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Date 20 October 2014

To International Bar Association (IBA)
Subcommittee on Recognition and Enforcement of Arbitral Awards

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Re **The Public Policy Exception under Article V(2)(b) – Methodological Approaches**
Country Report Austria

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I. THE DEFINITION OF PUBLIC POLICY IN RECOGNITION AND ENFORCEMENT PROCEEDINGS BEFORE AUSTRIAN COURTS

The statutory basis for the recognition and enforcement of foreign awards in Austria is sec. 614 Austrian Code of Civil Procedure (*Zivilprozessordnung – "ZPO"*). Similarly to the corresponding provision in German law,[1] sec. 614 ZPO is merely the basis for the direct application of the New York Convention ("Convention") and thus has mainly a clarifying character.[2]

According to the Austrian Supreme Court (Oberster Gerichtshof – "OGH"), only a violation of a fundamental value of the Austrian legal system can be subject to a violation of Article V(2)(b)'s public policy.[3] Fundamental values are, in particular, the fundamental principles of the federal constitution, of criminal law, civil law, procedural law and even public law.[4] As the Austrian Supreme Court has pointed out numerous times, any violation of public policy has to be a violation of mandatory law, but not every mandatory rule of the Austrian legal system is necessarily part of Austrian public policy.[5] Several restrictions apply:

– First, the refusal of enforcement due to the public policy defense has to be a "rare exception".[6] It only applies where the recognition and enforcement of the award would constitute an "intolerable breach" of the fundamental values mentioned above.[7]

– Second, the Austrian Supreme Court emphasizes that any scrutiny of an award for any possible public policy violation must never lead to a review of the award's reasoning.[8] Austrian courts thus apply the well-recognized prohibition of a *révision au fond.*

– Third, the award for which recognition and enforcement is sought, must bear a sufficient connection to Austria.[9] The stronger the connection to Austria, the less acceptable are disconcerting results of the application of foreign law (and vice versa).

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[1] Sec. 1061(1) German Code of Civil Procedure ("The recognition and enforcement of foreign arbitration awards is governed by the Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards (published in Federal Law Gazette (Bundesgesetzblatt, BGBl.) 1961 II page 121). The stipulations of other treaties concerning the recognition and enforcement of arbitration awards shall remain unaffected hereby.").

[2] Sec. 614(1) Austrian Code of Civil Procedure (Zivilprozessordnung – "ZPO") ("The recognition and declaration of enforceability of foreign arbitral awards shall be made in accordance with the provisions of the Enforcement Act ('*Exekutionsordnung*'), unless otherwise provided for in international law or in legal instruments of the European Union. The form requirements for the arbitration agreement shall be deemed to be fulfilled, if the arbitration agreement complies both, with the form requirements under section 583 and under the law applicable to the arbitration agreement.").

[3] Judgment of the OGH of 24 August 2011, 3 Ob 65/11x; Judgment of the OGH of 12 October 2011, 3 Ob 186/11s; Judgment of the OGH of 28 August 2013, 6 Ob 138/13g; Judgment of the OGH of 26 January 2005, 3 Ob 221/04b.

[4] OGH, RS0110125 (dictate of justice – Rechtssatz ("RS")).

[5] Judgment of the OGH of 8 June 2000, 2 Ob 158/00z.

[6] Judgment of the OGH of 24 September 1998, 6 Ob 242/98a.

[7] Judgment of the OGH of 1 April 2008, 5 Ob 272/07x.

[8] Judgment of the OGH of 23 February 1983, 3 Ob 185/82; Judgment of the OGH of 26 January 2005, 7 Ob 314/04h.

[9] Judgment of the OGH of 13 September 2000, 4 Ob 199/00v.

