Mr. Cohn (Israel) said in the same Meeting:

He agreed with the Iranian representative that a mere reference to "public policy" in Article IV (c) of the German amendment was inadequate. The meaning should be clarified. In that connection, he preferred the text of Article IV (h) of the Draft Convention.[108]

Mr. Maurtua (Peru) was not satisfied with the limitation of the exception in Article IV (e) of the three-power paper[109] to incompatibility to public policy. Incompatibility with fundamental principles of the law was an adequate ground for refusing enforcement, and he favored the retention of the wording in paragraph IV (h) of the Ad-hoc Committee's draft, with the deletion of the word "clearly".[110]

The Japanese delegate Mr. Urabe said with respect to the public policy clause:

He had listened with interest to the French representative's argument that the exception in Article IV (b) of the Netherlands' amendment (E/ Conf. 26/L. 17) was covered by the clause relating to public policy, and he noted that the substance of that exception had been omitted from the three-power draft (E/ Conf. 26/L. 40).[111] The commission tended to encourage a broad interpretation of public policy. He recalled the Swiss representative's citation of a case in which the Swiss Federal Court had reversed a decision of the Zurich Cantonal Court, which had refused the enforcement of a Czechoslovak award on grounds of public policy. In his view, to permit too wide an interpretation of public policy would be to defeat the purpose of

[108] Summary Record of the Fourteenth Meeting (May 29, 1958), U.N. DOC. E/ CONF. 26/SR.14, at 5.

[109] France, the Federal Republic of Germany, and the Netherlands: Working paper on articles III, IV and V of the draft convention (U.N. DOC. E/ CONF. 26/L.40).

[110] Summary Record of the Fourteenth Meeting (May 29, 1958), U.N. DOC. E/ CONF. 26/SR.14, at 9.

[111] France, the Federal Republic of Germany, and the Netherlands: Working paper on articles III, IV and V of the draft convention (U.N. DOC. E/CONF. 26/L.40).

the Convention. He therefore urged the retention of the exception in question.[112]

Mr. Georgiev (Bulgaria) said that he favored the provision of the German amendment on the question of "public policy".[113]

The conference split in several committees and working parties.[114]

D. Working Party No. 3 for Articles III – V

At the end of the Fourteenth Meeting, the conference established Working Party No. 3 to discuss the Articles III, IV and V. The Working Group consisted of representatives of Czechoslovakia, El Salvador, the Federal Republic of Germany, Guatemala, Italy, Japan, the Netherlands, Pakistan, Sweden, Switzerland, Tunisia, the Union of Soviet Socialist Republics, and the United Kingdom, and was chaired by Mr. de Sydow from Sweden. For the discussions and the result of working party No, 3 it may have been of importance that only Pakistan and the United Kingdom have a common law system.

During the discussions of Working Party No. 3, France, Germany, and the Netherlands presented a working paper on Art. III, IV and V, which proposed the following wording for the public policy clause in Art. IV:

Recognition and enforcement of an arbitral award may only be refused if:

...

(e) the recognition or enforcement of the award would be incompatible with the public policy of the country in which the award is relied upon;[115]

Germany had realized that its proposal to replace "may" by "shall" did not have support from other delegations, and therefore did not pursue it any longer.

[112] Summary Record of the Fourteenth Meeting (May 29, 1958), U.N. DOC. E/ CONF. 26/SR.14, at 7.

[113] Summary Record of the Fourteenth Meeting (May 29, 1958), U.N. DOC. E/ CONF. 26/SR.14, at 10.

[114] Summary Record of the Fourteenth Meeting (May 29, 1958), U.N. DOC. E/ CONF. 26/SR.14, at 10.

[115] U.N. DOC. E/ CONF.26/L.40 (June 2, 1958).

Based on these suggestions, the Working Party 3 adopted at its last meeting new Articles III, IV, and V. Subparagraph no. 1 of this new Article IV proposed that "recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought proof that. . . ."[116]

The Working Party suggested the following wording for Article IV subparagraph 2:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought considers that:
>
> (a) the subject matter of the difference is not capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon; or
>
> (b) the recognition or enforcement of the award would be incompatible with the public policy of the country in which the award is sought to be relied upon;
>
> (c) or the award, recognition and enforcement of which is sought, has not yet become binding on the parties, or has been set aside in the country in which it was made.[117]

The wording of letter (b) was identical with the three-power proposal.

Working Party No. 3 presented its considerations regarding Articles III, IV and V in the Seventeenth Meeting on June 3, 1958. The Chair Mr. de Sydow (Sweden) gave an oral report on behalf of the Working Party No. 3 and introduced the draft of Articles III, IV.[118]

With two exceptions, the Working Party No. 3 had unanimously agreed on a single text to be recommended to the Conference for adoption. These two exceptions are not relevant for the subject of the public policy exception.[119] Therefore, it must be noted that despite all previous heated debates representatives of civil and common law

[116] U.N. DOC. E/ CONF.26/L.43 of June 3, 1958, at 1.
[117] U.N. DOC. E/ CONF.26/L.43 of June 3, 1958, at 2.
[118] Text of Articles III, IV and V of the draft Convention proposed by the Working Party for adoption of the Conference (Document U.N. DOC. E/ CONF. 26/L.43).
[119] U.N. DOC. E/ CONF. 26/SR.17, at 2.

countries unanimously approved the wording of the public policy exception.

Mr. de Sydow reported that the text of Articles III, IV and V adopted by the Working Party represented a compromise arrived at after exhaustive consideration of the views advanced at the Conference and of the requirements of the various legal systems governing arbitration proceedings in different countries.[120]

Mr. de Sydow further reported that Working Party No. 3 also came to the following conclusion:

> It would be more appropriate to divide Article IV into two paragraphs, one containing the grounds for refusal which had to be invoked by the party opposing enforcement, and the other those grounds which the enforcement authority could take into account ex officio. It was felt that that would clarify and considerably facilitate the task of the enforcement authority which in practice may find it difficult, if not impossible, to take into account some of the grounds for refusal unless their existence was first brought to its knowledge and substantiated by the party opposing enforcement.[121]
>
> As regards § 2 (b) of Article IV [the public policy exception], the Working Party felt that the provision allowing refusal of enforcement on grounds of public policy should not be given a broad scope of application. It therefore agreed to recommend the deletion of references to the subject matter of the award and to fundamental principles of law.[122]

Mr. de Sydow concluded his report with the hope that "the new text of articles III, IV and V recommended by the Working Party for adoption would obtain the unanimous approval of the Conference."[123]

No representative objected. This statement regarding a narrow interpretation of the term "public policy" is important for the

[120] Summary Record of the Seventeenth Meeting, U.N. DOC. E/ CONF. 26/SR.17, at 2.
[121] Mr. de Sydow (Sweden), Summary Record of the Seventeenth Meeting, U.N. DOC. E/ CONF. 26/SR.17, at 2 et seq.
[122] Summary Record of the Seventeenth Meeting, U.N. DOC. E/ CONF.26/SR.17, at 3.
[123] Summary Record of the Seventeenth Meeting, U.N. DOC. E/ CONF.26/SR.17, at 4.

interpretation of the public policy exception because it makes it clear what the representatives in Working Party No. 3 unanimously wanted to achieve with their proposal.

