been examined dating back to 1997.

MAL Article 34: Grounds for Annulment of an Arbitral Award

1. Most courts have demonstrated a preference for having a hands-off approach when considering motions made by parties for annulment of arbitral awards, adhering strictly to the UNCITRAL Model Law on International Commercial Arbitration [MAL] when parties agree that this law will govern their transactions. Courts are reluctant to upset an arbitral award absent gross misconduct and blatant error on part of the arbitral tribunal during the arbitration proceedings.¹
2. Agreements made by the parties prior to arbitration are traditionally given great deference by the courts. Awards are annulled under Article 34 of the MAL only in instances where the appellant can meet the burden of proof of showing that during the arbitration proceedings there was gross error², mistake³, lack of proper notice⁴, lack of tribunal competence⁵, lack of jurisdiction on the part of the tribunal⁶ or an award that is clearly erroneous, such as one outside the agreement to arbitrate. The

¹ CLOUT Case 10, Superior Court of Quebec, Canada (16 April 1987).

² CLOUT Case 323, Supreme Court, Zimbabwe (21 October and 21 December 1999)

³ CLOUT Case 375, Bayerisches Oberstes Landesgericht, Germany (15 Dec 1999); *See also* CLOUT Case 436 Bayerisches Oberstes Landesgericht, Germany (24 February 1999)

⁴ CLOUT Case 527, High Court of the Hong Kong Special Administrative Region, Court of First Instance, Hong Kong (11 October 2001); *See also* CLOUT Case 440, Oberlandesgericht Köln, Germany (22 December 1999)

⁵ CLOUT Case 182, Superior Court of Quebec, Canada (9 September 2004)

⁶ CLOUT Case 391, Superior Court of Justice, Canada (22 September 1999); *See also* CLOUT case 148 Russian Federation: Moscow City Court (10 February 1995); *See also* CLOUT case 374

most common ground for appeal of an arbitration agreement considered by courts is procedural error in the formation of the tribunal.⁷ Courts look to causal relationships between appointment and selection of the arbitrators and the decision of the arbitral tribunal in determining if the error has been prejudicial against either party.⁸ Tenuous relationships between a party and an arbitrator are largely insufficient to justify annulment. Again, contractual agreements between parties are afforded a great deal of deference.

3. Courts will not allow for judicial review if the reason stated for the appeal is that the arbitral tribunal made an error of law or an erroneous finding of fact provided the decision is within the jurisdiction of the Tribunal.⁹ It is the onus of the parties to the proceedings to raise objections to findings of fact and law prior to final resolution of the issues. Failure to do so is not grounds for judicial review under MAL 34.¹⁰

MAL Article 36: Grounds for Non-Enforcement of an Arbitral Award

4. In relation to Article 36 MAL, courts have demonstrated an inclination to refuse an application against the enforcement of an arbitral award. This preference for upholding an arbitral award is consistent with the approach adopted in relation to Article 34 MAL. Indeed some courts have adopted the view that even if one of the grounds in Article 36 MAL are established, the word “may” vests a discretion with the court to nonetheless recognise and enforce the award.¹¹

5. Grounds for non-enforcement contemplated in Article 36 include when there is “incapacity” in the arbitration clause arising from a provision excluding arbitration in the particular circumstances.¹² It also contemplates instances when there is a lack of natural justice requirements¹³ or the arbitral decision is not the outcome of “fair and constitutional procedures” in the state in which enforcement is sought.¹⁴ Arguments that a tribunal has denied a motion to receive evidence,¹⁵ decided not to order an oral hearing¹⁶ or misinterpreted the agreement have been unsuccessful.¹⁷

The Public Policy Ground

6. Public policy is a slippery concept and no attempt has been made at conclusively defining this theory. No uniform understanding of this concept exists across jurisdictions, as the following case law demonstrates.

Oberlandesgericht Düsseldorf, Germany (23 March 2000); *See also* CLOUT Case 448 High Court of Hong Kong Special Administrative Region, Court of Appeal, Hong Kong (27 June 2001)

⁷ CLOUT Case 436, Bayerisches Oberstes, Germany (24 February 1999).

⁸ CLOUT Case 440, Oberlandesgericht Köln, Germany (22 December 1999).

⁹ CLOUT Case 375, Bayerisches Oberstes Landesgericht, Germany (15 Dec 1999 *See also* *The Attorney General of Canada v. S.D. Myers, Inc*, 2004 WL 3753165 (APPAWD); Federal Court Canada Docket: T-225-01 T-81-03 Citation: 2004 FC. *See also* Lax J. in *Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.P.A. et al.* (1999), 45 (3d) 183 at page 191, affirmed by 49 O.R. (3d) 414 (C.A.).

¹⁰ CLOUT Case 12, Federal Court of Canada, Canada (7 April 1988). *See also* CLOUT Case 391, Superior Court of Justice, Canada, (22 September 1999).

¹¹ CLOUT Case No. 88, High Court of Hong Kong, Hong Kong (16 December 1994). CLOUT Case No. 366, Ontario Court of Justice, Canada (21 January 1997);

¹² CLOUT Case No. 67, Saskatchewan Court of Appeal, Canada, (17 September 1991).

¹³ CLOUT Case No. 358, British Columbia Supreme Court, Canada (11 May 1998).

¹⁴ CLOUT Case No. 371, Hanseatisches Oberlandesgericht Bremen, Germany (30 September 1999).

¹⁵ CLOUT Case No. 371, Hanseatisches Oberlandesgericht Bremen, Germany (30 September 1999).

¹⁶ CLOUT Case No. 371, Hanseatisches Oberlandesgericht Bremen, Germany (30 September 1999).

¹⁷ CLOUT Case No. 366, Ontario Court of Justice, Canada (21 January 1997).

MAL Article 34

7. Public policy is enforced in extreme cases only. For example, German Courts accept a violation of public policy in “extreme cases only.” Swiss Courts adhere to the standard that it must be considerably clear that public policy will only be deemed to be present where innate feelings of justice are hurt in an intolerable manner, where fundamental provisions of the Swiss legal order have been disregarded, or where the Swiss legal thinking compels the prevalence of the applicable or applied law.¹⁸ Canadian courts have cited violations of public policy to be found in cases where the arbitrator’s findings are patently unreasonable, clearly irrational, totally lacking in reality, or a flagrant denial of justice.¹⁹

8. Many courts, including those in the United States, have set a clear precedent toward enforcement of findings of arbitral tribunals.²⁰ As considered under MAL Article 34, a common definition for an award that violates public policy is one that an award was based on so fundamental an error that it constituted a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice would be intolerably hurt by the award then it should be contrary to public policy to uphold it.²¹

9. In the absence of gross violations of moral turpitude, courts have considered failure to provide procedural due process as grounds for invalidating an award on the basis of public policy. In the event that a party is denied the opportunity to be heard due to substantial errors in procedure, a court may use a public policy if other avenues are absent. As a rule, however, courts will look to the laws of the Forum State to determine if other rules of law apply prior to resorting to a public policy defense.²²

MAL Article 36

10. Generally supervising courts in all jurisdictions, with the exception of Germany, have exhibited a reluctance to refuse recognition and enforcement of an arbitral award on public policy grounds alone. For example, the Ontario Court held that an arbitral award should not be re-opened to ensure conformity with public policy unless there has been misconduct.²³ This reluctance to overturn an arbitral award was also exhibited by the Harare High Court which adopted a particular interpretation of an award so that it did not contravene the Zimbabwean common law rule of *in duplum* and to enforce an arbitral award.²⁴

11. In instances where public policy arguments have succeeded in challenging the enforcement of an award, reasons include failure to observe natural justice requirements²⁵ and principles of due process including the right to be heard, the right to be informed about the arbitration and to be summoned to an arbitral hearing in due time.²⁶ In Germany, the notion of public interest may be violated if the foreign decision is the result of a procedure which differs from the fundamental

¹⁸ Hong Xiao, *Refusing Recognition and Enforcement of Foreign Arbitral Awards under Article V (2) of the New York Convention in China: From the Judicial Experience of Europe and USA*. US China Law Review, Jul. 2005 Vol 2, No. 7 (Serial No. 8) at p. 4. Available at: <http://www.jurist.org.cn/doc/uclaw200507/uclaw20050707.pdf>.

