

Resolution 2/2002

INTERNATIONAL COMMERCIAL ARBITRATION

The 70th Conference of the International Law Association held in New Delhi, India, 2-6 April 2002:

HAVING CONSIDERED the Final Report on Public Policy as a Bar to the Enforcement of International Arbitral Awards by the Committee on International Commercial Arbitration;

RECOGNISING the importance of finality in arbitration proceedings but also the rôle of public policy in upholding fundamental principles, applicable mandatory laws and international obligations;

ADOPTS the Recommendations annexed to this Resolution;

COMMENDS the Recommendations to the attention of State courts, with a view to facilitating consistency and predictability in the interpretation and application of public policy.

Annex

INTERNATIONAL LAW ASSOCIATION RECOMMENDATIONS ON THE APPLICATION OF PUBLIC POLICY AS A GROUND FOR REFUSING RECOGNITION OR ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

1. General

1(a) The finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances.

1(b) Such exceptional circumstances may in particular be found to exist if recognition or enforcement of the international arbitral award would be against international public policy.

1(c) The expression "international public policy" is used in these Recommendations to designate the body of principles and rules recognised by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).

1(d) The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "*lois de police*" or "public policy rules" and (iii) the duty of the State to respect its obligations towards other States or international organisations.

1(e) An example of a substantive fundamental principle is prohibition of abuse of rights. An example of a procedural fundamental principle is the requirement that tribunals be impartial. An example of a public policy rule is anti-trust law. An example of an international obligation is a United Nations resolution imposing sanctions. Some rules, such as those prohibiting corruption, may fall into more than one category.

1(f) Whether the seat of the arbitration was located within the territory of the forum or abroad is not a consideration which should be taken into account by a court when assessing an award's conformity with international public policy.

1(g) If the court refuses recognition or enforcement of the arbitral award, it should not limit itself to a mere reference to Article V.2 (b) of the New York Convention 1958 or to its own statute or case law. Setting out in detail the method of its reasoning and the grounds for refusing recognition or enforcement will help to promote a more coherent practice and the development of a consensus on principles and rules which may be deemed to belong to international public policy.

1(h) If any part of the award which violates international public policy can be separated from any part which does not, that part which does not violate international public policy may be recognised or enforced.

2. Fundamental Principles

2(a) A court verifying an arbitral award's conformity with fundamental principles, whether procedural or substantive, should do so by reference to those principles considered fundamental within its own legal system rather than in the context of the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.

2(b) Nevertheless, in order to determine whether a principle forming part of its legal system must be considered sufficiently fundamental to justify a refusal to recognise or enforce an award, a court should take into account, on the one hand, the international nature of the case and its connection with the legal system of the forum, and, on the other hand, the existence or otherwise of a consensus within the international community as regards the principle under consideration (international conventions may evidence the existence of such a consensus). When said consensus exists, the term "transnational public policy" may be used to describe such norms.

2(c) Where a party could have relied on a fundamental principle before the tribunal but failed to do so, it should not be entitled to raise said fundamental principle as a ground for refusing recognition or enforcement of the award.

3. Public policy rules

3(a) An award's violation of a mere "mandatory rule" (*i.e.* a rule that is mandatory but does not form part of the State's international public policy so as to compel its application in the case under consideration) should not bar its recognition or enforcement, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.

3(b) A court should only refuse recognition or enforcement of an award giving effect to a solution prohibited by a rule of public policy forming part of its own legal system when: (i) the scope of the said rule is intended to encompass the situation under consideration; and (ii) recognition or enforcement of the award would manifestly disrupt the essential political, social or economic interests protected by the rule.

3(c) When the violation of a public policy rule of the forum alleged by a party cannot be established from a mere review of the award and could only become apparent upon a scrutiny of the facts of the case, the court should be allowed to undertake such reassessment of the facts.

3(d) When a public policy rule of the forum enacted after the rendering of the award prohibits the solution implemented by said award, a court should only refuse the award's

recognition or enforcement if it is plain that the legislator intended the said rule to have effect as regards awards rendered prior to its enactment.

4. International obligations

A court may refuse recognition or enforcement of an award where such recognition or enforcement would constitute a manifest infringement by the forum State of its obligations towards other States or international organisations.