E. Discussion of the Proposal of Working Party No. 3 and Decision on Wording

The final wording of the public policy clause was discussed at the Seventeenth Meeting on June 3, 1958.

The Italian delegate Mr. Matteucci explained that he had withdrawn his proposal to refuse recognition and enforcement of an arbitral award where the arbitral award was incompatible with the judgment applying to the same parties and the same subject matter rendered in the territory of the state where recognition was sought on the understanding that it was covered by the term "public policy".[124]

When the Israeli delegate asked whether the principle of *res judicata* deemed to have been covered by the term "public policy", also applied to violations of a country's criminal law, the Italian delegate responded that "public policy" was a matter within the discretionary power of each country.[125]

When several delegates said that they could not vote for Israel's proposal, Mr. Cohn (Israel) explained that his amendment did not purport to prevent recognition or enforcement of an award because it was not in accordance with the civil law of the country in which the award was sought to be relied upon but only when it involved violation of criminal law.[126]

Brazil had suggested to add in § 2 (b) the words "or with fundamental principles of the law (ordre public)".[127] Several delegates felt that a mere reference to "public policy" was inadequate and suggested to add again the words "or with the fundamental principles of the law" sometimes with, sometimes without reference to "ordre

[124] Summary Record of the Eighteenth Meeting, U.N. DOC. E/ CONF. 26/SR.17, at 15.

[125] Summary Record of the Eighteenth Meeting, U.N. DOC. E/ CONF. 26/SR.17, at 15.

[126] Summary Record of the Seventeenth Meeting, U.N. DOC. E/ CONF. 26/SR.17, at 15.

[127] U.N. DOC. E/ CONF. 26/SR.17, at 15.

public".[128] But the Conference rejected the Brazilian proposal by 21 votes to 12 votes with 4 abstentions.

The conference discussed with respect to Article IV (now V) especially the deletion of the provision regarding the principle of separability. It was argued that the application of the principle of separability would inevitably invite a court to look into the substance of the award.[129] The Indian, Italian, and Bulgarian delegate opposed this argument. But the majority voted against separability.[130]

The Israeli proposal was rejected by 27 votes to 8 with 4 abstentions. The Brazilian proposal to insert the words or with fundamental principles of the law (ordre public) was rejected by 21 votes to 12, with 4 abstentions. The Swedish proposal stipulated to add the following new paragraph to Article IV:

> the circumstances referred to in article IV, paragraphs (b), (c), (e) and (g), shall not constitute a bar to recognition or enforcement by the party against whom the award has been made unless the said party raises an objection based on those circumstances.[131]

This proposal was not adopted.

Finally, the Conference adopted at its 17th meeting on June 04, 1958 the text for the Articles III, IV and V of the draft convention. Article IV (now V) was adopted by 32 votes to 1, with 4 abstentions.[132] Article IV paragraph 2 had now the following wording:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought considers that:
>
> (a) the subject matter of the difference is not capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon; or

[128] Peru, Iran, Brazil (Summary Record of the Seventeenth Meeting, U.N. DOC. E/ CONF. 26/SR.17, at 15).

[129] Mr. Herment (Belgium) and Mr. Bakhtov (Union of Soviet Socialistic Republics), U.N. DOC. E/ CONF. 26/SR.17, at 9.

[130] U.N. DOC. E/ CONF. 26/SR.17, at 15.

[131] U.N. DOC. E/ CONF.26/L.8.

[132] U.N. DOC. E/ CONF. 26/SR.17, at 16.

(b) the recognition or enforcement of the award would be incompatible with the public policy of the country in which the award is sought to be relied upon."[133]

The Conference voted in its 21st Meeting on June 05, 1958 to include a new Art. II (Arbitration Agreement) in the Convention; thereby, draft Art. IV became draft Art. V.[134]

F. Drafting Committee

On June 6, 1958, the Drafting Committee provisionally approved the text of Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Article V (2) had now the following wording:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country.[135]

On June 9, 1958, the Drafting Committee approved the text of the Convention. The wording of Article V subparagraph 2 was identical to the provisionally approved draft.[136]

G. Final Text Approval

The Conference discussed and voted upon several proposals regarding the new Article V at the twenty-third Meeting on June 9, 1958 and the twenty-fourth Meeting on June 10, 1958.[137]

[133] U.N. DOC. E/ CONF.26/L.48 of June 4, 1958, at 2.; Text of Articles III, IV and V of the Draft Convention as adopted by the Conference at its Seventeenth Meeting, U.N. DOC. E/ CONF. 26/L.48.

[134] U.N. DOC. E/ CONF.26/L.59; U.N. DOC. E/ CONF.26/SR.21, at 17

[135] U.N. DOC. E/ CONF.26/L.61 of June 6, 1958, at 3.

[136] U.N. DOC. E/ CONF.26/8 of June 9, 1958, at 3.

[137] Summary Record of the Twenty-Third Meeting, U.N. DOC. E/ CONF. 26/SR.23, at 14-16; Summary Record of the Twenty-Fourth Meeting, U.N. DOC. E/ CONF. 26/SR.24, at 2-3.

Article V as a whole was adopted in the 24th Meeting of June 10, 1958 by 31 votes to 2, with 4 abstentions. The Convention as a whole was adopted by 35 votes to none with 4 abstentions.[138] Abstentions came among others from Yugoslavia,[139] and Guatemala.[140]

Based upon of all working papers the meaning of the term "public policy" was never discussed during the Conference, at least not in a form which would have been recorded. At length discussed was whether the term should stand alone or whether further elements should be added to it like principles of law, or a reference to void and illegal contracts. However, the Conference without any doubt approved by an overwhelming majority of the participating States and the report of Working Party 3 with only 2 objections and 4 abstentions that that the term "public policy" was to be interpreted narrowly.

H. Resolution on Measures for Increasing Effectiveness of Arbitration

On the basis of proposals made by the Committee on Other Measures for Increasing the Effectiveness of Arbitration in the Settlement of Private Law Disputes, the Conference adopted in the Final Act of June 10, 1958 a resolution stipulating:

> The Conference,
>
> Believing that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field,
>
> Having considered the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General (Document E/ CONF. 26/6).
>
> ...