¹⁹ See *The Attorney General of Canada v. S.D. Myers, Inc*, 2004 WL 3753165 (APPAWD); Federal Court Canada Docket: T-225-01 T-81-03 Citation: 2004 FC 38. See also CLOUT Case 267, Harare High Court, Zimbabwe (29 March and 9 December 1998).

²⁰ See *Sea Dragon Inc. v. Gebr. Van Weelde Scheepvaartkantoor*, 574 F. Supp. 367 (S.D.N.Y. 1983).

²¹ CLOUT Case 323, Supreme Court, Zimbabwe (21 October and 21 December 1999).

²² CLOUT Case 391, Canada, 22 September 1999.

²³ CLOUT Case No. 30, Ontario Court General Division, Canada (13 February 1992).

²⁴ CLOUT Case No. 342, Harare High Court, Zimbabwe (1 March and 5 April 2000).

²⁵ CLOUT Case No. 358, British Columbia Supreme Court, Canada (11 May 1998).

²⁶ CLOUT Case No. 402, Highest Regional Court of Bavaria, Germany (16 March 2000).

principles of German procedural law in such a way that under the German legal system it cannot be considered the result of a fair and constitutional procedure.²⁷ As a broad and multi-faceted concept, public policy rationales may also include the essential morality of the state²⁸ and the principle of finality in arbitration.²⁹

Article V(2) of the New York Convention

12. Where parties have elected to utilize the New York Convention as controlling law, courts have demonstrated more consistency. Enforcement of a foreign arbitral award may be denied, according to article V(2)(b) of the New York Convention when its enforcement would be contrary to domestic foreign policy in the State where enforcement is sought.³⁰ It is generally accepted that the expression “contrary to the public policy of that country” means “contrary to the fundamental conceptions of morality and justice of the Forum State.”³¹ Courts construe this definition very narrowly and as a result it very rarely serves as a corrective function. The comity of countries has agreed that there is a strong public policy interest in enforcing awards under the New York Convention.³²

Appendices:

Summary of CLOUT case law for MAL 34 and 36 (table)

Summary of case law on public policy relating to Article V(2) of the New York Convention of 1958 (table)

Summary of additional pertinent case law on annulment of arbitration awards

²⁷ CLOUT Case No. 371, Hanseatisches Oberlandesgericht Bremen (30 September 1999).

²⁸ CLOUT Case 37, Ontario Court General Division, Canada (12 March 1993).

²⁹ CLOUT Case No. 233, Harare High Court, Zimbabwe (10 July and 20 August 1997).

³⁰ *Switzerland* No. 37. Bezirksgericht [Court of the First Instance], Zurich, 14 February 2003 and Obergericht [Court of Appeal], Zurich, 17 July 2003. Vol. XXIX (2004); *See also German* No. 58. Oberlandesgericht [Court of Appeal], Schleswig, 24 June 1999, No. 16 SchH 01/99. Vol. XXIX (2004); *See also India* No. 38. Supreme Court, 31 August 2001, Civil Appeal No. 12930 of 1996 Vol. XXVII (2002); *See also Japan* No. 8. District Court, Yokohama, 25 1999, Docket: Heisi 10 (wa) 3851 Vol. XXVII (2002); *See also United States* No. 391. United States District Court, Southern District of New York, 8 January 2002, No. M-82 (PART I JFK) Vol. XXVII (2002); *See also United States*. No. 361. United States District Court for the Eastern District of Pennsylvania, 12 April 2001, No 99-2996 Vol. XXVII (2001); *See also Germany* No. 50. Oberlandesgericht [Court of Appeal], Hamburg, 30 July 1998 Vol. XXV 2000; *See also Hong Kong* 12. High Court of the Hong Kong Special Administrative Region, Court of Appeal, 16 January 1998, Civil Appeal No. 116 of 1997 Vol. XXIII (1998); *See also United Kingdom* No. 49. Court of Appeal (Civil Division), 16 December 1997, no. QBCMI 97/0769/B; Court of Appeal (Civil Division), 19 December 1997 no. QBCMI/1265/B Vol. XXIII (1998); *See also Austria* No. 13. Oberster Gerichtshot [Supreme Court], 26 January 2005, No. 30b221/04b Vol. XXX(2005); *See also Germany* No. 80 Oberlandesgericht [Court of Appeal], Cologne, 23 April 2004, No. 9 Sch 01-03 Vol. XXX (2005)

³¹ *Hong Kong* No. 17. High Court of the Hong Kong Special Administrative Region, Court of First Instance, 20 December 2003 and 237 March 2003, Construction and Arbitration Proceedings no. 28 of 2002. Vol. XXVIII (2003); *See also United States* No. 415. United States District Court, Southern District of New York, 9 October 2002, No. 01 Civ. 1285 (DAB), Vol. XXVIII (2003); *See also United States* No. 420, United States Court of Appeals, Second Circuit, 6 November 2002, no. 02-7156 Vol. XXVIII (2003); *See also United States* No. 391. United States District Court, Southern District of New York, 8 January 2002, No. M-82 (PART I JFK) Vol. XXVII (2002); *See also Canada* No. 19. Alberta Court of Queen’s Bench, Judicial District of Edmonton, 9 December 2004, Docket NO. 0203 03768 Vol. XXX (2005)

³² *Hong Kong* No. 15, High Court of the Hong Kong Special Administrative Region, Court of First Instance, 30 November 1998, 1998 No. MP 4765. Vol. XXIVa (1999); *See also United States* No. 340. United States District Court, District of Connecticut, 14 March 2000, Civil Actions no. 3:95cv2362, no. 3:96cv2218 and no. 3:96cv2219, Vol. XXVII (2001); *See also United States* No. 318. *United States* District Court, Southern District of New York, 25 June 1999, No. 99 CIV. 1164 (DLC) Vol. XXV (2000);

Appendix Part I**Summary of CLOUT case law for MAL 34 and 36**

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Last modified : 12 September 2007

Jurisdiction and Citation	Summary	CLOUT Case Number
Canada: Superior Court of Quebec, <i>Navigation Sonamar Inc. V. Algoma Steamships Limited and others</i> (16 April 1987)	Applicant (Navigation Sonomar) submitted application to set aside the award based on alleged lack of coherent and comprehensible reasons. Court rule that arbitrators cannot be criticized for expressing themselves as commercial men and not as lawyers. Where agreement b/t the parties does not specify the form of the award, form is governed by 31(2).	10
Canada: Federal Court of Canada, Trial Division, <i>D. Frampton and Co. Ltd. V. Sylvio Thibeault and Navigation Harvey & Freres Inc.</i> (7 April 1988)	With respect to an application to set aside an arbitral award, the powers of the court are limited to examining the award on the basis of the restrictive provisions of <u>article 34</u> of the MAL, as those provisions are reproduced in the Commercial Arbitration Code (1985). The court cannot draw authority from <u>article 34(4) MAL</u> to refer the matter back to the arbitral tribunal and request that it consider the question of the applicable rate of interest where that question was not originally considered by the arbitrators.	12
Canada: British Columbia Court of Appeal, <i>Quintette Coal Limited v. Nippon Steel Corp. et al.</i> (24 October 1990)	Dispute concerning the interpretation of a contract clause outlining a pricing mechanism referred to arbitration. Quintette sought to set aside the award on the ground that the arbitrators had exceeded their jurisdiction by dealing with a matter not contemplated by or falling within the scope of the submission to arbitration. HELD: Court of Appeal upheld lower court's affirmation of the award. Court noted world wide trend toward restriction the scope of judicial intervention into commercial arbitration. Award was justified under the terms of the contract, so the Court was prevented from intervening under <u>art 34(2)(a)(iv)</u> of the BCA (same as <u>34(2)(a)(iii)</u> of MAL).	16
Canada: Ontario Court, General Division, <i>Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd</i> (30 January 1992)	Concluding an agreement prior to legislation enacting MAL will not render an award unenforceable.	29
Canada: Ontario Court, General Division <i>Robert E. Schreter v. Gasmac Inc.</i> (13 February 1992)	A court which confirms the arbitral award should not re-open the merits of the award where there has been no misconduct, simply on the grounds of ensuring conformity with public policy.	30
Canada: Ontario Court, General Division <i>Arcata Graphics Buffalo Ltd. V. Movie</i>	In order to refuse to enforce an award as contrary to public policy (<u>Art 36(1)(b)(ii) MAL</u>), the award must be contrary to the essential morality of the state in question.	37

