



The Hague Academy of
International Law's Advanced Course in
Hong Kong – 2nd Edition

Judgments Convention

Public policy as a limit to recognition and enforcement

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Outline

1. Interpretation of the public policy exception
2. Conditions for the exercise
3. Nationality of public policy
4. Intensity of court control
5. Incidental questions
6. Overlaps with other exceptions
7. Content

Interpretation of the public policy exception

2019 Hague Judgement Convention

<https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>

- Last update: 19-IX-2024
Number of Contracting Parties, incl. REIOs and States bound as a result of approval by an REIO: 30
- Entered into Force:
 - European Union
 - Ukraine
 - United Kingdom
 - Uruguay

Vienna Convention on the Law of Treaties 1969

Status	: Signatories : 45. Parties : 116
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https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII1&chapter=23&Temp=mtdsg3&clang=en#EndDec

- Customary Law

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the **ordinary meaning** to be given to the terms of the treaty in their **context** and in the light of its **object and purpose**.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent **practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the **preparatory work** of the treaty and the circumstances of its conclusion, in order to **confirm** the meaning resulting from the application of article 31, or to **determine** the meaning **when** the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Autonomous interpretation

- **Article 20 of the 2019 Convention:**

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

- Criteria for exercising public policy reservation are autonomous
- But: Content of public policy is national

Similar public policy exceptions

- 1958 Hague Convention on maintenance , art 2
- 1961 Hague Convention on protection of infants, art 16
- 1970 Hague Convention on divorce, art 10
- 1978 Hague Convention on marriage, art 5 and 14
- 1978 Hague Convention on trusts, art 18
- 1993 Hague Convention on adoption, art 24
- 1996 Hague Convention on child protection, art 22 and 23
- 2000 Hague Convention on protection of adults, art 21 and 22
- 2005 Hague Convention on Choice of Court, art 6 and 9
- 2007 Hague Convention on child support, art 22

Similar public policy exceptions

- 1958 New York Convention on recognition and enforcement of foreign arbitral awards
 - (arbitration)
- Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
 - (regional)
- UNCITRAL Model Law on International Commercial Arbitration
 - (soft law)

Conditions for the exercise
of the public policy exception

Outline

1. Discretionality
2. Exhaustive list
3. Manifest breach
4. Fundamental principles
5. Actual breach
6. Due process
7. Security or sovereignty

Article 7

Refusal of recognition and enforcement

1. Recognition or enforcement **may be refused if** –

(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –*

(i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;*

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin;

(e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties;* or

(f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.*

2. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Recognition or enforcement may be refused if...

La reconnaissance ou l'exécution peut être refusée si

- As opposed to 1958 New York Convention article V(2)(b)
 - may be refused “only” if
 - ne seront refusées que si
 - МОЖЕТ БЫТЬ ОТКАЗАНО ТОЛЬКО ЕСЛИ
 - Sólo se podrá denegar, si
 - 一 . 裁決唯有於受裁決援用之一造向聲請承認及執行地之 主管機關提具證據證明有下列情形之一時，始得依該造之請求， 拒予承認及執行：
 - ...

Exhaustive list

Article 4

General provisions

1. A judgment given by a court of a Contracting State (State of origin) **shall** be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement **may be refused only on the grounds specified in this Convention.**

...would be manifestly incompatible...

Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention) by Francisco Garcimartín and Geneviève Saumier:

259. The public policy defence is a final safeguard against recognition or enforcement of a foreign judgment that is considered to be “manifestly incompatible with the public policy of the requested State”. It is **widely accepted** that the concept of public policy must be “**interpreted strictly**” and recourse thereto “is to be had **only in exceptional cases**”.

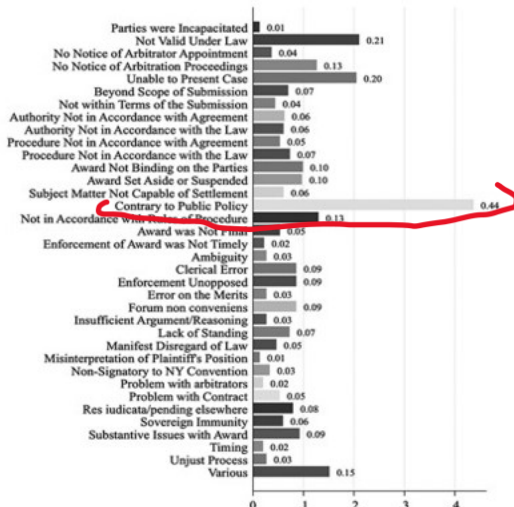
Recognition or enforcement of the judgment in question “would have to constitute a **manifest** breach of a rule of law regarded as **essential** in the legal order of the State in which enforcement is sought or of a right recognised as being **fundamental** within that legal order

Alford, Roger P., Baltag, Crina, Hall, Mathew E.K. and Sasson, Monique. «Empirical Research of National Courts Vacatur and Enforcement of international Commercial Arbitration Awards», *Journal of International Arbitration* (2022):299-330

4.4 GROUNDS FOR CHALLENGE IN ENFORCEMENT ACTIONS

The data set also allowed us to analyse the grounds for challenge raised by defendants in offensive enforcement actions. As identified in Figure 11, defendants raised the New York Convention grounds for challenge in an enforcement action with varying degrees of frequency. Of the different possible grounds for challenge, defendants most frequently raised public policy arguments (44%) not valid under the applicable