> As a matter of international comity, domestic conceptions of justice should not be imposed if the situations bears no or little connection to Austria.[10]

From a dogmatic point of view, Austria courts apply a national concept of public policy, which is interpreted autonomously with reference to international and comparative authorities. In 1983, the Austrian Supreme Court rejected the notion of an "international public policy" with regard to the recognition and enforcement of foreign arbitral awards:

> "The attempt of the award-debtor to construct a difference between a sort of national and international *ordre public* with reference to foreign commentators has to fail. According to Article V(2)(b) of the Convention, the only decisive criterion is clearly the violation of the *ordre public* of the country where recognition and enforcement is sought."[11]

According to the Court, the Convention contains no reference to international public policy because public policy, by definition, differs from country to country. Accordingly it is above all a national concept.[12] However, as detailed below, Austrian courts regularly refer to international authorities and favor a uniform application of the Convention.[13]

Similar to courts in other jurisdictions, Austrian courts confirm that the issue of public policy can be raised by a court *ex officio*.[14] However, this does not alter the ultimate burden of proof, which is on the award-debtor who has to establish clearly and convincingly that public policy forbids recognition and enforcement of an award.[15]

II. THE METHODOLOGICAL APPROACH OF AUSTRIAN COURTS TOWARDS THE PUBLIC POLICY EXCEPTION: SUMMARY OF THE RELEVANT CASE LAW

In the following, relevant Austrian case law will be summarized (under B.) and analyzed (under C.), with a special focus on *how* the courts arrived at their decisions on public policy.

A. Case Law Regarding Procedural Public Policy

Under current case law, serious procedural unfairness or irregularities may constitute a violation of procedural public policy. These irregularities are sometimes also considered under Article V(1)(b) (denial of opportunity to present one's case) or Article V(1)(d) of the Convention (violations of parties' agreed arbitral procedures or law of arbitral seat), in addition to, or lieu of, Article V(2)(b). Nevertheless, the case law can provide valuable insights into the courts' methodology. In the following, the public policy categories "right to

[10] Judgment of the OGH of 12 October 2011, 3 Ob 186/11s.
[11] Judgment of the OGH of 11 May 1983, 3 Ob 30/83.
[12] D. Czernich, *Art V NYC* in Burgstaller et al. (eds.), *Internationales Zivilverfahrensrecht* (8th ed., 2008), para 71 ("The question whether there has been a violation of the public policy has to be examined exclusively according to the laws of the recognition state.").
[13] Judgment of the OGH of 26 January 2005, 3 Ob 221/04b, 12 ("exceptional rule that must be used sparingly, in order not to disturb the harmony of international decisions unnecessarily").
[14] Judgment the OGH of 25 April 2001, 3 Ob 84/01a, 2 ("This refusal ground [public policy] is to be exercised *ex officio.*").
[15] Judgment of the OGH of 13 April 2011, 3 Ob 154/10h; Judgment of the OGH of 22 July 2009, 3 Ob 144/09m.

a reasoned award" (a.), "independence and impartiality of the tribunal" (b.) and "opportunity to present one's case" (c.) will be examined.

1. Right to a Reasoned Award

Austrian Supreme Court, Judgment of 26 April 2006, 3 Ob 211/05h: The Austrian Supreme Court dismissed the appeal against a decision recognizing and enforcing an arbitral award (seat in France). The underlying dispute concerned a licensing agreement. Among other things, the court found that there was no violation of arbitral procedures (Article V(1)(d)) or a breach of the public policy exception of Article V(2)(b) of the Convention.

The Tribunal was comprised of three arbitrators. In preparing the award, the presiding arbitrator sent questionnaires to each party nominated arbitrator and later conducted individual phone calls with both of them. The Tribunal as a whole never discussed the decision in a phone conference nor in person. The award-debtor argued that this constituted a breach of Article V(1)(d) and Article V(2)(b) of the Convention.

The Court dealt with the potential breach of Article V(2)(b) only briefly. Without much analysis or reasoning it found no violation of public policy.[16] However, the Court stressed the exceptional character of the public policy ground, referring to several past decisions.[17]

Austrian Supreme Court, Judgment of 13 April 2011, 3 Ob 154/10h: The Austrian Supreme Court dismissed the appeal against a decision recognizing and enforcing an arbitral award (seat in Russia). Apart from the facts of the case that directly relate to possible defenses of Article V of the Convention, the Court did not report any factual information about the case, including the matter in dispute in the arbitration.