<i>(Magazine) Corp.</i> (12 March 1993)		
Canada: Sakatchewan Court of Appeal <i>AAMCO Transmissions Inc. v. Kunz</i> (17 September 1991)	When a provision excluding arbitration is satisfied, an arbitration award will not be enforceable pursuant to Art <u>36(1)(a)(i) MAL</u> .	67
Hong Kong: High Court of Hong Kong <i>China Nanhai Oil Joint Service Corporation, Shenzhen Branch v. Gee Tai Holdings Co. Ltd</i> (13 July 1994)	<u>Art 36(1)(a)(iv) MAL</u> will not be satisfied when the parties have obtained basically what it had agreed to. This is so even when parties agreed to arbitration in CIETAC Beijing, and a Shenzhen arbitration who at the time of dispute could not arbitrate in Beijing was part of the panel.	76
Hong Kong: High Court of Hong Kong <i>Nanjing Cereals, Oils and Foodstuffs Import & Export Corporation v. Luckmate Commodities Trading Ltd.</i> (16 December 1994)	Even if there are grounds for court to set aside award, it was at the discretion of court since MAL provided enforcement “may” be refused. Defendant had sufficient opportunity to present its own evidence - did not succeed <u>Art 36(1)(a)(ii) MAL</u> .	88
Russian Federation: Moscow City Court (10 November 1994) (Unpublished)	Plaintiff filed an application to have arbitration award set aside on the ground that in the course of the arbitration parties had not been treated with equality and the award was in was in conflict with public policy. Plaintiff argued that the decision to dismiss the claim had been made despite the fact that the defendant partially acknowledged the claim against it. Court noted that a procedural infringement in the arbitral proceedings had no relevance to the notion of “public policy.”	146
Russian Federation: Moscow City Court; Decision on the application to set aside the award made by the Court of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry in case No. 214/1993 (10 February 1995) (Unpublished)	Plaintiff filed application to set aside an arbitral award made against it, citing as grounds for doing so the fact that no arbitration agreement existed between the parties and thus the arbitral tribunal had no jurisdiction to examine the dispute in question. Court found that Act of the Russian Federation on international commercial arbitration provided that a plea on the grounds that an arbitral tribunal did not have jurisdiction should be raised not later than the submission of the statement of defence. The court did not concur with the plaintiff’s position that its submission in its statement of defence before the arbitral tribunal that it was not the legal successor and did not recognize itself as a part to the contract should be considered an objection to the jurisdiction of the arbitral tribunal.	148
Russian Federation: Moscow City Court	Plaintiff – against whom arbitral award had been made – applied to have the award set aside, arguing that the award was in conflict	149

(18 September 1995) (Unpublished)	with the public policy of the Russian Federation, since it obliged the plaintiff to pay the defendant a sum of money in a foreign currency whereas the plaintiff did not have a foreign currency account. HELD: The award made by the arbitral tribunal ordering the Russian Plaintiff to make the payment in a foreign currency was not in conflict with the public policy of the Russian Federation, even if the P did not have foreign currency at its disposal.	
Canada: Superior Court of Quebec; <i>International Civil Aviation Organization v. Tripal Systems Pty. Ltd.</i> (9 September 1994)	Following commencement of arbitral proceedings to resolve dispute between the parties, ICAO raised immunity to contest the tribunal's competence and requested that the Superior Court of Quebec declare that it enjoyed an absolute immunity from judicial process of any kind. Tripal submitted motion for dismissal on grounds that only the arbitral tribunal was competent at that stage. SC determined arbitral tribunal alone competent to determine immunity issue.	182
Canada: Quebec Court of Appeal <i>Transport de cargaison (Cargo Carriers) v. Industrial Bulk Carriers</i> (15 June 1990)	Reimbursement of a ransom does not violate public policy within meaning of <u>Art 36(1)(b)(ii) MAL</u> and so award can be enforced. However, a bribe may violate public policy.	185
Zimbabwe: Harare High Court <i>Durco (Pvt) Ltd v. Dajen (Pvt) Ltd</i> (10 July and 20 August 1997)	Public policy in terms of <u>Art 36(1)(b)(ii) MAL</u> will consider the principle of finality in arbitration. However, it will not intervene with the free choice of parties which has chosen to waive right to finality of first award.	233
Zimbabwe: Harare High Court; <i>Zimbabwe Electricity Supply Commission v. Genius Joel Maposa</i> (29 March and 9 December 1998)	Employment dispute subject to arbitration. Tribunal awarded employee his salary & benefits together with interest from 24 Dec 1996. Employer sought to have the award set aside on the basis that the arbitrator had made a reviewable factual error in calculating the back-pay and that error [<u>under MAL Art. 34</u>] rendered the award contrary to public policy. Court considered that an award which was contrary to public policy would be one that would undermine the integrity of the system of international arbitration put in place by the model law and that this would include cases of fraud, corruption, bribery, and serious procedural irregularities. HELD: As in this case it was not suggested that any moral turpitude attached to the arbitrator's conduct, the award could not be said to be in conflict with public policy (<u>MAL Art. 34</u>). Error was one of computation for which model law makes adequate provision.	267
Zimbabwe: Supreme Court; <i>Zimbabwe Electricity Supply Authority v. Genius Joel Maposa</i> (21 October and 21 December 1999)	Employer appealed from [case above] on the same grounds and, in his notice of cross-appeal, the employee contended that the High Court, having correctly refused to set aside the arbitral award, should accede to the enforcement thereof. As considered under <u>MAL Art. 34</u> – the Supreme Court held that where an award was based on so fundamental an error, as in this case, that it constituted a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards	323