[138] Summary Record of the Twenty-Fourth Meeting, U.N. DOC. E/ CONF. 26/SR.24, at 10.

[139] U.N. DOC. E/ CONF. 26/SR.24, at 10 et seq.

[140] U.N. DOC. E/ CONF. 26/SR.24, at 12.

When Brostrom wanted to enforce the arbitral award, Vulcano raised the public policy exception.

The Irish court had to decide whether Section 9 paragraph 3 provided a basis for refusing the enforcement of the Norwegian award against a Spanish company. It held:

> I am satisfied that there are strong public policy considerations in favour of enforcing awards. ... Such a leaning in favour of enforcement must not, of course, stand in the way of refusal if such is required as a matter of public policy. . . . I am satisfied that the public policy referred to in Sect. 9 (3) of the Act is the public policy of this State. That is clear, in my view, from the wording of Art. V (2) (b) of the New York Convention. . . . Counsel for the defendant was unable to produce a single authority from here or anywhere in the common law world supportive of her contention . . . that the comity of courts would be imperilled by an enforcement order being made.
>
> I am satisfied that a refusal of an enforcement order on grounds of public policy would not be justified in this case. To do so would extend to a very considerable extent the notion of public policy as it has come to be recognised in the context of the enforcement of an arbitral award. The case law and the textbook writers make it clear that the public policy defence to an enforcement application is one which is of a narrow scope. It extends only to a breach of the most basic notions of morality and justice. In this regard, I derive considerable assistance from the decision in *Parson and Whittemore Overseas Company v. Société Générale de l'Industrie du Papier*, a decision of Circuit Judge Joseph Smith [508 F.2d 969].[229]
>
> I am of the opinion that I would only be justified in refusing enforcement if there was:
>
> Some element of illegality, or that the enforcement of the award would be clearly injurious to the public good, or possibly that enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public.[230]

[229] Yearbook of Commercial Arbitration, Vol. XXX (2005), para. 11, at 596.

[230] Yearbook of Commercial Arbitration, Vol. XXX (2005), para. 16, at 597 et seq.

IX. Italy

Italy acceded to the Convention on January 31, 1969; the Convention became effective on May 01, 1969.[231]

A. Law

The relevant provisions are contained in Chapter VII of Title VIII of the Italian Code of Civil Procedure (CCP) which deals with foreign arbitral awards. The CCP provides for a two stage proceeding. The first stage is based just on the application of the plaintiff without hearing the other party.[232]

Article 839 of the Italian Code of Civil Procedure reads:

> (4) The President of the Court of Appeal, after having ascertained the formal regularity of the award, shall declare by decree the enforceability of the foreign award in the Republic unless:
>
> ...
>
> 2. the award contains provisions contrary to public policy.[233]

Article 840 of the Italian Code of Civil Procedure governs the review of a foreign arbitral award if opposition was filed against the decree of the President of the Court of Appeal granting or denying enforcement of a foreign award; such opposition must be filed within 30 days from the communication of such decree. Article 840 (3) provides that the Court of Appeals shall refuse recognition and enforcement if in the opposition proceeding the party against which the award is invoked proves the

[231] Status 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards (www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html); Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 707.

[232] Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 708.

[233] Yearbook of Commercial Arbitration, Vol. XXXII (2007), at 385 fn 1; Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 718.

existence of one of the circumstances exhaustively listed in Art. V (1); failure to meet such burden of proof will result in the confirmation of the decree of the President of the Court of Appeal.[234] The Supreme Court shall deny *ex officio* recognition and enforcement in the circumstances enlisted in Art. V (2). Art. 840 (5) of the Italian Code of Civil Procedure reads:

> (5) Recognition or enforcement of a foreign award shall be refused also where the Court of Appeal shall ascertain that:
>
> ...
>
> 2. the award contains provisions contrary to public policy.[235]

It is to be noticed that this clause does not define public policy, but it mandatorily requires the court to refuse recognition and enforcement if public policy is violated.

The judgment of the Court of Appeals is subject to recourse before the Supreme Court (Art. 840 (2) of the Italian Code of Civil Procedures).[236]

B. No Review of the Merits

Italian Courts consistently refuse to review the merits of an award during the enforcement proceedings[237] even if a violation of public policy is alleged. In a long series of decisions, Italian courts always held that the court of enforcement cannot review a foreign arbitral award on the merits.[238]

[234] Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 709.

[235] Yearbook of Commercial Arbitration, Vol. XXXII (2007), at 385 et seq. fn. 2; Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 718 et seq.

[236] Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 718.

[237] *See also*, Yearbook of Commercial Arbitration, Vol. XXXII (2007), at 402.

[238] *Algemene Oliehandel V.O.F. v. Oleificio Barbi S.p.A.* Corte di Appello of Brescia, April 10, 1985, Yearbook of Commercial Arbitration, Vol. XI, (1986), at 511; Corte di Appello of Milan, December 04, 1992, Yearbook of Commercial Arbitration, Vol. XXII (1997), para. 2, at 725 et seq.

In *Vigel S.p.A. v. China National Machine Tool Corp.*,[239] a CIETAC arbitral panel failed to apply the Vienna Sales Convention, especially the time restrictions to object to defects. The Italian Supreme Court held that the court will not review the reasons for the award;[240] the Supreme Court held "(a)n error *in iudicando* is not one of the grounds for opposition to a foreign arbitral award pursuant to Art. 840 CCP or the New York Convention."[241]

The Supreme Court (*Corte di Cassazione*) reconfirmed its decisions of March 17, 1982[242] and of April 03, 1987[243] that a potential violation of the Italian public policy could only be found by reviewing the dictum of the award, but not its reasons. The Supreme Court held:

> This court has already made clear on this point that in proceedings for the enforcement of a foreign arbitral award accordance with Italian public policy must ascertained only in respect of the dictum [dispositivo] of the award (Supreme Court. Decision of 17 March 1982 no. 1727; see also Supreme Court decision no. 1351 of 1965 as well as for a specific case Supreme Court, decision of 3 April 1987 no. 3221).[244]

The Italian Supreme Court had to deal in *Industrie Technofrigo Dell'Orto S.p.A. v. PS Profil Epitoipari Kreresdedelmi SS Szolgatató KFT* with the enforcement of a Hungarian arbitral award; the Court of Arbitration attached to the Hungarian Chamber of Commerce had violated Hungarian arbitration rules[245] during the arbitral proceeding. The Italian party demanded refusal of recognition and enforcement. It is noteworthy that the Italian Supreme Court in its decision of May 30, 2006, no. 12873, did not review the irregularities in the arbitration

[239] *Corte di Cassazione* (Supreme Court), April 08, 2004, no. 6947, Yearbook of Commercial Arbitration, Col. XXXI (2006), at 802 et seq.

