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An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings

Johannes Koepp** & Agnieszka Ason**

This article examines how Polish courts have dealt with annulment applications based upon purported violations of substantive public policy and measures the Polish jurisprudence against the standards developed by the national courts in England, France, Switzerland and Germany. It identifies an anti-enforcement bias of the Polish courts which, in sharp contrast to their European counterparts, still favour an expansive interpretation of the public policy exception and have surprisingly little qualms in engaging in a thinly veiled merits review with unclear boundaries. The markedly interventionist approach of the Polish judiciary encourages annulment applications, which both ill-serves the arbitral process generally and undermines recent efforts to promote Poland as a desirable seat for international arbitration specifically.

A solution to these ills can only be found in a narrower interpretation of the substantive public policy exception, in harmony with the standards developed by the national courts in the major European arbitration centres.

1 INTRODUCTION

Most national arbitration statutes permit the annulment of international arbitral awards if they violate public policy. Article 34(2)(b)(ii) of the UNCITRAL Model Law states that an award may be annulled if the relevant court finds that 'the award is in conflict with the public policy of this State'.[1] The arbitration statutes of, inter alia, France,[2] Germany,[3]

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1 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

2 French Code of Civil Procedure, Art. 1520(5): 'An award may only be set aside where … recognition or enforcement of the award is contrary to international public policy.'

3 German Code of Civil Procedure, Art. 1059(2)(2)(b): 'An arbitral award may be set aside only if … the court finds that … the recognition or enforcement of the award leads to a result which is in conflict with public policy (ordre public).'

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Switzerland,[4] and England[5] contain provisions to the same effect. In jurisdictions where the applicable arbitration statutes do not contain an express public policy exception, national courts have nevertheless found that the annulment of an arbitral award may be justified as 'a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy'.[6] This 'more general doctrine' is expressed in similar public policy exceptions in legal instruments dealing with the recognition and enforcement of foreign judgments,[7] the recognition and enforcement of foreign arbitral awards,[8] or choice-of-law questions.[9]

Poland is no exception, falling within the category of jurisdictions with an express statutory provision to annul arbitral awards that violate the 'fundamental principles of the legal order of the Republic of Poland'.[10]

The public policy exception includes procedural matters (i.e. awards that are annulled on account of the procedure pursuant to which they were rendered) and substantive matters (i.e. awards that are annulled on account of their contents). The purpose of this article is to analyse how Polish courts have dealt with annulment applications based upon purported violations of substantive public policy, and how the Polish judiciary's interpretation of the public policy exception in annulment actions fares from a comparative law perspective.

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4 Swiss Private International Law Act, Art. 190(2)(e): 'The award may only be annulled … if the award is incompatible with public policy.'

5 English Arbitration Act 1996, s. 68(2)(g): 'A party to arbitral proceedings may … apply to the court challenging an award in the proceedings on the ground of serious irregularity [meaning, inter alia] the award or the way in which it was procured being contrary to public policy.'

6 *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (U.S. S.Ct. 1987).

7 *See* e.g. Regulation (EU) 1215/2012 of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Art. 45(1)(a): 'On application of any interested party, the recognition of a judgment shall be refused: … if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed' and Art. 46: 'On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist.'

8 *See* e.g. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Art. V(2)(b): '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 … [t]he recognition or enforcement of the award would be contrary to the public policy of that country.'

9 *See* e.g. Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980), Art. 16: 'The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum'; Regulation (EU) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), Art. 21: 'The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.'

10 Polish Code of Civil Procedure, Art. 1206(2)(2): 'An arbitral award shall also be set aside if the court finds that … the arbitral award is contrary to fundamental principles of the legal order of the Republic of Poland (public order clause).'

Substantive public policy varies from country to country and it is, of course, ultimately for the Polish judiciary to define the 'fundamental principles' of the Polish legal order and to determine whether an arbitral award made in Poland should be annulled on the basis of such principles. Yet when comparing the Polish jurisprudence on the public policy exception to that of other European jurisdictions, the picture that emerges is that of a markedly interventionist judiciary and, equally disturbingly, an uncertain notion of substantive public policy and an unpredictable standard of review. In Poland, the risk that the application of the public policy doctrine becomes 'potentially unpredictable and expansive'[11] seems to have materialized. In these authors' view, the current interpretation of the public policy exception by the Polish judiciary both ill-serves the international arbitral process and damages the reputation of Poland as a desirable seat for arbitration. A solution to these ills can only be found in a narrower interpretation of substantive public policy, in harmony with the standards developed by the national courts of the major European arbitration centres.