	that a sensible and fair minded person would consider that the conception of justice would be intolerably hurt by the award then it should be contrary to public policy to uphold it	
Zimbabwe: Harare High Court <i>Conforce (Pvt.) Limited v. The City of Harare</i> (2000)	Arbitral awards should be enforced as much as possible. This may involve adopting particular interpretations so that arbitral awards are not contrary to public policy.	342
Canada: British Columbia Supreme Court <i>Food Services of America Inc. (c.o.b. Amerifresh) v. Pan Pacific Specialties Ltd</i> (24 March 1997)	“The British Columbia Supreme Court allowed the application. The applicant could bring the proceeding since they were brought not on a contractual basis, but to enforce an international commercial arbitration award. Furthermore, the waiver was not limited to situations where there had been no jurisdictional or procedural breach by the arbitrators. Here the parties had waived any right to oppose enforcement stemming from <u>section 36</u> of the International Commercial Arbitration Act. Hence, the respondent could not resort to any ground for opposing enforcement.”	351
Canada: British Columbia Supreme Court <i>Canadian National Railway Co. v. Southern Railway of British Columbia Ltd.</i> (11 May 1998)	Pursuant to <u>Art 36</u> , lack of natural justice requirements may be a ground for no enforcement. However it will be not satisfied where the committee were presented with evidence and answered the only question posed to it.	358
Canada: Ontario Court of Justice <i>Europcar Italia S.p.A. v. Alba Tours International Inc.</i> (21 January 1997)	<ul style="list-style-type: none"> • Court observed it was obliged to enforce award (Art 35) unless one of the grounds for refusal in <u>Art 36</u> is established. Even then, discretion remains to recognise award (“may”). • <u>Art 36(1)(a)(iii) MAL</u> – argued that arbitrator lost jurisdiction by misinterpreting the agreement – rejected on facts • <u>Art 35(1)(a)(v) MAL</u> – rejected on facts • <u>Art 36(2)</u> satisfied so court ordered an adjournment of the enforcement proceedings in Ontario, conditional upon Alba furnishing security pending a determination of the appeal in Italy. 	366
Germany: Hanseatisches Oberlandesgericht Bremen (30 September 1999)	<p>Tribunal’s denial of a motion to take evidence could not constitute a violation of the right to present one’s case under <u>Art 36(1)(a)(ii) MAL</u></p> <p>No oral hearing being ordered by the arbitral tribunal does not constitute a violation of <u>Art 36(1)(a)(iv) MAL</u>.</p> <p>German public interest is only violated if the foreign decision is the result of a procedure which differs from the fundamental principles of German procedural law in such a way that under the German legal system it cannot be considered the result of a fair and constitutional procedures.</p>	371
Germany: Oberlandesgericht Rostock (28 October 1999)	German Court denied declaration of recognition and enforceability under equivalent of <u>Art 36(1)(a)(v) MAL</u> because under German Law an award can only be declared enforceable if it has become binding under the law of the country in which it was made.	372
Germany: Oberlandesgericht Düsseldorf (23	Dispute regard value of a share in a partnership sold by one party to another, upon motion of the claimant, arbitrator rendered an arbitral award at his home in Düsseldorf, not at their place of	374

March 2000)	business in Zurich, Switzerland. Respondent filed application for setting aside before Higher Regional Court in Düsseldorf. Court declined jurisdiction to rule on the validity of the award based on German code 1059 [adopted from MAL 34]. Court found that the place of arbitration was neither agreed upon by the parties. The Court defined the place of arbitration to be the actual, effective place of arbitration. Only if no particular place could be determined, could the place of the last oral hearing be considered to be the place of arbitration. The auditing and the subsequent negotiation with both parties took place in Zurich. Therefore the effective place of arbitration was not situated in Germany.	
Germany: Bayerisches Oberstes Landesgericht (15 Dec 1999)	[MAL 34] Patenting dispute between 2 car door lock manufacturers. Parties agreed to submit the dispute to arbitration and tribunal ruled in favour of the patent holder. Applicant appealed to Higher Regional Court to set aside the award arguing that the tribunal did not possess the required knowledge of Italian patent law and therefore been under a duty to call for a neutral expert opinion. Under German law, courts do not have the power to review an arbitral award on the merits. The Court could only review whether any mistake had been made in the process of establishing the principles of Italian Law. Applicant had submitted expert opinion earlier and mistake would not have led to a different award. Court refused to set aside the award.	375
Canada, Superior Court of Justice; <i>Re Corporacion Transnacional de Inversiones, S.A. De C.V. et al. and STET International, S.p.A. et al.</i> (22 September 1999)	Conflict between STET and CORTISA over purchase of indirect interest in the Cuban national telephone company. STET sought rescission of the subscription agreement. Arbitral tribunal was constituted and concluded it had jurisdiction and went on to find the applicants were all jointly and severally liable to compensate STET for losses incurred as a result of the breaches of the subscription agreement. Award challenged on several grounds provided for in <u>34(2)(a)(ii)</u> and <u>(b)(ii)</u> of the MAL: the tribunal was without jurisdiction over three of the parties, that they had been denied equality of treatment and opportunity to present their case contrary to Article 18 of the Model Law, and that they award was in conflict with public policy in Ontario. HELD: applicant had the onus of proving that the award should be set aside. The “due process” protection of art. <u>34(2)(a)(ii)</u> included both procedural and substantive fairness, which made it overlap with the public policy defence. FOUND: No unfairness, Court noted that a party that refuses to participate in arbitration is deemed to have forfeited the opportunity to be heard. That the award might be legally or factually wrong was not, in the Court’s view, grounds for setting it aside. Failure of the applicant to seek judicial assistance cannot be imputed to the Tribunal.	391
Germany: Highest Regional Court of Bavaria (16 March 2000)	An arbitral award may not be recognised and enforced on public policy grounds under <u>Art 35(1)(b) MAL</u> in circumstances where the arbitral proceeding violates the principle of due process, including the right to be heard, the right to be informed about the arbitration and to be summoned to a hearing in due time.	402
Germany: Budgesgerichtshot (2 November 2000)	(general discussion; no specific article referred to) Under German law a violation of public policy is assumed if one of the grounds which justify a reopening of a case under s580ZPO	407

	<p>exist. Criminal acts alleged by respondent only justify a reopening of a case under s581ZPO if they already resulted in a conviction.</p> <p>An award may be set aside if it is based on a wilful and intentional violation of public policy pursuant to s826 of German civil code.</p>	
Germany: Bayerisches Oberstes Landesgericht (24 February 1999)	<p>Dispute between potato farmer and a potato trader. Award rendered in favour of the defendant trader and claimant farmer appealed. Claimant set farmer as arbitrator and defendant successfully challenged. Claimant applied to the courts to have this award set aside for procedural irregularities in the appointment process.</p> <p>HELD: court granted application and set aside on basis of [equivalent to <u>34(2)(a)(iv) MAL</u>] finding that the Tribunal might have decided – in a different composition – differently on the outcome of the appeal. Court affirmed that the procedural mistake had potentially caused an unfavourable outcome for the claimant. Court held that the refusal of the Tribunal to appoint the substitute arbitrator nominated by the claimant for the successfully challenged first arbitrator had been a procedural error.</p>	436
Germany: Oberlandesgericht Köln (22 December 1999)	<p>[<u>MAL 34</u>] Application for the recognition and enforcement of an award rendered by tribunal in Germany. At issue was a lease agreement containing an arbitration clause. At the termination of the lease, claimant sent request for arbitration to defendant and nominated its arbitrator. As defendant did not nominate per their agreement, claimant nominated one on the defendant's behalf and they proceeded with arbitration and an award in favour of the claimant. Defendant contested that the tribunal was not properly formed.</p> <p>HELD: No causal relationship between appointment procedure and decision of the arbitral tribunal. Part agreed on such a procedure and the principle of party autonomy requires such agreements to be held valid as long as it does not violate other principles such as the requirement of neutrality of the tribunal</p>	440
Germany: Oberlandesgericht Dresden (13 January 1999)	<p>Enforcement of an award is not contrary to public policy within terms of <u>Art 36(1)(b)(ii) MAL</u> when:</p> <ul style="list-style-type: none"> • Under German law, standard conditions of contract may become part of the contract, if the party using the standard conditions refers to them in any manner in the contract or in the precontractual correspondence with the other party. Such a reference to an arbitration agreement would not violate German public policy since also under German law standard conditions can become part of a contract in the same way. • The Court further concluded that also the liquidated interest rate of 14 per cent would not make the enforcement of the award contrary to public policy. 	443
Hong Kong: High Court of Hong Kong Special Administrative Region, Court of Appeal <i>Sam Ming City Forestry Economic Co. &</i>	<p>Defendants contended that the award dealt with a difference not contemplated by or falling within the terms of the submission to arbitration [<u>MAL 34(2)(a)(iii)</u>]. The defendant argued that the arbitral tribunal did not have jurisdiction to make the award to the second plaintiff. The Court of Appeal stated that the defendants could not raise the issue of lack of jurisdiction. Appeal was refused.</p>	448