The Tribunal was comprised of three arbitrators. The arbitrators never met in person to deliberate. One of the arbitrators refused to sign the award but the award contained no explanation thereof.

The OGH analyzed whether the lack of signature by the third arbitrator constituted a violation of Article V(2)(b)'s public policy. The Court emphasized that only a violation of basic values of the Austrian legal system can constitute a violation of Article V(2)(b).[18] The Court referred to the Austrian Code of Civil Procedure according to which the signatures of the majority of arbitrators suffices as long as the reason for the missing signatures is stated.[19] The Court also conducted a comparative analysis, citing to the corresponding provision of the German Code of Civil Procedure,[20] of the UNCITRAL Model Law[21] and leading international commentators.[22] The Court found that the Austrian solution is well-accepted in other jurisdictions and seems necessary to protect against potentially obstructive arbitrators. On the basis of the foregoing, the OGH ultimately denied that the lack of signature continued a violation of Article V(2)(b).

[16] Judgment of the OGH of 26 April 2006, 3 Ob 211/05h, 5.
[17] RIS Justiz RS0110743, RS0002402, RS0002409.
[18] RIS Justiz RS0058323[T2], RS0002402, RS0002409.
[19] Sec. 606(1) Austrian ZPO.
[20] Sec. 1054(1) German ZPO.
[21] Sec. 31(1) UNCITRAL Model Law on International Commercial Arbitration.
[22] Lionnet & Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*, (3rd ed). 391.

With regard to the lack of deliberations, the Court focused its analysis on Article V(1)(d) of the Convention (and found that there was no violation). Concerning Article V(2)(b), the Court's reasoning is very brief, referring mainly to the exceptional character of the public policy defense. The Court found that the award-debtor did not prove such a violation.

2. Independence and Impartiality of the Tribunal

Austrian Supreme Court, Judgment of 17. June 2013, 2 Ob 112/12b (annulment proceedings): The Austrian Supreme Court dismissed the application for annulment of an arbitral award concerning the alleged bias of one of the arbitrators. The underlying dispute concerned the delivery of industrial machinery. The setting seems purely domestic, although the redacted nature of the decision does not allow a final determination of this point.[23] After the award was rendered, the award-debtor discovered that one of the arbitrators had been a member of the supervisory board of the other side's parent company.

In its extensive deliberations, the Austrian Supreme Court dealt with the violation of the parties' agreed arbitral procedures or law of arbitral seat as basis for annulment (sec. 611(2) No 4 ZPO) and the breach of procedural public policy (sec. 611(2) No 5 ZPO) as one. The core issue was whether the link was sufficient to consider the arbitrator biased. The Court analyzed the Austrian academic debate, but also German case law and commentary.[24]

Applying the facts of the case, the Court balanced the right to an impartial and independent tribunal against the principle of certainty and reliability of the law. In its considerations, the Court referred both to provisions of the Austrian ZPO as well as to the IBA Guidelines on Conflicts of Interest in International Arbitration and its traffic light-categories of bias. Ultimately, the Court found that there was no breach of the requirements for the composition of the tribunal nor of (procedural) public policy, and thus refused to annul the award.

3. Due Process

Austrian Supreme Court, Judgment of 24 April 2013, 9 Ob 27/12d (annulment proceedings): The Court upheld a domestic arbitral award concerning the obligation of the award-debtor and former CEO of the award-creditor to pay compensation after an extraordinary termination of his employment. The dispute was of a purely domestic nature. The award-debtor sought annulment of the award under almost all annulment grounds of sec. 611 Austrian ZPO.[25] However, the Court's reasoning is mainly focused on the notion of public policy.[26]

The decision contains a number of interesting general statements on public policy. First, the Court emphasized the prohibition of a *révision au fond* and the exceptional character of the