2 PUBLIC POLICY CONTROL OF INTERNATIONAL ARBITRAL AWARDS IN SOME MAJOR EUROPEAN JURISDICTIONS

All of the arbitration statutes considered in this study contain express provisions for international arbitral awards to be set aside on the ground of public policy. There are no uniform international rules defining public policy; rather, the national courts in each jurisdiction determine its meaning in their respective legal orders. Notwithstanding, there is a remarkable consistency of arbitration-related decisions across different jurisdictions. Specifically, most national courts, from both common law and civil law jurisdictions, favour a narrow concept of public policy, adopting a so-called 'pro-enforcement bias'.

2.1 France

Article 1520 of the French Code of Civil Procedure (NCPC) establishes an exhaustive list of the grounds for annulment. Pursuant to Article 1520(5), an international arbitral award may be set aside where its recognition or enforcement would be contrary to international public policy. A challenge may be brought before the Court of Appeal in the district where the award was rendered within one month of notification of the award. The Court of Appeal's decision may be subject to further appeal to the Court of Cassation. By way of a specific agreement, the parties may waive their right to bring an action to set aside the award.

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[11] Gary Born, *International Commercial Arbitration* 3320 (2d ed., Kluwer 2014).

In the context of annulment actions relating to domestic arbitrations, the French concept of public policy is very broad, encompassing all mandatory provisions of French law. In contrast, the annulment of awards in international cases is limited to those awards that are 'contrary to *international* public policy' (emphasis added). International public policy is a narrower, more limited concept, which, although not defined by statute, has been defined in jurisprudence as 'the entirety of the rules and matters of fundamental importance which the French legal system requires to be respected even in situations of an international character'.[12] Substantive international public policy includes matters such as (1) the principle of good faith;[13] (2) the rule of *fraus omnia corrumpit*;[14] (3) the principle that contractual obligations may not be of an indefinite duration;[15] and (4) the rule that contracts with an illegal purpose, such as corruption, are unenforceable.[16]

Where an annulment application involves public policy issues that have already been determined by the arbitral tribunal, French courts generally defer to the tribunal's original decision and are reluctant to consider such issues de novo. This reluctance applies to both the tribunal's factual findings and its resolution of legal questions. The object of the French courts' inquiry is to determine whether the award's dispositive provisions would require an action that is incompatible with public policy. To justify annulment, the infringement of public policy must be '*flagrant, effective et concrète*'.[17] By way of illustration, the French courts have held that where the award debtor argues for the first time in annulment proceedings that the arbitral award should be annulled for a violation of competition law, and where that purported violation had not been noted by the parties, the tribunal, or the arbitral institution during the arbitration, by definition that purported violation cannot be 'flagrant, effective et concrète', rendering any further inquiry into that matter superfluous.[18] While the narrow French concept of international public policy is sometimes criticized for its perceived lack of effectiveness, it is typically praised as being arbitration-friendly.[19]

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12 Paris Court of Appeal, judgment of 27 Oct. 1994, Rev. Arb. 1994, 709.
13 Paris Court of Appeal, judgment of 12 Jan. 1993, Rev. Arb. 1994, 685.
14 Paris Court of Appeal, judgment of 6 Jan. 1984, Rev. Arb. 1985, 279.
15 Paris Court of Appeal, judgment of 24 Nov. 1981, Rev. Arb. 1982, 224.
16 Paris Court of Appeal, judgment of 30 Sept. 1993, Rev. Arb. 1994, 359.
17 For an overview of the recent case law, *see* Denis Bensaude, in *Concise International Arbitration* 1183–1184, ad s. 1520 NCPC (Loukas A Mistelis ed., 2d ed., Kluwer 2015).
18 Paris Court of Appeal, judgment of 18 Nov. 2004, Rev. Arb. 2005, 529. In a later decision, the Paris Court of Appeal reaffirmed the standard of a '*flagrant, effective et concrète*' violation but also stated that when a party raises a public policy challenge, the court could carry out an assessment, in fact and in law, of the relevant elements contained in the award. *See* Paris Court of Appeal, judgment of 22 Oct. 2009, Rev. Arb. 2010, 124.
19 *See* in particular, Alexis Mourre & Luca G Radicati Di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, 23 J. Int'l Arb. 171 (2006).

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2.2 Germany

An arbitral award rendered by an arbitral tribunal seated in Germany may be set aside in annulment proceedings pursuant to the German Code of Civil Procedure (ZPO). The central provision is ZPO, section 1059, which establishes an exhaustive list of grounds for annulment. Pursuant to ZPO, section 1059(2)(2)(b) an arbitral award may be set aside if the court finds that its recognition or enforcement will lead to a result that conflicts with public policy. Subject to the parties agreeing otherwise, the challenge must be brought before the competent Higher Regional Court within three months of receiving the award. Decisions made in annulment proceedings can be appealed to the Federal Court of Justice.