<i>Anor v. Lam Pun Hung Trading as Henry Company & Anor</i> (27 June 2001)		
Germany: Bayerisches Oberstes Landesgericht; 4Z Sch 31/99 (27 June 1999)	[MAL 34] The Court reasoned in this case that the purpose of a declaration of enforceability within the award was the extinction of the possibility to demand the setting aside of the award once the award was declared enforceable by a German court. It also found that the form and scope of the arbitral award did not hinder the declaration of enforceability.	452
Germany: Hanseatisches Oberlandesgericht Hamburg; 1 Sch 2/99 (14 May 1999)	[MAL 34] The decision, arising out of an action to have an award declared enforceable, deals with the question of the right to be heard. The court concluded that the rejection of the respondent's last submission by the arbitral tribunal did not violate the respondent's right to be heard. The court stated that such a right only requires that a tribunal take into account arguments brought forward by the parties but does not limit the right of the tribunal to evaluate the evidence presented.	457
Hong Kong: High Court of the Hong Kong Special Administrative Region, Court of the First Instance, <i>Medson Co. Ltd. v. Viktor (Far East) Ltd.</i> (8 April 2000)	[MAL 34] Plaintiff applied to enforce foreign award as a judgement and leave was granted. Defendant sought leave to resist enforcement. The Defendant submitted that the entire operation was a sham and thus contrary to the public policy of Hong Kong. The court found little support from the evidence for such a submission and that the Defendant did not raise this during arbitral proceedings.	459
Canada: Prince Edward Island Supreme Court (March 23 2001)	Public policy objection to enforceability requires more than inaequality of bargaining power.	501
Canada: British Columbia Supreme Court, <i>Metalclad v. Mexico</i> (May 2, 2001)	The court found that on certain issues, the arbitral tribunal had gone beyond the scope of the submission to arbitration by relying on inapplicable sections of NAFTA within the Chapter 11 context. It, however, concluded that the tribunal's alternative basis for its finding of expropriation did not involve any breach of article 34 and refused to set aside the award. The court set aside a certain portion of interest which had been calculated on the basis of conclusions the court found to have been in violation of article 34(2)(a)(iii). Otherwise, the motion was dismissed.	502
Canada: British Columbia Supreme Court <i>Javor v. Francoeur</i> (March 6, 2003)	Arbitration exception of Art 36(1)(b)(i) applied because the matter of Francoeur's liability could not have been determined by arbitration under British Columbia law since he was not a party to the arbitration agreement.	510
Canada: Supreme Court of Canada <i>Desputeaux v. Les Editions Chouettes (1987) Inc.</i> (March 21, 2003)	Adopts narrow view of public policy defence to arbitration and enforcement of arbitral awards, rejecting tendency of some courts to conduct merits review.	511
Hong Kong: High Court of Hong	The first defendant argued that the award should not be enforced on the basis of a violation of public policy of Hong Kong in	517

Kong Special Administrative Region, Court of the First Instance, <i>Sam Ming City Forestry Economic Co. & Others v. Liu Yuk Lin & Others</i> (6 July 2000)	accordance with [MAL Art. 34(2)(b)(ii)]. Allegations of fraud were made that were not made during the course of arbitration. The Court found the allegations to be tactical and without merit, thus they did not accept them.	
Hong Kong: High Court of Hong Kong Special Administrative Region, Court of the First Instance. <i>Wuzhou Port Foreign Trade Development Corp. v. New Chemic Ltd.</i> (8 December 2000)	[MAL 34] Defendant submitted that the award should be set aside on the ground that the arbitral procedure was not in accordance with the agreement of the parties, based on the MAL. The defendant argued that the arbitral tribunal should have applied its former rules and not the amended ones. The Court found that the Defendant had not raised the issue before the arbitral tribunal, which was therefore unable to make a ruling upon the issue.	519
Hong Kong: High Court of Hong Kong Special Administrative Region, Court of the First Instance. <i>Shanghai City Foundation Works Corp. v. Sun Link Ltd.</i> (2 February 2001)	[MAL 34] Defendant moved to set aside award on the grounds that there was an overriding oral agreement between the parties, making the award unenforceable. The court refused to hear evidence as the agreement was never reduced to writing and no mention thereof was made during the arbitral proceedings. Court then considered violation on the grounds of public policy, stating that awards should only be set aside on this ground where there was a violation of the most basic principles of morality and justice.	520
Hong Kong: High Court of the Hong Kong Special Administrative Region, Court of First Instance, <i>Chongqing Machinery Import & Export Co. Ltd. v. Yiu Hoi & Others Trading as Tin Lee Ship Builders & Trading Co.</i> (11 October 2001)	Defendant argued that it had not been given proper oral notice of the proceedings as required under MAL 34 & MAL 36. Court found ample evidence that the defendant either had notice or did not object to application to set aside award in the jurisdiction where it was rendered. The defendant submitted that it would be a breach of public policy of Hong Kong to enforce the award as it alleged that the tribunal had refused to allow evidence or representation as to the authenticity of the signature in the arbitration agreement. The Court found that the other court had made the necessary investigation and dismissed that submission	527
Hong Kong: High Court of the Hong Kong Special Administrative Region, Court of the First Instance, <i>Shenzhen City Tong Ying Foreign Trade Corp. Ltd. v. Alps</i>	[MAL 34] Defendant argued that there was no binding agreement to arbitrate under MAL. The Court found that the statement “that the arbitration agreement was not valid” meant that the arbitration agreement existed.	528

<i>Co. Ltd.</i> (15 October 2001).		
Hong Kong: High Court of Hong Kong Special Administration Region <i>Societe Nationale d'Operations Petrolieres de la Cote d'Ivoire Holding v Keen Lloyd Resources Ltd.</i> (20 December 2001)	[MAL 34] Residual discretion remains with the court to enforce an arbitral award, even where an applicant exhibited successfully that it had made out one of the grounds.	530

Appendix Part II**Summary of case law on public policy relating to Article V(2) of the New York Convention of 1958**

Prepared by Victoria Tan and Rebecca White

Last modified : 24 September 2007

Full Case Citation	Held	Location Reference
Austria No. 13. Oberster Gerichtshot [Supreme Court], 26 January 2005, No. 30b221/04b	The relevant standard for autonomous public policy review of a foreign arbitral award by an Austrian court is whether the arbitral award is irreconcilable with the fundamental principles of the Austrian legal system.	Vol. XXX(2005)
Canada No. 19. Alberta Court of Queen’s Bench, Judicial District of Edmonton, 9 December 2004, Docket NO. 0203 03768	Canadian Courts will not recognise or enforce a foreign law or judgment that is contrary to the forum’s fundamental public policies, its “essential public or moral interest” or its “conception of essential justice and morality”. Generally fundamental values must be at stake. Public policy serves a corrective function.	Vol. XXX (2005)
Germany No. 80 Oberlandesgericht [Court of Appeal], Cologne, 23 April 2004, No. 9 Sch 01-03	Enforcement is refused when the arbitral decision deviates from the basic principles of German procedural law so much that it cannot be deemed to have been rendered in proper legal proceedings. Not all procedural defects are relevant, it must be a violation of minimum standards of procedural justice.	Vol. XXX (2005)
Germany No. 82, Bayerisches Oberstes Landesgericht [Higher Court of Appeal of Bavaria], 23 September 2004, No. 4Z Sch 005-04	An arbitral award violates public policy when it violates a norm regulating principles of state and economic life or it unacceptably contradicts German notions of justice.	Vol. XXX (2005)
Ireland No. 1. High Court, Dublin, 19 May 2004	There are strong public policy considerations in favour of enforcing 1958 New York Convention awards, and so enforcement may be refused on public policy grounds only if the award violates “the most basic notions of morality and justice.”	Vol. XXX (2005)