[23] Both parties were private limited companies (GmbH), but the parties' names are redacted in public documents. Thus, the parties could (theoretically) be Austrian, German, Swiss etc.
[24] Judgment of the OGH of 26 January 2005, 7 Ob 314/04h.
[25] Austrian ZPO sec. 611(1) No 1 (Non-existent or invalid arbitration agreement), No 2 (denial of opportunity to present case), No 3 (excess of authority of the tribunal), No 4 (unlawful composition of the tribunal), No 5 (violation of procedural public policy) and No 8 (violation of substantive public policy).
[26] Although the case circles around the notion of denial of opportunity to present one's case, the court never refers to this specific annulment ground directly (sec. 611(1) No 2, but builds its reasoning upon the notion of procedural public policy (sec. 611(1) No 5).

public policy defense which only comprises core values of the Austrian legal system. These core values include principles of Austrian constitutional law, Austrian private and procedural law, Austrian criminal law and public law.[27] In this context, the Court explained that not all Austrian mandatory provisions are core values in the sense of public policy.[28] Second, the Court stated that due to the nature of arbitral proceedings as a party-determined dispute settlement, only a severe breach of procedural public policy would suffice and that the parties had waived part of their right to due process of Art. 6 ECHR.[29] Based on that principles, the Court dismissed a violation of the right to be heard.[30] The Court also found that neither procedural nor substantive public policy had been violated.

Austrian Supreme Court, Judgment of 31. March 2005, 3 Ob 35/05a: The Austrian Supreme Court dismissed the appeal against a decision recognizing a foreign award, in an very brief decision, mainly focusing on Article V(1)(b) of the Convention.

The issue related to the Tribunal's alleged failure to admit certain evidence and to the alleged incompleteness of the Tribunal's fact findings. The Court discussed whether this amounted to a breach of the right to present one's case and thus constituted grounds for non-enforcement of the award pursuant to Art V(1)(b) of the Convention. The Court referred to "established case law of the Supreme Court" and held that these irregularities did not amount to a breach of the right to present one's case. The Court dealt with the public policy defense in Article V(2)(b) of the Convention only very succinctly and held that since the right to be heard had not been violated, a fortiori, the same facts did not constitute a violation of public policy.[31]

B. Case Law Regarding Substantive Public Policy

1. Interest

Austrian Supreme Court, Judgment of 26 January 2005, 3 Ob 221/04b: The Austrian Supreme Court granted an appeal against a decision recognizing and enforcing an arbitral award (seat in former Yugoslavia). The underlying dispute was about the shipment of mushrooms. The award-debtor resisted enforcement of the awards on grounds of public policy alleging, among other things, that the annual interest rate (107.35%) applied in the award was in violation of Austrian public policy.

Section 879(1) of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch – "ABGB") provides that contracts *contra bonos mores* are prohibited, which includes contracts with usury interest rates. The Court emphasized that a breach of the *contra bones mores* prohibition did not necessarily constitute a breach of the Austrian public policy. However, the Court calculated that the accrued interest in the first year would by far exceed the primary debt, and found that this violated fundamental principles of Austrian contract law. In reaching this decision, the Court referred to the requirement of an autonomous

[27] Specifically, the Court refers to RIS-Justiz RS0045124, RS0110743, RS0110126.
[28] With reference to RIS-Justiz RS0110125, RS0110743[T6].
[29] RIS-Justiz RS0117294, RS0117294[T1. T2].
[30] RIS-Justiz RS0045092; Judgment of the OGH of 20 August 2008, 9 Ob 53/08x.
[31] Judgment of the OGH of 31 March 2005, 3 Ob 35/05a, 2.

interpretation of public policy, and stressed that the public policy exception should be used restrictively.[32]

2. Mandatory EU law

Austrian Supreme Court, Judgment of 22 July 2009, 3 Ob 144/09m: The Austrian Supreme Court dismissed an appeal against a decision recognizing and enforcing an arbitral award (seat in Denmark). The underlying dispute was about a franchise agreement. Two of the three award-debtors , who were physical persons, challenged the award. Among other things, they argued that, as consumers, the benefited from Austrian law on consumer protection (which in turn is based on EU law). They contended that the arbitration agreement was not effective based on the consumer protection provisions, and the award thus violated the public policy exception of Article V(2)(b) of the Convention.