Whereas in enforcement actions, a distinction is made between the *ordre public international* (applying to international cases) and the stricter *ordre public interne* (applying to domestic cases), no such distinction between domestic and international cases is made in annulment proceedings. In these proceedings, arbitral awards made in Germany, regardless of whether they are of a cross-border or purely domestic nature, are only subject to *ordre public interne* considerations.[20] Substantive public policy in Germany encompasses (1) mandatory rules serving essential public interests (e.g. competition law, anti-money laundering provisions, export control regulations); (2) fundamental principles (e.g. the principles of *pacta sunt servanda*, good faith, and proportionality); and (3) good morals (e.g. an award the enforcement of which would result in a criminal offence).[21]

Not every infringement of mandatory rules amounts to a public policy violation. It is only where the recognition or enforcement of the award would lead to a result which is 'obviously' incompatible with the fundamental principles of German law that the *ordre public* is concerned.[22] In an effort to promote arbitration, German courts interpret public policy quite narrowly and consistently reiterate the need to avoid abusing this ground as a vehicle to challenge an unfavourable award on its merits (prohibition of *révision au fond*).[23] As in France, the public policy exception is directed only towards ensuring that the enforcement of the award is not contrary to mandatory rules pertaining to public policy.[24]

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20 Federal Court of Justice, judgment of 29 Jan. 2009, III ZB 88/07.

21 Stefan M Kröll & Peter Kraft, in *Arbitration in Germany: The Model Law in Practice* paras 412–413, ad s. 1059 ZPO (Karl-Heinz Böckstiegel et al. eds, 2d ed., Kluwer 2015).

22 Federal Court of Justice, judgment of 30 Oct. 2008, III ZB 17/08; Federal Court of Justice, judgment of 28 Jan. 2014, III ZB 40/13; Federal Court of Justice, judgment of 16 Dec. 2015, I ZB 109/14.

23 Higher Regional Court of Hamburg, judgment of 14 May 1999, 1 Sch 2/99; Higher Regional Court of Jena, judgment of 8 Aug. 2007, Az 4 Sch 03/06.

24 Bavarian Supreme Court, Judgment of 20 Mar. 2003, Case No. 4 Z Sch 23/02; Federal Court of Justice, judgment of 28 Jan. 2014, III ZB 40/13; Higher Regional Court of Munich, judgment of 15 Jan. 2015, U 1110/14 Kart.

In determining whether substantive public policy is infringed, German courts are not bound by the facts determined by the tribunal or its legal reasoning.[25] This doctrine of unlimited review was developed by the Federal Court of Justice in the late 1950s and 1960s, primarily in its jurisprudence on competition law infringements.[26] Some of the more recent case law paints a more nuanced picture, with the scope of review ranging from a full re-examination of the public policy issue in a given case, potentially involving the admission of new evidence,[27] to a summary check of the award's compatibility with the mandatory rules forming part of public policy.[28] However, annulments on the grounds of substantive public policy are very rare and a violation of public policy can only be found in 'extremely exceptional cases'.[29]

2.3 Switzerland

The central provision governing the setting aside of international arbitral awards in Switzerland is Article 190 of the Federal Act on Private International Law (PILA), which provides that an award may be challenged if, inter alia, it is incompatible with public policy. The application to set aside must be filed at the Swiss Supreme Court within thirty days of notification of the award. The Swiss Supreme Court renders a final decision against which there is no further appeal. Foreign parties are free to agree to waive the right to initiate annulment proceedings.

Swiss public policy is defined as the essential values and fundamental legal principles which, from a Swiss perspective, form part of any legal order. Values and principles that are not recognized universally (e.g. mandatory provisions of competition law) are excluded from its scope.[30] Included are principles such as (1) the rule of *pacta sunt servanda*; (2) the prohibition of abuse of rights; (3) the principle of good faith; (4) the prohibition of expropriation without compensation; (5) the

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[25] *See* Hans-Joachim Musielak, in *ZPO Kommentar zur Zivilprozessordnung* para. 30, ad s. 1059 ZPO (Hans-Joachim Musielak & Wolfgang Voit eds, 14th ed., Beck 2017); Agnieszka Ason, *Schutz des Wettbewerbs im Wettbewerb der Schiedsorte: Zur Ordre-public-Kontrolle von Schiedssprüchen mit kartellrechtlichem Bezug*, Wirtschaft und Wettbewerb 1057 (2014).