Spain No. 40, Tribunal Supremo [Supreme Court], 7 October 2003, No. 112/2002	There may be a violation of public policy where the objective and subjective impartiality requires of members of decision-making bodies is tainted or absent.	Vol. XXX (2005)
Spain No. 42, Tribunal Supremo [Supreme Court], 14 October 2003, No. 1943/2001	Public policy objections to the enforcement of an arbitral award are onerous and require more than mere allegation of procedural irregularities such as the language of arbitration and lack of reasons in the interim orders.	Vol. XXX (2005)
United States No. 489, Court of Appeal of California, Second Appellate District, Division Five, 11 May 2004, No. B166041	The public policy limitation on the New York Convention is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice.	Vol. XXX (2005)
United States No. 501, Northern District of Illinois, Eastern Division, 29 December 2004, No. 02C 8708 United States Court of Appeals, Seventh Circuit, 4 March 2004, No. 04-3661	Public policy limitation is extremely narrow, it applies when a decision violates the most basic notions of morality and justice and enforcement would entail a violation of a paramount legal principle.	Vol. XXX (2005)
Germany No. 59. Oberlandesgericht [Court of Appeal], Brandenburg, 2 September 1999, No. 8 Sch 01/99	There is no violation of substantive public policy. According to the Supreme Court, it does not suffice for German substantive public policy to be violated that German court, if it had decided the dispute, would have reached a different conclusion based on German mandatory law. There is no violation of procedural public policy. There is a ground for refusal only where the foreign decision was rendered in proceedings that so differ from the fundamental principles of German procedural law that the decision cannot be deemed to have been rendered in proper, legally correct proceedings	Vol. XXIX (2004)
German No. 58. Oberlandesgericht [Court of Appeal], Schleswig, 24 June 1999, No. 16 SchH 01/99	The arbitral award does not violate public policy. According to German law, an arbitral award only violates public policy when it violates a norm that regulates state or economic principles or when it is unacceptably at odds with the German principles of justice. This [opinion] aggress with the opinion held by a large majority that also from the point of view of public policy the recognition of foreign arbitral awards is subject to a less stringent regime than is the case with domestic arbitral awards, because there is a distinction between national and international public policy.	Vol. XXIX (2004)

<p>Germany No. 60. Oberlandesgericht [Court of Appeals], Stuttgart, 18 October 1999, No. 5 U 89/98; Bundesgerichtshof [Federal Supreme Court], 1 February 2001, No. III ZR 332/99</p>	<p>[Fed. Supreme Court Appeal 1 Feb. 2001] Contrary to the opinion of the Court Appeal, the enforcement of the arbitral award does not violate German public policy. The bias of an arbitrator can only have an impact on the enforcement proceeding when either the affected party can still seek annulment of the arbitral award on that ground according to the applicable foreign law or the recognition of the arbitral award would be obviously at odds, on that ground, with the fundamental principles of German law</p>	<p>Vol. XXIX (2004)</p>
<p>Germany No. 55. Hanseatisches Oberlandesgericht [Court of Appeal], Hamburg, 12 March 1998, no. 6 U 110/97</p>	<p>There is no violation of public policy for violation of currency law as alleged by the defendant in the first instance proceedings</p>	<p>Vol. XXIX (2004)</p>
<p>Switzerland No. 37. Bezirksgericht [Court of the First Instance], Zurich, 14 February 2003 and Obergericht [Court of Appeal], Zurich, 17 July 2003</p>	<p>Enforcement of a foreign arbitral award may be denied, according to Art. V(2)(b) of the Convention when its enforcement would be contrary to domestic public policy. This means that the award, because of its contents or the procedure followed by the arbitral tribunal, breaches the legal principles prevailing in Switzerland in an unacceptable manner and violates fundamental principles of the Swiss legal system. Denial of due process is in principle a violation of procedural public policy. Defendant did not prove in this case that they were denied due process in any of the manners alleged.</p>	<p>Vol. XXIX (2004)</p>
<p>Hong Kong No. 17. High Court of the Hong Kong Special Administrative Region, Court of First Instance, 20 December 2003 and 237 March 2003, Construction and Arbitration Proceedings no. 28 of 2002</p>	<p>It is generally accepted that the expression “contrary to the public policy of that country” means “contrary to the fundamental conceptions of morality and justice of the forum.”</p>	<p>Vol. XXVIII (2003)</p>
<p>United States No. 415. United States District Court, Southern District of New York, 9 October 2002, No. 01 Civ. 1285 (DAB)</p>	<p>The Court must construe the public policy exception very narrowly and apply it only where enforcement would violate our most basic notions of morality and justice.</p>	<p>Vol. XXVIII (2003)</p>

United States No. 420, United States Court of Appeals, Second Circuit, 6 November 2002, no. 02-7156	The Court must construe the public policy exception very narrowly and apply it only where enforcement would violate our most basic notions of morality and justice. An award of costs does not violate the most basic notions of morality and justice and accordingly is not contrary to public policy.	Vol. XXVIII (2003)
India No. 38. Supreme Court, 31 August 2001, Civil Appeal No. 12930 of 1996	In the absence of a definition of “public policy”, it is construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced. As applied to private international law, which means that a foreign award cannot be recognised or enforced if it is contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The Court determined that there would have been a question of public policy had there been a complete restriction on the implementation of the terms of the contract and no such restriction was imposed.	Vol. XXVII (2002)
Japan No. 8. District Court, Yokohama, 25 1999, Docket: Heisi 10 (wa) 3851	Defendant alleged that plaintiff submitted forged evidence and that this [coupled with other facts] should be sufficient for the Court to find on their behalf on public policy grounds. The Court held that there was no evidence of forgery, but if there had been that forgery of the kind alleged “should not be regarded as violating [the] public policy of Japan, because contravention in this context should be such that falls foul of basic principles or rules of the Japanese judicial order.” It would be unfair for the defendant because the defendant could bring a motion to set aside the award in a proper court.	Vol. XXVII (2002)
United States No. 366. United States District Court, Northern District of California, 1 June 2001, No. C-00-4480-SC	The Court cites to Chapter 1 of the Federal Arbitration Act stating that arbitration awards based on corruption, fraud or undue means may be vacated by a reviewing court. Fraud requires a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of the arbitrator, or wilfully destroying evidence, and further requires that such evidence of fraud was unavailable to the arbitrator during the course of the proceeding. [Court found the moving party did not meet burden of proof]	Vol. XXVII (2002)
United States No. 391. United States District Court, Southern District of New York, 8 January 2002, No. M-82 (PART I JFK)	Under [Art. V](2) a court can refuse enforcement where “the recognition of enforcement of the award would be contrary to the public policy of that country”. This very narrow public policy defence applies only where enforcement would violate [the forum state’s] most basic notions of morality and justice.	Vol. XXVII (2002)
United States No. 400. United States District Court, Northern District of Illinois, Eastern Division, 27 March 2002, No. 01 C 4809 Consolidated No. 01 C 4839	Applicant alleged that the Arbitration Award created an implied covenant not to compete which is contrary to public policy [of the state of Illinois]. The Court stated that it may vacate an award for violating a public policy that is explicit, well-defined, and dominant as ascertained by the reference to the laws and legal precedents and not from general considerations of proposed public interest. Court held that the covenant not to compete was coterminous with the existing licensing agreement and as it was ancillary to a valid transaction, it was not in violation of public policy [of the state].	Vol. XXVII (2002)