[240] Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 715.

[241] Yearbook of Commercial Arbitration, Vol. XXXI (2006), para. 8, at 806.

[242] Yearbook of Commercial Arbitration, Vol. IX (1984), at 426 et seq.

[243] Yearbook of Commercial Arbitration, Vol. XVII (1992), at 529 et seq.

[244] *Vigel S.p.A.v. China National Machine Toll* Corporation, Supreme Court, 08 April 2004, No. 6947, Yearbook of Commercial Arbitration, Vol. XXXI (2006), para. 10, at 806.

[245] The arbitral tribunal had violated its obligation to declare the taking of evidence completed and to request the parties to file their closing arguments before rendering the award.

procedure under due process aspects and public policy, but only under Art. V (1) (b) and (d). It held that the award did not violate Italian public policy, and the Italian party should have filed a recourse in the foreign legal system.[246]

Therefore, a violation of public policy will only be recognized if it is found in the *dispositif* part of the award without reviewing the statement of reasons.[247] In the case at issue, Vigel was ordered to pay damages and this is not a violation of Italian public policy.[248] However, it is to be seen how the Supreme Court would handle an arbitral award which would grant treble or punitive damages.

C. *International Public Policy*

The Italian legal system distinguishes between domestic public policy which is the standard for domestic arbitral awards, and international public policy for foreign arbitral awards. The domestic public policy comprises all the mandatory rules in force in Italy. The international public policy comprises the essential and compulsory principles to which the Italian legal system conforms in various historical periods, so that they constitute the foundation of the ethical, social, and economic structure of the national community.[249]

In *SpA Abati Lagnami v. Fritz Häupl*,[250] the Italian defendant in an enforcement proceeding had alleged a violation of Italian public policy on the basis that the award allegedly ensued from proceedings maliciously commenced by claimant based on both a factual error and an agreement allegedly providing for the illegal export of currency. The Supreme Court held:

> This contention cannot be accepted. A foreign award ensuing from the malicious behaviour of one of the parties or from a factual error based on the act and documents of the case . . . cannot be

[246] Yearbook of Commercial Arbitration, Vol. XXXII (2007), at 409.

[247] Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 717.

[248] Yearbook of Commercial Arbitration, Vol. XXXI (2006), para. 10, at 806

[249] Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 717.

[250] Yearbook of Commercial Arbitration, Vol. XVII (1992), at 529 et seq.

> challenged on the contention that the holding resulted from a violation of legal provisions and thereby violates, according to the general principles of our legal system, the ethical, social and political conscience of our democratic country.[251]

The Court of Appeals of Milano referred to "international public policy" as a "body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions."[252]

The Court of Appeals of Rome affirmed the decision of the President of the Court of Appeals of Rome to recognize and enforce a foreign award. The Italian Party had argued that the award violated Italian international public policy and Art. 840 CCP.[253] It held that the foreign award is perfectly in accordance not only with international public policy but also with [Italian] public policy.[254]

Based on decisions of the Italian Supreme Court it seems that neither a lack of relevant statements of reasons of the award[255] nor a foreign award made by two arbitrators only would violate Italian international public policy.[256]

In *Fratelli Damiano s.n.c. v. August Toepfer & Co GmbH*, the arbitral tribunal had not drawn up a statement of reason. The Supreme Court held that the Geneva Convention of 1961 on International Commercial Arbitration was violated; therefore it refused recognition and enforcement, however, solely based on Art. V (1) (d) of the New York Convention. In *Soc. Rocco v. Federal Commerce and Navigation Ltd.*, the Supreme Court decided that the foreign award was

[251] Yearbook of Commercial Arbitration, Vol. XVII (1992), para. 12, at 532.

[252] Yearbook of Commercial Arbitration, Vol. XXII (1997), para. 4, at 726.

[253] *Technip Italy S.p.A. v. Eati Limited*, Yearbook of Commercial Arbitration, Vol. XXXIV (2009), para. 2, at 638.

[254] *Technip Italy S.p.A. v. Eati Limited*, Yearbook of Commercial Arbitration, Vol. XXXIV (2009), para. 6, at 638.

[255] *Fratelli Damiano s.n.c. v. August Toepfer & Co. GmbH*, Cass. February 08, 1982, n. 722; Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 714 et seq. and 717.

[256] *Soc. Rocco v. Federal Commerce and Navigation Ltd.*, Cass. December 15, 1982, n. 6915; Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 717 et seq.

enforceable.[257] The Italian Supreme Court is exercising a very pro-enforcement bias.

X. Japan

Japan acceded to the Convention on June 20, 1961, and it became effective in Japan on September 18, 1961.[258]

A. Law

Japan did not implement the New York Convention explicitly in Japanese Law.

Art. 98 (2) of the Japanese Constitution provides that international conventions and treaties to which Japan is a party shall be faithfully observed: this clause is interpreted to mean that international conventions and treaties become directly applicable without the need for any implementing legislation and that they will prevail over Japanese law.[259] Therefore, international conventions and treaties are directly applicable in Japan whether or not they are of a self-executing nature. Based on this Article, the Tokyo District Court in a decision of August 20, 1959 and the Osaka District Court in a decision of November 27, 1961 held that the New York Convention was a self-executing treaty and could be applied directly.[260]

Art. 802 of the Law on Public Notice Procedure and Arbitration Procedure[261] contained the rules regarding the enforcement of domestic arbitral awards; it stipulated that for the execution of an arbitral award an

[257] Piero Bernardini and Marco Perrini, New York Convention of June 10, 1958: The Application of Article V by the Courts in Italy, Journal of International Arbitration, Vol. 25(6) (2008), at 715.

[258] Status 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards (www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

[259] Yasuhei Tanaguchi and Tatsuya Nakamura, Japanese Court Decisions on Article V of the New York Convention, Journal of International Arbitration, Vol. 25(6) (2008), at 857.

[260] Tokushiro Ohata/Tadashi Imai, Waseda Bulletin of Comparative Law, Vol. 5, at 102 (http://www.waseda.jp/hiken/jp/public/bulletin/pdf/05/runbun/A02859211-00-000050099.pdf).

[261] http://www.jseinc.org/en/laws/new_arbitration_act.html.

execution judgment was needed. It was held that this provision was applicable *mutatis mutandis* also for foreign arbitral awards.

In 2003, Japan enacted a new Arbitration Law (no. 138 of 2003);[262] based on Art. 1, the Arbitration Law contains rules which apply where the place of arbitration is in the territory of Japan as well as rules for court proceedings in connection with arbitral proceedings. Chapter VIII deals with "Recognition and Enforcement Decisions of Arbitral Awards". Art. 45 (1) stipulates that "an arbitral award (irrespective of whether or not the place of arbitration is in the territory of Japan) shall have the same effect as a final and conclusive judgment."