The Court held that, in principle, the violation of consumer protection laws may amount to a violation of Austrian public policy. The Court nevertheless dismissed the objections on the basis that the parties had participated without objection in the arbitral proceedings meant and thus waived these objections.

Austrian Supreme Court, Judgment of 23 February 1998, 3 Ob 115/95: The Court dismissed an appeal against decision recognizing and enforcing a Yugoslavian arbitral award. The underlying dispute was about a licensing agreement. The award-debtor challenged the award on grounds of public policy, submitting that the award violated Yugoslavian as well as Austrian public policy. The award-debtor alleged, among other things, that the licensing agreement distorted competition and thus violated EU law.

The Court held that a substantial violation of EU competition law could, in principle, lead to a violation of Austrian public policy. The Court noted that competition law forms part of the fundamental principles of the Common Market. According to the Court, due to the supremacy of European law, principles of EU public policy automatically form part of the Member States' public policy. However, in the case at hand, the Court found that EU public policy (and thus Austrian public policy), had not been violated.

III. THE METHODOLOGICAL APPROACH OF AUSTRIAN COURTS TOWARDS THE PUBLIC POLICY EXCEPTION: ANALYSIS OF CASE LAW

A. General Remarks

The examined case law surrounding the notion of public policy in recognition and enforcement proceedings shows all the methodological characteristics usually associated with Austrian (and German) case law.[33] Austrian decisions are rather academic in nature with frequent references to national and international commentators.[34] Courts also tend to disclose their approach quite openly as can be seen in the Supreme Court's decision of 17 June 2013,

[32] RIS Justiz RS0110743, RS0002409.
[33] The modern doctrine of methodology in Austria is pretty much identical with the German doctrine, *see* T. Henniger, *Europäisches Privatrecht und Methode* 100 (2009).
[34] T. Henninger, *Europäisches Privatrecht und Methode* 101 (2009).

where the court displays in great length its analysis of the Austrian academic debate surrounding the admissibility of annulment grounds.[35]

In Austrian case law, the public policy exception is often asserted, but rarely successful.[36] Of the eight cases summarized above, in only one case the award (granting effective annual interest beyond 100 per cent) was refused recognition and enforcement.[37] Contrary to German case law,[38] none of the Austrian decisions go into detail regarding the facts of the case (*Einzelfallentscheidung*). In fact, the only case analyzing the facts in detail is the one which ultimately denied recognition and enforcement. Overall, as detailed above, the Austrian courts apply the public policy defense under Article V(2)(b) in a restrictive fashion.[39]

B. Interpretation of "Public Policy"

As detailed above, the Austrian courts follow an autonomous interpretation of public policy under the Convention.[40] A different, namely Austrian, standard of interpretation should theoretically to the notion of "public policy" of sec. 611(1) No 5 and No 8 Austrian ZPO (annulment proceedings). However, the case law does not show any significant difference of interpretation of the two concepts by Austrian courts.

The Austrian Supreme Court predominantly uses a textual interpretation,[41] compared to other means of interpretation.[42] For instance, when rejecting the notion of *ordre public internationale*, the Supreme Court relies above all on the text of Article V(2)(b).[43] Other means of interpretation are found only rarely. For instance, some decisions use a teleological interpretation, looking at the rationale of the public policy defense.[44] In the sample of decisions studied in this report, no examples of systematic and historical interpretation could be found.