<p>United Kingdom No. 58. High Court of Justice, Queen's Bench Division Commercial Court, 19 January 2001</p>	<p>The Court distinguished between the situation in which the manner in which the award has been obtained can be criticised, and circumstances which may have arisen since the publication of the award which are said to render its enforcement unfair. In the former case, the validity of the award itself is impeached. In the later case, however, it is simply unfair to enforce it, however given the strong public policy consideration in favour of enforcing awards, it would require a very strong and unusual case to render enforcement contrary to public policy.</p>	<p>Vol. XXVII (2001)</p>
<p>United States No. 340. United States District Court, District of Connecticut, 14 March 2000, Civil Actions no. 3:95cv2362, no. 3:96cv2218 and no. 3:96cv2219</p>	<p>Given the pro-enforcement bias of the Convention, the public policy defence under Art. V(2)(b) is extremely narrow and so erroneous legal reasoning or misapplication of established legal principles should not generally be held to violate public policy within the meaning of the Convention.</p>	<p>Vol. XXVII (2001)</p>
<p>United States. No. 361. United States District Court for the Eastern District of Pennsylvania, 12 April 2001, No 99-2996</p>	<p>A party must demonstrate that the award would violate this country [United States] basic notions of morality and justice, otherwise statute requires the court to confirm the arbitral award.</p>	<p>Vol. XXVII (2001)</p>
<p>Germany No. 50. Oberlandesgericht [Court of Appeal], Hamburg, 30 July 1998</p>	<p>The Court states that the recognition of this arbitral award does not lead to a manifest violation of the fundamental principles of German law, in particular of its constitutional principles. "Especially in the field of arbitration, enforcement of a foreign arbitral award can be denied only when the arbitration is vitiated by a grave fault, which affects the fundamentals of social and economic life." [Court found that the arbitral holding was no in violation of public policy]</p>	<p>Vol. XXV 2000</p>
<p>United States No. 318. United States District Court, Southern District of New York, 25 June 1999, No. 99 CIV. 1164 (DLC)</p>	<p>The Court cites to the central policy statement of the [New York] Convention which is: to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. The Court states that this statement "evidences a strong public policy in support of arbitration proceedings and enforcement of arbitration awards. A court should find that enforcement is contrary to public policy only where enforcement would violate our most basic notions of morality and justice." [Confirmation of the award was consistent with the stated policy of the United States]</p>	<p>Vol. XXV (2000)</p>

France No. 30. Court de Cassation [Supreme Court], 24 March 1998	French Code of Civil Procedure provisions which are substantially identical to Art. V(2)(b) New York Convention allow an arbitral award to be denied enforcement where it violates the public policy of the country of enforcement in respect of both procedure and merits. In this case, partiality of one of the party's arbitrators in conveying erroneous information to influence the tribunal's decision on jurisdiction amounts to an irregularity – violation of due process – and so violates French public policy.	Vol. XXIVa 1999
Hong Kong No. 15, High Court of the Hong Kong Special Administrative Region, Court of First Instance, 30 November 1998, 1998 No. MP 4765	Courts should recognise the validity of arbitral awards as a matter of comity and give effect, unless to do so would violate the most basic notions of morality and justice.	Vol. XXIVa 1999
Luxembourg No. 2. Cour d'Appel [Court of Appeal], 28 January 1999	The Convention does not allow the enforcement court in any case to review the manner in which the arbitrators decided on the merits, with the sole exception of compliance with international public policy. Even if the arbitral tribunal makes a gross mistake of fact or law, this is not a ground for refusing enforcement of the award.	Vol. XXIVa 1999
United States No. 271. United States District Court, Western District of Tennessee, Western Division, 14 February 1996, No. 95-2464-M1/V	Public policy favouring international arbitration is strong, and circumstances warranting a denial of enforcement are narrowly drawn.	Vol. XXIVa 1999
United States No. 280. United States Court of Appeals, Second Circuit, 2 September 1998, No. 97-7224	Court distinguished between the issue of a fraudulently obtained arbitration award, which might violate public policy and preclude enforcement, and the issue of an underlying contract the subject of an arbitrated dispute being forced or fraudulently induced. The later is a matter to be determined exclusively by the arbitrators.	Vol. XXIVa 1999

<p>Hong Kong 12. High Court of the Hong Kong Special Administrative Region, Court of Appeal, 16 January 1998, Civil Appeal No. 116 of 1997</p>	<p>The Court states that concept of public policy in Hong Kong is something which is generally part of the common law and it is difficult to see how it could be the same as that relating to the “social and public interest” of the PRC [People’s Republic of China]. Defendant was not notified of the date and time of factory inspection and thus argued that the tribunal was guilty of misconduct and, considering the bias against the defendant, it would be contrary to public policy to enforce the arbitration award.</p> <p>The Court adopts the test: whether, in all the circumstances of the case, it would violate the most basic notions of morality and justice of the Hong Kong system if the foreign award in question is to be enforced. They state that the cases in which the court would come to such a conclusion would not be very common, it must be quite clearly the case.</p> <p>Court did find that defendant established a serious breach of natural justice and strong case of apparent bias.</p>	<p>Vol. XXIII (1998)</p>
<p>Switzerland No. 30. Bezirksgericht [Court of the First Instance], Affoltern am Albis, 26 May 1994</p>	<p>The Court states that in light of increasing globalization, foreign decisions should not be kept out of Switzerland through a narrow application of public policy and that most of what is done in other countries is generally acceptable and does not violate Swiss public policy. Discussion ensues about the relationship of the parties and the arbitrators and the import of neutrality of the arbitrator. The Court acknowledges that the selection by a party of an arbitrator and subsequent compensation thereof does create a special relationship, but this does not violate Swiss public policy, providing it is not particularly intense</p>	<p>Vol. XXIII (1998)</p>
<p>Switzerland No. 31. Cour de Justice [Court of Appeal], Geneva, 11 December 1997</p>	<p>The Court discusses Art. V(2)(b) of the New York Convention and states that the reservation has an “eminently subsidiary character” and applies only in the presence of a violation of the fundamental principles of the Swiss legal system, which hurt the innate feeling of justice in an intolerable manner. [Award did not violate Swiss public policy]</p>	<p>Vol. XXIII (1998)</p>
<p>United Kingdom No. 49. Court of Appeal (Civil Division), 16 December 1997, no. QBCMI 97/0769/B; Court of Appeal (Civil Division), 19 December 1997 no. QBCMI/1265/B</p>	<p>The Court examined the assertion made by Russian company NKAP that claimed that by virtue of the Russian judgment it was unlawful by Russian law for them to pay and, in addition, as a result it is contrary to English public policy to force them to pay. The Court responds by stating that there being no requirement as a result of the arbitration to perform some act which English law would regard as illegal under English law or contrary to the recognized morals of this country, the public policy is if anything in favour of abiding by the terms of the [New York] Convention and enforcing the award. On the contrary, English public policy would be offended if it released the party from its obligation to meet the award.</p>	<p>Vol. XXIII (1998)</p>

<p>United States No. 264. United States District Court, Southern District of New York, 16 October 1997 and 22 December 1997, 97 Civ. 5976 (DLC)</p>	<p>The Court reaffirms earlier statements that the public policy exception under the Convention is to be construed narrowly. An award will be set aside under [that] exception only where it violates the most basic notions of morality and justice.</p>	<p>Vol. XXIII (1998)</p>
<p>Hong Kong No. 11. Hong Kong Court of Appeal, 22 May 1997, No. 1997-2 HKC 481</p>	<p>The Court stated that it was not demonstrated [the arbitrator] had acted partially, contrary to natural justice as an appointed arbitrator or that the tribunal had laid itself open to suspicion by a fair minded person knowing all the relevant facts of a possible unfair hearing.</p>	<p>Vol. XXIII (1998)</p>
<p>India No. 27. Court of Appeal, 14 January 1998, CA No. 112 of 1998.</p>	<p>Parties objected to the second respondent being appointed as arbitrator on the ground that she was a high ranking officer of the first respondent. Appellants urged the court to find that an award given by her could not be enforced in India because it would be against public policy. The Court found no violation of any public policy in this case. The parties agreed to be governed by the law of Ukraine. If the award was valid under the law of Ukraine, then there was no violation of any public policy being enforced [in India]. Parties appointing an officer of one of the parties in an arbitration agreement does not ipso facto make the arbitration or the award contrary to public policy, especially if the officer had not personally handled disputed transactions and is impartial.</p>	<p>Vol. XXIII (1998)</p>
<p>United States No. 255. United States District Court, Southern District of Texas, Houston Division, 7 July 1997, Nos. H-95-4114, H-95-5553, H-96-0166</p>	<p>The appellant alleged that they were denied due process and incorporated into this claim the assertion that enforcement of the award was thus contrary to public policy. The Court stated that the fundamental requirement to due process is the opportunity to be heard at a meaningful time and in a meaningful manner. The Court stated that the right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration CNMC subjected itself to its advantages and disadvantages. The appellant did not meet the burden of showing that they were denied the opportunity to be heard.</p>	<p>Vol. XXIII (1998)</p>
<p>Italy No. 142. Corte di Cassazione [Supreme Court], 11 July 1992, no 4869</p>	<p>It is not a violation of public policy for an arbitral award to direct payment in a currency that is not the official method of exchange in the enforcing country.</p>	<p>Vol. XXII (1997)</p>
<p>Singapore No. 10. High Court, 29 September 1995, no. 1056 of 1994</p>	<p>Exceptional circumstances such as illegality or fraud or lack of opportunity to present your case would be required in order for the court to refuse to enforce an arbitral award. Indeed the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference by national courts.</p>	<p>Vol. XXII (1997)</p>