Under Art. 46 (8) a court may dismiss the application for an enforcement decision "only when it finds any of the grounds described in each of the items under paragraph (2) of the preceding article present." Art. 45 (2) enlists nine grounds and stipulates with respect to public policy: "the content of the arbitral award would be contrary to the public policy or good morals of Japan."[263]

B. Public Policy: Basic Principles or Rules of Japanese Judicial Order

It is interesting to note that the public policy exception in Art. 45 (2) is referring to a conflict of the content of the arbitral award with the public policy or good morals of Japan; Japan follows with this provision the original intent of Art. V (2) (b) of the New York Convention. It is a matter of controversy among Japanese scholars whether a breach of procedural public policy would be included in the public policy exception;[264] a literal interpretation would exclude that. But this controversy does not have a real importance since procedural irregularities are included in Art. V (1) and the other grounds are enlistet in Art. 45 (2).

Japanese courts dealt with the public policy exception several times and always rejected it. All cases but one[265] were related to the enforcement of an arbitral award issued by the China International Economic and Trade Arbitration Commission (CIETAC). The Japanese

[262] http://www.jseinc.org/en/laws/new_arbitration_act.html.

[263] http://www.jseinc.org/en/laws/new_arbitration_act.html.

[264] Hiroshi Oda, Enforcement and Setting Aside of Foreign Arbitral Awards in Japan, ICC International Court of Arbitration Bulletin, Vol. 21/2 – 2010, at 13.

[265] Hiroshi Oda, Enforcement and Setting Aside of Foreign Arbitral Awards in Japan, ICC International Court of Arbitration Bulletin, Vol. 21/2 – 2010, at 15.

may be denied;[74] however, the implementation sometimes turns out to be different. The Supreme *Arbitrazh* Court gave guidance with respect to the meaning of "contrary to the public policy" and clarified the approach of Russian courts to certain issues relating to the enforcement of arbitral awards. The Overview provides that

> the public policy of the Russian Federation is based on the principles of the parties' equality in civil law relations, good faith (*bona fide* behaviour) in their actions, and the commensurability of remedies with the effects arisen from the breach of duty and the degree of the fault.[75]

Section 29 of the Informational Letter No. 96 provides that

> an *arbitrazh* court shall refuse to recognize and enforce a foreign commercial arbitral award if it determines that the consequences of enforcement of such an award contradict the public order of the Russian Federation because of a violation of the principles of the equality of the parties in civil law relations, the bona fide nature of their behaviour and the proportionality of the civil liability measures taken as a result of the breach, taking into account fault.[76]

[74] Ilya Nikiforov, Interpretation of Article V of the New York Convention by Russian Courts, Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement, Journal of International Arbitration, Vol. 25(6) (1980), at 789.

[75] Yearbook of Commercial Arbitration, Vol. XXXII (2007), para. 4, at 487. In *Odfjell SE v. OAO Northern Machine Building Enterprise*, the Federal *Arbitrazh* Court for the North-Western District, St. Petersburg approved in its decision of March 10, 2011the standard of review taken by the court of first instance as follows: An award "may be considered as being contrary to the public policy of the Russian Federation if its enforcement will result in actions that are either directly prohibited by the law, or may cause harm to the sovereignty or safety of the state, or impair interests of large social groups, or are incompatible with the principles of economic, political, legal systems of states, or impair constitutional rights or freedoms of citizens, or are contrary to the fundamental principles of civil legislation, such as equal treatment of participants, inviolability of property, freedom of contract." (www.kluwerarbitration.com/print.aspx?ids=KLI-KA-1152029, paras. 25).

[76] *Odfjell SE v. OAO Northern Machine Building Enterprise*, Federal Arbitrazh Court for the Northwestern District, Decision of March 10, 2011 (www.kluwerarbitration.com/print.aspx?ids=KLI-KA-1152029, para 26, at 8); Section 29 of the Informational Letter No. 96, Russia/Eurasia Newsletter of the Section of International Law of the ABA, Spring 2009, at 11.

This is not contemplated by Art. V (2) (b) of the New York Convention. Based on Section 29, the *arbitrazh* courts do not only have to check whether the enforcement of the foreign arbitral award would violate Russian public policy; the *arbitrazh* courts also have to review whether even the consequences of the recognition and the enforcement of the foreign arbitral award would violate Russian public policy even if the award itself or its enforcement does not violate Russian public policy. The Supreme *Arbitrazh* Court instructed the lower *arbitrazh* courts that Russian public policy contemplates the good faith and equality of parties entering into private relations as well as the proportionality of civil law liability to the breach of duty.[77]

However, many uncertainties in the law are not dealt with in the Overview.[78] The criteria contained in the Information Letter of the Supreme *Arbitrazh* Court are broader than those stated in the ruling of the Supreme Court of the Russian Federation of 1998, and in the Bulletin 1999 no. 3 of the same court. But some observers comment that the Supreme *Arbitrazh* Court has itself sometimes applied a narrower interpretation of the public policy ground.

C. *Enforcement Despite Broad Interpretation of Public Policy*

The *Arbitrazh* Courts received on average annually about 100 applications to recognize and enforce foreign arbitral awards;[79] there is

[77] Maxim Kulkov, Enforcement of International Arbitral Awards in Russia, ABA Teleconference Handout (November 17, 2009), at 2; Russia/Eurasia Committee Newsletter of the Section of International Law of the ABA, Spring 2009, at 12.

[78] Boris Karabelnikov/Dominik Pellew, Enforcement of International Arbitral Awards in Russia - Still A Mixed Picture, ICC International Court of Arbitration Bulletin, Vol. 19/No. 1 - 2008, at 67.

[79] In comparison, these courts received between about 1,000 and 1,700 applications annually for setting aside domestic and international awards (Ilya Nikiforov, Interpretation of Article V of the New York Convention by Russian Courts, Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement, Journal of International Arbitration, Vol. 25 (6) (2008), at 790).

no information published on how many of the applications were successful.[80] Some foreign arbitral awards were enforced in Russia.