[26] Federal Court of Justice, judgment of 23 Apr. 1959, KZR VII ZR 2/58; Federal Court of Justice, judgment of 25 Oct. 1966, KZR 7/65; Federal Court of Justice, judgment of 27 Feb. 1969, KZR 3/68.

[27] Higher Regional Court of Düsseldorf, judgment of 21 July 2004, VI–Sch (Kart) 1/02.

[28] Higher Regional Court of Jena, judgment of 8 Aug. 2007, Az 4 Sch 03/06.

[29] Federal Court of Justice, judgment of 28 Jan. 2014, III ZB 40/1; Federal Court of Justice, judgment of 8 May 2014, III ZR 371/12.

[30] Referring to the example of centrally planned economies, the Swiss Supreme Court held that provisions of competition law do not pertain to the '*valeurs essentielles*' and are therefore excluded from the scope of Swiss public policy. Accordingly, in Switzerland, the violation of competition law, 'even Swiss competition law', does not constitute a ground for the annulment. *See* Swiss Supreme Court, judgment of 8 Mar. 2006, 4P.278/2005.

principles of economic freedom; (6) the prohibition of discrimination; and (7) the prohibition of corruption.[31] While this list is not exhaustive, Swiss courts tend to define public policy extremely narrowly and the scope of protection of these principles is highly circumscribed.[32] For example, in cases dealing with challenges based on a purported violation of the principle of *pacta sunt servanda*, the Swiss Supreme Court has repeatedly held that the award could be only set aside when at least one of the following requirements is met:

(1) an arbitral tribunal makes a finding that a valid agreement between the parties exists but refuses to order its performance without any recognizable basis;
(2) an arbitral tribunal denies the existence of a contract but nevertheless orders the performance of contractual obligations or awards damages on the basis of this contract;
(3) an arbitral tribunal makes a finding that a condition precedent has been fulfilled, but does not order the performance of the contingent obligation; or
(4) an arbitral tribunal makes a finding that a condition precedent has not been fulfilled, but nevertheless orders the performance of the contingent obligation.[33]

In practice, annulments based on public policy are virtually unheard of in Switzerland.[34] One of the reasons for this is the limited standard of review. The Swiss Supreme Court shows great deference to arbitrators' decisions and it generally does not review their findings of fact or their application of the law. For example, in corruption cases, it is only where a tribunal made a finding of corruption but nonetheless upheld the tainted transaction that an award might be successfully challenged on substantive public policy grounds.[35]

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31 Manuel Arroyo, *Arbitration in Switzerland: The Practitioner's Guide* 242 (Manuel Arroyo ed., Kluwer 2013).

32 Elliott Geisinger & Alexandre Mazuranic, in *International Arbitration in Switzerland: A Handbook for Practitioners* 249 (Elliott Geisinger & Nathalie Voser eds, 2d ed., Kluwer 2013).

33 Each of these scenarios amounts to 'quite an unlikely situation', *see* Gabrielle Kaufmann–Kohler & Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* 499 (3d ed., OUP 2015); *see also* Geisinger & Mazuranic, *supra* n. 32, at 251 (with numerous references).

34 Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland – An Updated Statistical Analysis*, 28 ASA Bull. 86 (2010): '[F]or practical purposes, it does not matter how public policy is being defined because there will be no annulment.' While recent years saw the first two annulments of arbitral awards on account of public policy, it remains the case that 'the chances of a challenge based on this ground remain negligible'. *See* Felix Dasser & Piotr Wójtowicz, *Challenges of Swiss Arbitral Awards – Selected Statistical Data as of 2015*, 34 ASA Bull. 285 (2016).

35 Geisinger & Mazuranic, *supra* n. 32, at 253.

2.4 England

The challenge of arbitral awards in England is governed by sections 67–69 of the Arbitration Act 1996. An international arbitral award can be challenged before English courts on the grounds of substantive jurisdiction (section 67), serious irregularity (section 68), or by an appeal on a question of English law (section 69). All challenges must be brought within twenty-eight days of the date of the award. Although sections 67–69 expressly provide for the possibility to appeal against the High Court decision to the Court of Appeal, the ability to do so is restricted and it is difficult to succeed.[36]