The Austrian Supreme Court quite frequently refers to international sources of law when interpreting the notion of public policy. These international sources include institutional

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[35] Judgment of the OGH of 17 June 2013, 2 Ob 112/12b, 14ff.
[36] D. Czernich, *Art V NYC* in Burgstaller et al. (eds.), *Internationales Zivilverfahrensrecht* para 74 f. (8th ed., 2008).
[37] Judgment of the OGH of 26 January 2005, 3 Ob 221/04b.
[38] R. Wunderer, *Der Deutsche "Ordre Public D'Arbitrage International" und Methoden seiner Konkretisierung*, 260.
[39] Judgment of the OGH of 26 April 2006, 3 Ob 211/05h.
[40] Judgment of the OGH of 26 January 2005.
[41] Judgment of the OGH of 11 Mai 1983, 3 Ob 30/83, 2; Judgment of the OGH of 13 April 2011, 3 Ob 154/10h, 8; Judgment of the OGH of 24 April 2013, 9 Ob 27/12d (annulment proceedings), 16.
[42] The modern Austrian doctrine of interpretation of legislation is more or less identical with the German doctrine. The four modes of interpretation are textual, systematic, subjective-historical and objective-teleological interpretation. The first three modes of interpretation were derived from Roman law by Savigny. The latter's origin is Jhering's doctrine of interest-based interpretation (*Interessenjurisprudenz*).
[43] Judgment of the OGH of 11 Mai 1983, 3 Ob 30/83, 2.
[44] Judgment of the OGH of 26 January 2005, 3 Ob 221/04b, 12 ("exceptional rule that must be used sparingly, in order not to disturb the harmony of international decisions unnecessarily."). This is rather surprising since the teleological interpretation is deemed to be the centerpiece of legislative interpretation under Austrian law. *See* T. Henninger, *Europäisches Privatrecht und Methode* 61ff, 100. (2009).

arbitration rules,[45] soft law like the IBA Guidelines on Conflicts of Interest in International Arbitration[46] or the UNCITRAL Model Law,[47] as well as case law and academic commentary from other countries.[48] And this despite the fact that, as explained above, the Austrian Supreme Court rejected the notion of an *ordre public international*.[49]

In practice, Article V(2)(b)'s public policy exception is invoked often, but rarely successful.[50] The cases descried above confirm this presumption. This makes sense given the Convention's overall objective and aim to facilitate the recognition and enforcement of foreign awards.

Conversely, it is very difficult to define what actually triggers the public policy exception. One interesting example emerges from the case law discussed above. According to the Austrian Supreme Court, the public policy of the European Union (*ordre public communitaire*) is automatically part of the national public policy of all EU Member States. Accordingly, the European Court of Justice has a heavy responsibility when exercising this definition power. In *Mostaza Claro* the ECJ elevated large parts of EU consumer law to European public policy.[51] This extensive interpretation of the *ordre public communitaire* was criticized by some commentators as it contradicts the objectives of the New York Convention.[52]

[45] Judgment of the OGH of 26 April 2006, 3 Ob 211/05h (ICC Rules of Arbitration); Judgment of the OGH of 13 April 2011, 3 Ob 154/10h (*see* above, para 19).
[46] Judgment of the OGH of 17 June 2013, 2 Ob 112/12b.
[47] Judgment of the OGH of 13 April 2011, 3 Ob 154/10h.
[48] Judgment of the OGH of 13 April 2011, 3 Ob 154/10h; Judgment of the OGH of 17 June 2013, 2 Ob 112/12b; Judgment of the OGH of 26 January 2005, 3 Ob 221/04b. Due to the proximity of the legal systems, German authorities have a special role in the Austrian legal doctrine. Despite the frequent references to German case law and commentators in the cases summarised above, none of the courts referred to other foreign jurisdictions than the German one.
[49] Judgment of the OGH of 11 May 1983, 3 Ob 30/83.
[50] G. Born, *International Commercial Arbitration*, 3647 (2nd ed., 2014).
[51] Judgment of the ECJ of 26 October 2006, C-269/05, I/10421 – *Elisa Maria Mostaza Claro v. Centro Movil Milenium Sl.*
[52] G. Born, *International Commercial Arbitration*, 3690 (2nd ed., 2014); P. Schlosser, IPRax 497 2008.