In 1991, in what was probably the first case involving a claimant from a country outside the former socialist bloc, the Moscow City Court allowed the enforcement of an award rendered in London on the basis of the New York Convention and the 1988 decree of the Presidium of the USSR Supreme Soviet. In another case, the Moscow City Court enforced an award made in Stockholm.[81]

In 1998, another Stockholm award was enforced, this time in St. Petersburg. This case reached the Supreme Court, which gave a questionable ruling, but the City Court of St. Petersburg, to which the case was remanded, allowed enforcement.[82]

In a first case after the publication of the Information Letter no. 96, a Dutch claimant had lent money to a Russian company and obtained several arbitration awards in its favor, which the Dutch party tried to enforce. Enforcement was denied at cassation level of the Federal *Arbitrazh* court for the Eastern Siberian Region, which held that there was no proof that the monies had actually been advanced and that therefore enforcement would be a breach of public policy. The Supreme *Arbitrazh* Court Presidium overturned the cassation court's decision and re-instated the first instance judgment allowing enforcement.[83]

The Supreme *Arbitrazh* Court held that there was no reason for considering that public policy would be breached if enforcement were allowed, and it further held that the cassation court had wrongly re-

[80] Ilya Nikiforov, Interpretation of Article V of the New York Convention by Russian Courts, Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement, Journal of International Arbitration, Vol. 25(6) (1980), at 790.

[81] K. Hober, Enforcing Foreign Arbitral Awards in Russia, Russia and Commonwealth Business Law Report (16 August 1995) at 8-10.

[82] Hiroshi Oda, Enforcement of International Commercial Arbitral Awards in Russia, VDRW Mitteilungen 28-29 / 2006, at 36.

[83] *Arduina v. UVGK*, 4438/06, May 26, 2006 (Boris Karabelnikov/Dominik Pellew, Enforcement of International Arbitral Awards in Russia—Still A Mixed Picture, ICC International Court of Arbitration Bulletin, Vol. 19/No. 1 - 2008, at 73 fn. 26).

examined the arbitral tribunal's factual findings on the advance of the loan monies, as this fell within the arbitral tribunal's jurisdiction.[84]

There are also very restrictive interpretations of Russian public policy.

The Federal *Arbitrazh* Court for the Northwestern District enforced an award issued by the Arbitration Institute of the Stockholm Chamber of Commerce holding that defendant's arguments alleging a violation of public policy were going to the merits and would call for review of the given award "which is something that the *Arbitrazh* court has no authority to do when entertaining an application for recognition and enforcement of an arbitral award."[85]

The Federal *Arbitrazh* Court for the Moscow District reasoned in 2005 that the *Arbitrazh* Court of the City of Moscow should not have limited itself to the procedural norms, but should have applied Art. V of the New York Convention. It held that Art. V of the New York Convention did not contain "impossibility of enforcement" as a ground for refusal. This ground was created by the Moscow *Arbitrazh* Court to refuse recognition of the foreign award which was issued under UNCITRAL Arbitration Rules in London.

> In light of the conception of public policy set out in Art. 1193 of the Civil Code of the Russian Federation and also in developed court practice, the public policy of the Russian Federation means the foundations of the social order of the Russian State. A public policy exception is possible only in those isolated cases when application of foreign law could produce a result that is impermissible from the perspective of Russian legal consciousness.[86]

In a case which dealt with the recognition and enforcement of an arbitral award made in Germany, the Federal *Arbitrazh* Court for the Moscow District dismissed the appeal against a judgment of the *Arbitrazh* Court of the City of Moscow enforcing the award. The plaintiff

[84] Boris Karabelnikov/Dominik Pellew, Enforcement of International Arbitral Awards in Russia - Still A Mixed Picture, ICC International Court of Arbitration Bulletin, Vol. 19/No. 1 - 2008, at 73.

[85] *Dana Feed A/S v. OOO Arctic Salmon* (Yearbook of Commercial Arbitration, Vol. XXXIII (2008), para. 19, at 664 et seq.

[86] *Indosuez International Finance B.V. v. OAO AB Inkombank* (Yearbook of Commercial Arbitration, Vol. XXXIII (2008), para. 9, at 682 para. 9.

had alleged that the award is contrary to public policy. The Court held: "The recognition and enforcement of foreign arbitral awards is governed by the provision of [the 1958 New York Convention] . . . ."[87]

A basis similar to that provided by [Art. V (2) (b)] of the New York Convention is found in Art. 244 (1) (7) of the *Arbitrazh* Code.[88]

The provisions of the New York Convention do not afford the state courts of the country in whose territory the recognition and enforcement of a foreign arbitral award is sought the right to review such an award on the merits, and Art. 243 (4) of the *Arbitrazh* Code contains a direct prohibition on such a revision of an arbitral award.[89]

Moreover, Art. V (2) (b) of the New York Convention . . . goes to situations where public policy is violated not by the arbitral award itself . . . but its recognition and enforcement within the territory of the state in which enforcement is sought . . . [90] the petitioner . . . did not cite . . . circumstances that could show that enforcement of the award . . . violated the public policy of the Russian Federation, by which is meant the fundamental principles of the legal order, generally recognized principles of morality and ethics, as well as the national defense concerns of the country in which enforcement of the foreign arbitral award is sought.[91]

D. Refusal of Recognition and Enforcement

Based on inconsistent rulings and judgments, more and more Russian defendants try to block the recognition and enforcement of foreign arbitral awards by exercising the public policy defense.[92] Russian

[87] *OAO Foreign Trade Enterprise Stankoimport v. S.G. Industrial Finance AG* (Yearbook of Commercial Arbitration, Vol. XXXIII (2008), para. 6, at 685; the Federal *Arbitrazh* Court for the Central District reconfirmed this standard in a decision of April 09, 2009 (F10-915/09) (Dmitry Marenkov, Zur Anerkennung und Vollstreckung von ausländischen. Schiedssprüchen in Russland, German Arbitration Journal (SchiedsVZ) 2011, at 138).

[88] Yearbook of Commercial Arbitration, Vol. XXXIII (2008), para. 7, at 685.

[89] Yearbook of Commercial Arbitration, Vol. XXXIII (2008), para. 8, at 686.

[90] Yearbook of Commercial Arbitration, Vol. XXXIII (2008), para. 9, at 686.

[91] Yearbook of Commercial Arbitration, Vol. XXXIII (2008), para. 10, at 686.

[92] Oxana Peters and Bernd Schumann, Die Anerkennung und Vollstreckung ausländischer Schiedsgerichts- und Gerichtsurteile in wirtschaftlichen Streitfällen auf dem Territorium der Russischen Förderation, Wirtschaft und Recht in Osteuropa (WiRO) 2008, at 331.

courts seem not only to check whether the enforcement of the foreign award itself would violate Russian public policy, but also if the effect of the recognition and enforcement[93] of such award may be in conflict with Russian legal feeling.

The Federal *Arbitrazh* Court of the East-Siberian Circuit reasoned that it is not the award that might be considered as being in conflict with public policy, but rather its recognition and enforcement;[94] however, since the lower court did not provide any evidence that recognition and enforcement would violate Russian public policy, the decision of the lower court was reversed and the award of the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry was recognized.[95]

Sometimes, *Arbitrazh* courts have tended to reject public policy defenses based purely on supposed errors of law or misinterpretation of evidence by arbitral tribunals.