Public policy as a ground for challenge is explicitly mentioned in section 68 (2)(g). Pursuant to this provision, 'serious irregularity' can be assumed if the award (or the way in which it was procured) is contrary to public policy. Public policy covers a broad range of matters, including the 'fundamental conceptions of morality and justice' of the forum,[37] but not fraud.[38] The notion of public policy in this subsection is the same as that justifying refusal of enforcement under section 103(3).[39] Thus, as with section 103(3), public policy in annulment actions is (1) confined to the public policy of England;[40] (2) to be approached with 'extreme caution' (to maintain the desired finality of arbitral awards);[41] and (3) at least pre-Brexit, likely capable of including fundamental principles of EU law.[42] It includes substantive public policy matters, such as export control regulations[43] or the prohibition of bribery.[44]

As to the applicable standard of review, English courts are reluctant to consider a public policy objection de novo where the arbitrators have already addressed the topic and concluded that there was no violation. For example, in *Westacre Investments v. Jugoimport*, which involved allegations of perjury and fraud, Colman, J. refused to review the tribunal's findings of fact, emphasizing the responsibility of the arbitral tribunal as the competent finder of fact:

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36 *See* e.g. *Integral Petroleum S.A. v. Melars Group Ltd.* [2016] EWCA Civ 108.

37 *See* in particular, *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.* [1999] HKCFA 40, para. 99, citing *Parsons & Whittemore Overseas Co. Inc. v. Société Général de Industrie du Papier (Rakta)*, 508 F. 2d 969, 974 (2d Cir. 1974).

38 Fraud is listed as a separate ground for annulment in s. 68(2)(g).

39 *Gater Assets Ltd. v. Nak Naftogaz Ukrainiy* [2009] EWHC 237 (Comm), para. 40: 'The public policy referred to in section 103 of the Act is of course the same as that referred to in section 68, and it is never wise to attempt an exhaustive definition of its content.'

40 *IPCO Nigeria Ltd. v. Nigerian National Petroleum Corp.* [2005] 2 Lloyds' Rep. 326.

41 *DST v. Rakoil* [1987] 2 Lloyd's Rep. 246, para. 254.

42 C–536/13, *Gazprom OAO v. Lietuvos Respublica*, Opinion of Advocate General Melchior Wathelet of 4 Dec. 2014, para. 173.

43 *Soleimany v. Soleimany* [1999] Q.B. 785.

44 *Westacre Investments Inc. v. Jugoimport–SDPR Holdings Co. Ltd.* [1999] Q.B. 740.

> if the issue of illegality by reason of corruption is referred to high calibre ICC arbitrators and duly determined by them, it is entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission.[45]

Similarly, the recent case of *National Iranian Oil Co. v. Crescent Petroleum Co.y* affirmed that English courts should not interfere with an arbitral tribunal's decision on a challenge based on fraud or a public policy violation 'without fresh evidence … or save in very exceptional circumstances'.[46] In practice, these authors are not aware of a single case in which an arbitral award was set aside by an English court on the basis of public policy under section 68(2)(g), and this notwithstanding the extremely high number of arbitral awards rendered in London each year.

3 PUBLIC POLICY CONTROL OF INTERNATIONAL ARBITRAL AWARDS IN POLAND

Setting aside proceedings in Poland are governed by Articles 1205–1211 of the Polish Code of Civil Procedure (KPC). These provisions have recently seen significant amendments in an effort to promote efficiency in the review process.[47] Specifically, as of 1 January 2016, challenges against arbitral awards made in Poland (1) no longer need to be brought before district or regional courts, but may be made directly at the relevant Court of Appeal; and (2) must now be brought within a shortened time limit of two months from service of the award. A final appeal against the Court of Appeal's decision can be filed with the Polish Supreme Court.

KPC, Article 1206(2)(2) allows for annulment on the basis of public policy, both procedural and substantive:

> An arbitral award shall also be set aside if the court finds that … the arbitral award is contrary to fundamental principles of the legal order of the Republic of Poland. (public order clause)

It is said that public policy should be interpreted narrowly and approached 'extremely carefully'.[48] As far as the Polish courts are concerned, no distinction is made between international and domestic public policy. The object of the public policy inquiry is to determine whether the 'effects determined by the wording of

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45 *Ibid.,* para. 773.

46 *National Iranian Oil Co. v. Crescent Petroleum Co.* [2016] EWHC 510 (Comm), para. 49.

47 *See* Tadeusz Ereciński & Karol Weitz, in *The Challenges and the Future of Commercial and Investment Arbitration. Liber Amicorum Professor Jerzy Rajski* 330–346 (Beata Gessel–Kalinowska vel Kalisz ed., Warsaw 2015).