<p>Netherlands No. 23. Arrondissementsrechtbank [Court of First Instance], Zutphen, 3 September 1996</p>	<p>In order for the court to refuse enforcement of an award, more than mere allegation of partiality is required. Concrete facts and/or circumstances from which it can be deduced that there has been partiality by the arbitrators are required.</p>	<p>Vol. XXII (1997)</p>
<p>Switzerland No. 28. Tribunal Federal [Supreme Court], 9 January 1995</p>	<p>Public policy in enforcement proceedings opposes the enforcement of foreign arbitral awards that hurt the Swiss legal feeling in an intolerable manner and violate the fundamental principles of the Swiss legal system.</p> <p>In particular substantive public policy is not necessarily violated where the foreign award is contrary to a mandatory provision of Swiss law. In this case, Swiss law prohibits compound interest, however it is no obstacle to enforcement that a foreign award applies it.</p>	<p>Vol. XXII (1997)</p>
<p>United States No. 222. United States District Court, Southern District of New York, 8 March 1996, 95 Civ. 9586 (RPP)</p>	<p>The public policy provision is to be construed narrowly to only apply where enforcement would violate the forum state's most basic notions of morality and justice.</p>	<p>Vol. XXII (1997)</p>
<p>United States. No. 223. United States District Court, Southern District of New York, 11 March 1996, 95 Civ. 10278 (RRP)</p>	<p>Public policy under Art. V(2)(b) of the Convention refers to the public policy of the forum state, the state in which recognition and enforcement is sought, rather than to the state in which the award was originally rendered.</p>	<p>Vol. XXII (1997)</p>
<p>United States No. 230. United States District Court, District of Columbia, 31 July 1996, Civil No. 94-2339 (JLG)</p>	<p>Public policy does not give judges a license to impose their own brand of justice in determining applicable public policy, properly understood public policy emanates only from clear statutory or case law, not from general considerations of supposed public interest.</p> <p>The US public policy in favour of final and binding arbitration of commercial disputes is unmistakable and supported by treaty, by statute and by case law.</p>	<p>Vol. XXII (1997)</p>

Appendix Part III

Summary of additional pertinent case law relating to Article V(2) of the New York Convention of 1958 (table)

Prepared by Rebecca White

Last modified : 24 September 2007

- I. *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*³³
 - a. The arbitrated dispute in Parsons concerned delay in construction of a paper mill that an American company had contracted to build for an Egyptian manufacturer. The American company argued that the contract's *force majeure* clause should be recognized in light of the U.S. government's severing of diplomatic ties with Egypt and the U.S. government's subsequent withdrawal of financial backing for the project.
 - i. The Second Circuit **rejected this attempt to equate U.S. foreign policy with U.S. public policy**. It held that “[t]o read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility.” The Second Circuit wrote a general pro-enforcement biased opinion and indicated that the grounds for vacation be limited to the seven defences in article V. Furthermore, the Court indicated that the public policy defence should be construed narrowly and particularly its specific rule that “[e]nforcement of foreign arbitral awards may be denied on this basis *only where enforcement would violate the forum state's most basic notions of morality and justice.*” (emphasis added).
- II. *Gulf States v. Local 1692, International Brotherhood of Electrical Workers*³⁴
 - a. Laid groundwork for vacation of a domestic award on public policy grounds. Although the award at issue in Gulf States was enforced, the court recognized that “in some situations enforcement of a mandated arbitral award will be denied *because it compels violation of law or conduct contrary to accepted public policy*”
- III. *Sea Dragon Inc. v. Gebr. Van Weelde Scheepvaartkantoor*³⁵
 - a. Vacating an arbitral panel's award of funds sequestered by a Dutch court order, emphasizing that “[i]t is the firm and established policy of American courts to respect a valid foreign decree.” *Sea Dragon* emphasized the importance of respect for the judicial proceedings of other countries. The *Sea Dragon* court emphasized that the question of fraud should have been raised and dealt with in the foreign court proceeding and not at a subsequent arbitration.
- IV. *The Attorney General of Canada (Claimant) v. S.D. Myers, Inc. (Defendant)*³⁶
 - a. The applicant sought judicial review of NAFTA arbitration awards, which arose from a determination that Canada was in breach of articles 1102 and 1105 of the NAFTA, when it imposed a ban on exports of PCB wastes from Canada for treatment in the United States. The Tribunal awarded the respondent (SDMI) \$6,050,000 plus interest in compensation for damages, \$500,000 for legal costs and \$350,000 for arbitral costs. Ban was directed against the respondent (SDMI) since it was the only company that was granted permission from the EPA in the United States to import PCBs.
 - i. The *issue* on appeal is whether the awards exceeded the scope of the arbitration agreement by dealing with a dispute not contemplated by Chapter 11 of the NAFTA and whether the awards **contravene the public policy of Canada**.
 - ii. Opinion notes that Article 34 does not allow for judicial review if the decision is based on an error of law or an erroneous finding of fact if the decision is within the jurisdiction of the Tribunal. *The principle of non-*

³³ 508 F. 2d 969, 973 (2d. Cir. 1974)

³⁴ 416 F. 2d 198 (5th Cir. 1969) (US DOMESTIC)

³⁵ 574 F. Supp. 367 (S.D.N.Y. 1983)

³⁶ 2004 WL 3753165 (APPAWD); Federal Court Canada Docket: T-225-01 T-81-03 Citation: 2004 FC 38

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- judicial intervention in an arbitral award within the jurisdiction of the Tribunal has been often repeated. See Lax J. in Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.P.A. et al. (1999), 45 (3d) 183 at page 191, affirmed by 49 O.R. (3d) 414 (C.A.)*
- iii. In analysing the Court's jurisdiction under this subparagraph, the arbitral awards may only be set aside if the applicant, in this case the Attorney General of Canada, furnishes proof on one of two grounds:
1. The awards deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or, [*Court decided this had not been met*]
 2. The awards contain decisions on matters beyond the scope of the submission to arbitration.
- iv. Article 34(2)(b)(ii) of the *Code* refers to **public policy** and refers to *fundamental notions and principles of justice. Includes that a tribunal not exceed its jurisdiction in the course of an inquiry, and that such a jurisdictional error can be a decision which is patently unreasonable, such as a complete disregard of the law so that the decision constitutes an abuse of authority amounting to a flagrant injustice. [See Navigation Sonamar Inc. v. Algoma Steamships Ltd., [1987] R.J.Q. 1346; Analytical Commentary on the Draft Text of the Model Law on International Commercial Arbitration, Eighteenth Session of the United Nations Commission on International Trade Law; Mexico v. Feldman, supra at paragraph 87.]*
1. HELD: With respect to the two jurisdictional questions, the Tribunal's findings show that they are not **patently unreasonable, clearly irrational, totally lacking in reality, or a flagrant denial of justice.** [No conflict with PP in Canada]