In the case *Czech Commerce Bank v. Kamchatgasprom*, the Federal *Arbitrazh* Court of the Fareastern Region held that an award including compound and punitive interest was not contrary to public policy.[96] However, there is no consistency. The Federal *Arbitrazh* Court for the Jaroslaw Area did not recognize and enforce a foreign award issued in the Czech Republic because the amount of the penalty exceeded the principal amount. The Presidium of the Federal *Arbitrazh* Court for the Volgo-

[93] Oxana Peters and Bernd Schumann, Die Anerkennung und Vollstreckung ausländischer Schiedsgerichts- und Gerichtsurteile in wirtschaftlichen Streitfällen auf dem Territorium der Russischen Förderation, Wirtschaft und Recht in Osteuropa (WiRO) 2008, at 331.

[94] *Arduina Holding B.V. v. J.S.C. Iujno-Verhoyanskaya gornodobivaushaya companiya*, Federal *Arbitrazh* Court of the East-Siberian Circuit, October 16, 2006, Case No. A58-2103/05 (Ilya Nikiforov, Interpretation of Article V of the New York Convention by Russian Courts, Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement, Journal of International Arbitration, Vol. 25(6) (1980), at 801 et seq.).

[95] Ilya Nikiforov, Interpretation of Article V of the New York Convention by Russian Courts, Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement, Journal of International Arbitration, Vol. 25(6) (1980), at 802.

[96] Boris Karabelnikov/Dominik Pellew, Enforcement of International Arbitral Awards in Russia - Still A Mixed Picture, ICC International Court of Arbitration Bulletin, Vol. 19/No. 1 - 2008, at 71 fn. 23.

Vyatsky region did not reverse the judgment.[97] But in another case, the Supreme *Arbitrazh* Court held that contractual penalties are part of the Russian legal system, and, therefore, do not violate Russian public policy.[98]

The Federal *Arbitrazh* Court of Moscow held that a foreign judgment cannot be recognized and enforced when it is based on an agreement which violates Russian law because it is in conflict with the Russian legal system, and, therefore, with Russian public policy.[99]

2009, the *Arbitrazh* Court for the Ryasan area held that an arbitral award which grants interest on penalty and on the reimbusement of legal costs is violating Russian public policy; the argument was that Russian law does not provide for an interest payment on such compensations.[100] The Supreme *Arbitrazh* Court overruled and held that paying interest on a penalty or expensed legal costs is a form of compensation which is known under Russian law, and, therefore, does not violate the public interest; therefore, it held that the arbitral award is to be recognized and enforced.[101]

[97] Federal *Arbitrazh* Court for the Volgo-Vyatsky Region of May 25, 2006, No. A 82-10555/2005-2-2 (Oxana Peters and Bernd Schumann, Die Anerkennung und Vollstreckung ausländischer Schiedsgerichts- und Gerichtsurteile in wirtschaftlichen Streitfällen auf dem Territorium der Russischen Förderation, Wirtschaft und Recht in Osteuropa (WiRO) 2008, at 331).

[98] Decision of the Presidium of the SAC of September 19, 2006, No. 5243/06 2 (Oxana Peters and Bernd Schumann, Die Anerkennung und Vollstreckung ausländischer Schiedsgerichts- und Gerichtsurteile in wirtschaftlichen Streitfällen auf dem Territorium der Russischen Förderation, Wirtschaft und Recht in Osteuropa (WiRO) 2008, at 331 fn.11).

[99] Federal *Arbitrazh* Court of Moscow of April 13, 2004, No. A 40/2399-04 2 (Oxana Peters and Bernd Schumann, Die Anerkennung und Vollstreckung ausländischer Schiedsgerichts- und Gerichtsurteile in wirtschaftlichen Streitfällen auf dem Territorium der Russischen Förderation, Wirtschaft und Recht in Osteuropa (WiRO) 2008, at 331).

[100] Dmitry Marenkov, Zur Anerkennung und Vollstreckung von ausländischen Schiedssprüchen in Russland, German Arbitration Journal (SchiedsVZ) 2011, at 137.

[101] Dmitry Marenkov, Zur Anerkennung und Vollstreckung von ausländischen Schiedssprüchen in Russland, German Arbitration Journal (SchiedsVZ) 2011, at 139.

E. Very Broad Interpretation Leading to Refusal

Despite the decisions which made foreign arbitral awards enforceable, a Russian expert commented in 1999 that "many Russian courts, as before, do not understand that their power is limited by the New York Convention, and that they are not entitled to review an arbitral award on its merits."[102] Karabelnikow/Pellew analyzed 30 cases involving claims for enforcement of foreign arbitral awards subsequent to September 1, 2002. Fewer than 50 percent of these claims for enforcement were granted.[103]

In many cases, the Russian respondent alleged that the award violated Russian public policy in the definition of "fundamental principles of Russian law".[104] Public policy, interpreted broadly, remains the primary ground on which Russian parties seek to have awards set aside or refused enforcement.[105]

1. Social and Economic Interest

As reported, the term "public policy" includes the social and economic interest of a city, a region or the Russian nation.

In *United World v. Krasny Yakor*, a 2003 case, for example, the Federal *Arbitrazh* Court for the Volgo-Vyatsky Region refused enforcement of an ICC award of October 20, 2000 in the amount of less than USD 37,600 as this could (among other things) lead to the defendant's insolvency, which in turn could "negatively impact on the

[102] Alexander Mouranov & Natalia Toupikina-Holm, Enforcement in Russia: Chronology of a Loan Recovery, Stockholm Arbitration Report 1999:2, at 137.

[103] Boris Karabelnikov/Dominik Pellew, Enforcement of International Arbitral Awards in Russia - Still A Mixed Picture, ICC International Court of Arbitration Bulletin, Vol. 19/No. 1 - 2008, at 68; Elena Vinogradova says in her paper "Enforcement of the Arbitral Awards and Interim Measures in Russia" of November 01, 2007 that the success rates are about 80 per cent, but she does not distinguish between domestic and foreign awards.

[104] Boris Karabelnikov/Dominik Pellew, Enforcement of International Arbitral Awards in Russia - Still A Mixed Picture, ICC International Court of Arbitration Bulletin, Vol. 19/No. 1 - 2008, at 71.