48 Mateusz Pilich, *Klauzula porządku publicznego w postępowaniu o uznanie i wykonanie zagranicznego orzeczenia arbitrażowego*, KPP 2003, Nr 1, 168; Tadeusz Ereciński, in *Księga Pamiątkowa ku czci Profesora Jodłowskiego* 95 (Ewa Łętowska ed., Wrocław 1989).

the award are incompatible with a specific norm that is held to be a fundamental principle of public policy'.[49] A general judicial review of the correct application of the law by the tribunal is, at least in theory, impermissible.

The 'fundamental principles' of the Polish legal order pursuant to KPC, Article 1206(2)(2) are defined as the basic constitutional rules concerning the socio-economic system and the overriding principles governing specific fields of substantive and procedural law.[50] The fact that a rule is considered mandatory does not automatically elevate it to one of the 'fundamental principles'.[51] Examples of these fundamental principles include (1) the principle of *pacta sunt servanda*; (2) the tenet of liability for injury; (3) the compensatory function of damages; (4) freedom of economic activity and freedom of contract; and (5) equal treatment of creditors in insolvency proceedings.[52] Polish courts have not yet annulled arbitral awards for incompatibility with public law statutes or *lois de police* public policy rules (e.g. competition law, currency exchange law, or sanctions). Nor have Polish courts acknowledged EU law to be part of the 'fundamental principles' upon which an arbitral award may be annulled.

As to the relevant standard of review, Polish courts emphasize the exceptional character of the public policy exception.[53] They caution against using that exception to justify a review of the merits[54] and generally consider themselves to be bound by the facts established by the tribunal.[55] An exception is only made where 'the defects found were so fundamental that they would qualify as a violation of fundamental principles of civil procedure'.[56]

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49 Polish Supreme Court, judgment of 3 Sept. 2009, I CSK 53/09.

50 Polish Supreme Court, judgment of 19 Mar. 2015, IV CSK 443/14.

51 Karol Weitz, *Klauzula porządku publicznego jako podstawa uchylenia wyroku sądu polubownego na tle praktyki sądów*, Biuletyn Arbitrażowy 2010, Nr 1, 20.

52 Justyna Szpara, in *Arbitraż Handlowy. System Prawa Handlowego*, Band 8, 43–44 (Andrzej Szumański ed., 2d ed., Beck 2015).

53 Polish Supreme Court, judgment of 27 Apr. 1988, I CR 81/88.

54 Polish Supreme Court, judgment of 15 May 2014, II CSK 557/13 (erroneous interpretation of the substantive law does not justify setting aside an arbitral award, as long as fundamental principles of the Polish legal order are not violated). The task of the reviewing court is strictly limited to examining whether there is a ground for annulment. *See* Polish Supreme Court, judgment of 29 Oct. 2015, I CSK 922/14; Polish Supreme Court, judgment of 3 Sept. 2009, I CSK 53/09; Polish Supreme Court, judgment of 29 May 2000, I ACA 65/00.

55 Polish Supreme Court, judgment of 15 Mar. 2012, I CSK 286/11 (factual findings of the arbitral tribunal are generally binding in annulment proceedings); Polish Supreme Court, judgment of 7 Jan. 2009, II CSK 397/08 ('it is not the task of the state court to conduct a new merits assessment of the correctness of the claims pursued before the arbitral tribunal'); Polish Supreme Court, judgment of 9 July 2008 r, V CZ 42/08.

56 Warsaw Court of Appeal, judgment of 23 Aug. 2012, I ACa 46/11 and I ACa 578/12.

4 ANALYSIS

At first glance, the Polish concept of public policy appears unremarkable from a comparative law perspective. As with the judiciary of other jurisdictions, Polish courts (1) underline the exceptional character of public policy as a ground for annulment; (2) state that the concept must not be abused to carry out an impermissible and undesirable *révision au fond*; (3) are reluctant to interfere with the findings of fact by the arbitral tribunal; and (4) declare that their inquiry is focused on the effects of the award, rather than its content.

Upon closer consideration, however, a very different picture emerges. Substantively, the Polish concept of public policy focuses almost entirely on compliance with general principles, in particular the principle of *pacta sunt servanda*, rather than specific mandatory rules that serve essential public interests (e.g. competition law) or render compliance with the award illegal (e.g. corruption). Regrettably, the ensuing test by the Polish courts of compliance with these general principles often results in a thinly veiled merits review, with unclear boundaries, thereby rendering the entire annulment process very uncertain and unpredictable. Consider the following illustrations:

(1) In 2010, the Polish Supreme Court annulled an arbitral award for a purported violation of the principle of freedom of contract where the tribunal had found that a restructuring agreement was invalid for lack of consideration and failure to comply with formal requirements. The Supreme Court thus reviewed the award on the merits and reasoned that, in holding that the impugned contract was invalid, the arbitrators impermissibly 'reclassified the restructuring agreement without considering the mutual intent of the parties or the purpose of the agreement'.[57]

(2) In 2011, the Polish Supreme Court decided in a dispute between an attorney and his client that the interpretation of the underlying conditional fee arrangement by the tribunal constituted a violation of the constitutional right to property. The tribunal had reasoned that the stipulated condition in the fee arrangement had been satisfied as soon as the client's claims in bankruptcy proceedings were allowed. The court ultimately held that this reasoning manifestly violated both (a) fundamental principles of Polish contract law; and (b) the constitutional principle of the protection of property rights, and annulled the award on the grounds of public policy:

> By granting protection to one party to an agreement at the cost of the other, by awarding high consideration against the latter in favour of the other contracting

[57] Polish Supreme Court, judgment of 30 Sept. 2010, I CSK 342/10.

party despite a clear lack of grounds therefor, the arbitral tribunal violated the constitutional principle [of protection of property rights].[58]

Thus, what was considered by the Polish Supreme Court to be an erroneous interpretation of a contract by an arbitral tribunal was elevated to the level of a public policy violation.

(3) In 2014, the Polish Supreme Court rejected the challenge of an arbitral award in which the tribunal had reduced a contractual penalty based on a provision of the Polish Civil Code that allows for such reductions on the basis of disproportionality. It held that the reduction by the tribunal 'did not display the features of an arbitrary limitation of the legal consequences of providing for the contractual penalty, but fell within the bounds of statutory authority'.[59] While in this case, the Supreme Court upheld the tribunal's decision, its reasoning strongly suggests that the court would likely have annulled the award had it concluded that the reduction of the contractual penalty was beyond 'the bounds of statutory authority', which again amounted to a merits review of the award.

(4) In another 2014 decision, the Łódź Court of Appeal emphasized (a) the 'extraordinary' character of the judicial review of arbitral awards; (b) the prohibition of a merits review; and (c) the need to construe the public policy exception narrowly. In the same judgment, however, the court then immediately proceeded to review the factual findings of the tribunal. It held that the principles of party autonomy and enforceability of contracts had not been violated by the arbitrators because they had correctly found that the parties did not follow a contractually agreed procedure.[60] Although the court upheld the tribunal's decision, it seems that it would have annulled the award had it disagreed with the tribunal's factual finding that the parties acted in conformity with the contract.

These decisions produce a very unattractive result. While Polish courts may profess that the finality of arbitration awards should generally be respected, in reality they at times seem to have little qualms in engaging in an extensive review where they deem necessary. This anti-enforcement bias weakens the overall efficiency of arbitral proceedings and undermines the position of Poland as a desirable seat for international arbitration.[61] In *Eco Swiss*, the European Court of Justice

[58] Polish Supreme Court, judgment of 11 Mar. 2011, II CSK 385/10.
[59] Polish Supreme Court, judgment of 13 Feb. 2014, V CSK 45/13.
[60] Łódź Court of Appeal, judgment of 14 Nov. 2014, I ACa 1084/14.
[61] On Poland's aspirations to become the strongest arbitration centre in the region, *see* Monika Pacocha, *Model postępowania ze skargi o uchylenie wyroku sądu polubownego – uwagi de lege ferenda*, PPH 2014, No. 12, 24.

emphasized the importance of a limited review of arbitration awards, holding that:

> it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.[62]

This pro-enforcement bias is reflected in the jurisprudence of most developed European jurisdictions, but not in Poland.

Professor Wojciech Popiołek, a learned Polish scholar and an experienced arbitrator, identified the rationale for the Polish judiciary's interventionist approach in the following terms:

> The court sometimes abuses the public policy clause. But it does so because it sees what had happened in a case at hand. There is no other way. The court sees, speaking roughly, a 'hoax' in an arbitration award, and makes an effort to heal it. And the only means available is the public policy clause.[63]

Professor Popiołek further noted that the rulings of arbitral tribunals can be 'completely unworkable, or incorrect, or rendered under suspicious circumstances'. He concluded that a shift of focus in the ongoing debate is needed and, instead of criticizing judicial actions at the post-arbitration stage, 'we should rather focus on the quality of our awards'.[64]

Against this background, it is important to highlight the professional responsibility of arbitrators, not only vis-à-vis the disputing parties but also vis-à-vis the international business community more generally, which trusts the arbitration Bto administer an alternative system of justice. These authors are unconvinced, however, that the quality of arbitral awards rendered in Poland is necessarily inferior to, say, that of French, German, Swiss, or English awards. This is especially so in light of an ever more experienced Polish arbitration Bar and the increasing number of international cases involving Polish counsel and arbitrators. While arbitral awards that suffer from serious procedural irregularities or that violate specific mandatory rules serving essential public interests must not escape judicial scrutiny, Polish courts should resist the temptation to carry out a farther reaching *révision au fond*. Rather, they should revise their approach to the public policy exception to align with arbitration-friendly standards developed in other European jurisdictions.