[105] Hiroshi Oda, Enforcement of International Commercial Arbitral Awards in Russia, VDRW Mitteilungen 28–29 / 2006, at 38.

or phrase occurring therein should receive, consisting with its literal and dramatical sense, a liberal construction.[298]

This would imply that the defence of public policy which is permissible under Section 7 (1) (b) (ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I (e) of the Geneva Convention of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7 (1) of the Protocol and Convention Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression 'public policy' covers the field not covered by the words 'and the law of India' which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.[299]

After all this detailed explanation, the Supreme Court of India construed the term "public policy" under Section 7 (1) (b) (ii) of the Foreign Awards Act, 1961 as follows:

Article V (2) (b) of the New York Convention of 1958 and Section 7 (1) (b) (ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is said to be enforced. There is nothing to indicate that the expression "public policy" in Article V (2) (b) of the New York Convention and Section 7 (1) (b) (ii) of the Foreign Awards Act is not used in the same sense in which

[298] (1984) 4 SCC 679/723 para. 50; *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 SCC Suppl. (1), para. 64, at 681; Yearbook of Commercial Arbitration, Vol. XX (1995), para. 38, at 701.

[299] *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 SCC Suppl. (1), para. 65, at 681 et seq.; Yearbook of Commercial Arbitration, Vol. XX (1995), para. 38, at 701.

it was used in Article I (c) of the New York Convention of 1927 and Section 7 (1) of the Protocol and Convention Act of 1937. This would mean that 'public policy' in Section 7 (1) (b) (ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression 'public policy' in S. 7 (1) (b) (ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law; applying the said criteria it must be held that the enforcement of a foreign award would be contrary to (i) fundamental policy of Indian law; or (ii) the interest of India; or (iii) justice or morality.[300]

The Supreme Court of India went on to very rightly give narrow interpretation to the words "public policy" and held that

1. a violation of the Foreign Exchange Regulation Act 1973 (FERA)
2. payment of interest on interest (compound interest),
3. payment of damages on damages, and
4. the possibility of unjust enrichment by General Electric

did not amount to or was not contrary to the public policy of India.[301]

Renusagar thus was very correctly decided when the Indian Supreme Court took a narrow view of the term "public policy", thus leaving little scope of judicial interference in arbitral proceedings in the final determination of awards.[302]

[300] *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 SCC Suppl. (1), para. 66, at 682; Yearbook of Commercial Arbitration, Vol. XX (1995), para. 39, at 701 et seq.

[301] *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 SCC Suppl. (1), para. 67, at 682; Yearbook of Commercial Arbitration, Vol. XX (1995), para. 40 et seq., at 702 et seq.

[302] D.S. Chopra, Supreme Court's Role vis-à-vis Indian Arbitration and Conciliation Act, 1996, at 8.

With these clear words and this learned and elaborate decision, a historic ruling, one would have thought that the interpretation of the term "public policy" of Article V (2) (b) under Indian law would have been resolved forever.

3. *Application of the Public Policy Exception under the Arbitration and Conciliation Act 1996*

The Arbitration and Conciliation Act, 1996 has not worked out the way or the manner in which it was intended. The enactment of the 1996 Act was initially met with approbation by the Supreme Court in cases like Konkan;[303] it stated clearly that the provision of the 1996 Act unequivocally indicate that the Act limits court intervention with an arbitral process to the minimum, but subsequent reality, however, has been far from ideal.[304]

The term "public policy" has undergone a paradigm shift since the enactment of the Arbitration and Conciliation Act, 1996 by virtue of sporadic judicial interpretation. The Supreme Court of India deliberately expanded its extraterritorial jurisdiction and sanctioned interventions in international arbitral awards.[305]

Despite preceding cases where the Supreme Court held that "public policy" is to be interpreted in a restrictive manner and that a breach of "public policy" involves "something more than a mere violation of Indian law", the Supreme Court now expanded the interpretation and application of "public policy" gradually. The narrow definition of public policy was changed significantly a few years later.

a) *Definition of Public Policy Changed in the Saw Pipes Case—"Patent Illegality"*

At first view one could argue that this case relates not to the enforcement of a foreign arbitral award but to a domestic arbitration[306]

[303] *Konkan Railway Corporation v. Mehul Construction*, 2000 (7) SCC 201.

[304] Shalini Iyengar and Preeta Dhar, The Road Less Travelled: Arbitration in India, at 12.

[305] Tanuj Hazari, India's Commitment and Challenge to the International Arbitration: A Setback for Arbitration and Investors or the Neo-Dimension for the International Arbitration, at 3.

[306] Fali S. Nariman, The Function and Utility of International Commercial Arbitration in International Trade and Investment, in: Indian Council of Arbitration Journal, Vol. XLII No. 3 & 4 (October-December 2007 & January-

where the arbitral award could be reviewed by the courts on different standards than in a procedure for the enforcement of a foreign arbitral award. But the decision of the Supreme Court of India has a dominant influence in later interpretations of the public policy exception in India and was also applied to foreign awards.[307]

The Indian Public Sector Undertaking Oil and Natural Gas Corporation Ltd. (ONGC) had made a tender for the supply of casing pipes. The offer of Saw Pipes Ltd (Saw Pipes) was accepted and it had to deliver the goods by a specified date. Saw Pipes' delivery was late because its Italian supplier of raw material was late due to general strikes of steel mill workers. ONGC accepted late delivery but demanded damages which it did withhold and deduct from the purchase price. The arbitral tribunal held that only some of the withheld amounts were justified and other amounts were wrongfully withheld; it rejected the demanded liquidated damages because ONGC had not suffered any damage. ONGC alleged that the award was in conflict with Sect. 74 of the Indian Contract Act which permits liquidated damages; therefore, ONGC alleged that the award would violate public policy and it applied for setting aside the award at the Bombay High Court but was dismissed as was the appeal to a bench of the Bombay High Court.[308]

The Supreme Court of India had to decide whether the court would have jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside an arbitral award which is patently illegal or contrary to substantive provisions of Indian law, the Arbitration and Conciliation Act, 1996, or the terms of the contract.[309]

On April 17, 2003, the Supreme Court held that an award which is "contrary to substantive provisions of law or the provisions of the

March 2008), at 13; Sidharth Sharma, Public Policy Under the Indian Arbitration Act, In Defence of the Indian Supreme Court's Judgment in ONGC v. Saw Pipes, Journal of International Arbitration 26(1) [2009], at 140.

[307] On October 12, 2011, in *Phulchand Exports Ltd. v. Ooo* Patriot, the Indian Supreme Court referred to its decision in Saw Pipes and confirmed that the expression "public policy of India" used in Section 48 (2) (b) has the same meaning as in Section 34 of the Indian Arbitration and Conciliation Act, 1996 (http://indiankanoon.org/doc/1049823, para. 13, at 5).

[308] *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, http://indiankanoon.org/doc/919241/, at 16 et seq.

[309] *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, http://indiankanoon.org/doc/919241/, at 1.