For example, as noted above, while in Switzerland it is acknowledged that the principle of *pacta sunt servanda* is part of the *ordre public*, it

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62 Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int'l N.V.* [1999] ECR I-3055, para. 35.
63 Discussion at the 2009 Meeting of Arbitrators. *See* Weitz, *supra* n. 51, at 35.
64 *Ibid.*, at 36.

is equally undisputed that an intrusive judicial inquiry is impermissible, and a challenge based on a purported violation of the *pacta sunt servanda* principle can only occur in specifically defined and very narrow circumstances (which in practice have never materialized). Similarly, Polish courts should reject applications that attempt to procure a review of the tribunal's findings of fact and its interpretation of the relevant contractual provisions under the pretext of examining compliance with general principles.

Polish courts may also consider adopting a 'manifest' or 'obvious' criterion, as have done, for example, the courts in France and Germany, even in the absence of an express statutory basis for such qualitative thresholds.[65] Requiring that the alleged violation of the 'fundamental principles of the legal order of the Republic of Poland' be 'obvious' or 'manifest' would make it clear, to both judges and award debtors, that public policy will only be an exceptional ground for annulling arbitral awards. With regard to the recognition of foreign judgments, a Hague Conference Special Commission Report explains that:

> it is traditional to state that the requirement of a 'manifest' violation allows the judge addressed to carry out a superficial examination of the decision because the violation must be obvious or clear. That is to say, a refusal for this reason will be relatively infrequent.[66]

A similar message should be sent to losing parties in Poland and the judges hearing their complaints.

On the other hand, the proper control function of the public policy exception should be maintained in order to ensure that arbitral awards comply with legal norms adopted in the public interest (e.g. competition law and criminal law). Thus, while resort to extremely general principles such as *pacta sunt servanda* or freedom of contract should be truly exceptional, KPC, Article 1206(2)(2) should continue to play an important role in the field of *lois de police*. Rather than justifying their annulment

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[65] The Brussels I Regulation similarly expressly requires that the judgment be 'manifestly' contrary to public policy if recognition or enforcement were to be refused. Brussels I Regulation, Art. 34; Brussels Recast Regulation, Arts 45(1) and 46. *See also* Case C–7/98, *Dieter Krombach v. André Bamberski* [2000] ECR I–1935, para. 37: 'In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a *manifest* breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.' (Emphasis added). As far as Polish annulment proceedings are concerned, this approach was already adopted by the Katowice Court of Appeal in its judgment of 29 Dec. 2006, I ACa 1589/06.

[66] Preliminary Document No. 9, *Report on the Synthesis of the Work of the Special Commission of March 1998 on international jurisdiction and the effects of foreign judgments in civil and commercial matters*, drawn up by Catherine Kessedjian, July 1998, 32, n. 26.

> decisions by relying on general principles which are either loosely 'or not at all'[67] connected with the facts of a particular case, Polish courts and commentators should strive to identify specific mandatory rules serving essential public interests, the importance of which is such that they must be considered as expressions of the 'fundamental principles' of the Polish legal order, both positively (i.e. what are these rules?) and negatively (i.e. what rules are beyond the scope of public policy?).

5 CONCLUSION

This analysis has shown that the current state of the Polish courts' interpretation of the public policy exception in KPC, Article 1206(2)(2) is far from satisfactory. On the one hand, the interpretation is too broad because Polish judges have used the public policy exception to carry out what was, in truth, a review of the merits of the award. On the other hand, the Polish judiciary thus far has failed to identify the substantive norms where the public policy exception has an important role to play. Construing KPC, Article 1206(2)(2) in harmony with the standards developed in other developed jurisdictions would provide a solution to a number of ills. First, perceived uncertainty and inconsistency in the Polish judiciary's approach to the public policy exception encourages losing parties to seek annulment in order to avoid or at least delay enforcement of the award. Second, applying the exception harmoniously with the approaches developed by the courts of other countries would lead to greater consistency in annulment proceedings and ensure better predictability in the outcome of such challenges. Finally, a narrow interpretation of the public policy exception would further the finality of arbitral awards and render Poland more attractive as a seat for international arbitration.

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[67] Weitz, *supra* n. 51, at 28.