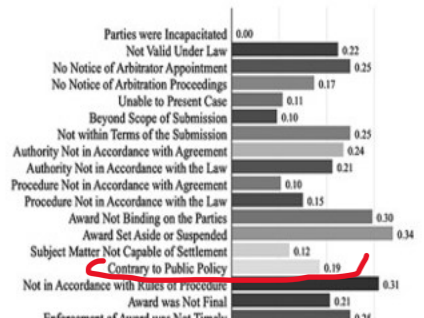
Figure 11 Proportion of Offensive Enforcement Actions in Which the Defendant Raised Each Type of Argument



Alford, Roger P., Baltag, Crina, Hall, Mathew E.K. and Sasson, Monique. «Empirical Research of National Courts Vacatur and Enforcement of international Commercial Arbitration Awards», *Journal of International Arbitration* (2022):299-330

The three most frequently raised arguments were rarely successful: arguments that the arbitration agreement is not valid under the applicable law succeeded 28.1% of the time; public policy arguments succeeded 19% of the time and the inability to present one's case succeeded 11% of the time.

Figure 12 Argument Success Rate by Type of Argument in Offensive Enforcement Actions



Violation of mandatory rule not sufficient

Explanatory Report:

263. The exceptional character of the public policy defence means that it is not sufficient for the party opposing recognition or enforcement to point to a mandatory rule of the law of the requested State that the foreign judgment fails to uphold. Indeed, this mandatory rule may be considered imperative for domestic cases but not for international situations. The public policy defence of sub-paragraph (c) should be triggered **only where such a mandatory rule reflects a fundamental value**, the violation of which would be **manifest** if enforcement of the foreign judgment was permitted. In some jurisdictions, this is referred to as “international public policy” as distinguished from “internal public policy”.

Manifestly = intolerable result

Note 184 of the Explanatory Report:

See the Explanatory Report by Professor Fausto Pocar to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (hereinafter, “Pocar Report to the 2007 **Lugano Convention**”), Official Journal of the European Union, 23.12.2009, No C 319/01.

Serious violation of underlying principles

- Competition law protects fundamental values, but not all infringements of competition law breach public policy
 - C-38/98 (EU)
 - C-681/13 (EU)
- Constitution and European Convention on Human Rights protect fundamental values, but not all infringements breach public policy
 - 4A_453/2021 (Swiss Federal Tribunal)

...the violation of which would be manifest if enforcement of the foreign judgment was permitted

- Actual violation following enforcement, not abstract conflict of a rule applied in the decision with values that are not affected in the specific case

Actual violation

- Punitive damages against public policy only if they are disproportionate
 - Cd'A Paris 17/18001 2020
 - *Travellers Casualty and Surety Company of Canada (UK) Limited* [2002] EWHC 1704
 - C-633/22 *Real Madrid v Le Monde*
- Future, hypothetical circumstances are irrelevant (luxurious honey moon in exchange of beneficial tax treatment is a sufficient red flag)
 - Cd'A Paris 18/18708, *Gabonese Republic v. Webcor ITP*

Actual violation and Recognition or enforcement

- Recognition is a condition for enforcement
- Some decisions can only be recognised (declaratory judgements)
- Recognition may have effects even though enforcement is restricted

Recognition or enforcement

Explanatory Report, para 113:

Recognition usually implies that the court addressed **gives effect to the determination of the legal rights and obligations** made by the court of origin. For example, if the court of origin held that a plaintiff had (or did not have) a given right, the court of the requested State would accept that this is the case, i.e., it would treat that right as existing (or not existing). Or, if the court of origin gives a declaratory judgment on the existence of a legal relationship between the parties, the court of the requested State accepts that judgment as determining the issue. Such determination of legal rights is **binding on the parties in subsequent litigation**. Thus, if the foreign judgment is recognised, it could be invoked, for example, to prevent proceedings between the same parties with the same subject matter (**res judicata or issue preclusion defence**) in the requested State and the judgment creditor would not be burdened with arguing the same claim twice.

Recognition or *enforcement*

Explanatory Report, para 116:

Enforcement means the application of legal procedures by the courts (or any other competent authority) of the requested State to ensure that the **judgment debtor obeys** the judgment given by the court of origin. Enforcement is usually needed when the foreign judgment rules that the defendant must **pay a sum of money** (monetary judgment) or must **do or refrain from doing** something (injunctive relief), and implies the exercise of the State's **coercive power** to ensure compliance. Thus, if the court of origin rules that the defendant must pay the plaintiff USD 10,000, the court addressed would enable the judgment creditor to obtain the money owed by the judgment debtor through an enforcement procedure and measures of execution. Because this would be legally indefensible if the defendant did not owe USD 10,000 to the plaintiff, a decision to enforce the judgment typically presupposes recognition of the judgment. Enforcement may also be needed in cases of injunctive relief through the court of the requested State requiring the defendant to meet the obligations to do or refrain from doing something deriving from the judgment.

Recognition *or* enforcement

- Decision determining that A is not in breach of contract, but it nevertheless must pay a certain amount to B because it was not entitled to withhold part of the price
- Payment to B violates sanctions
- Enforcement of order to pay is an actual violation of public policy
- Is recognition that there was no breach of contract an actual violation of public policy?

*Recognition, but not enforcement?
Alternative approach*

**Article 9
Severability**

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

...including situations where the **specific**
proceedings...

- Not the legal system in general or the abstract possibility that due process be violated, see above

...were incompatible with fundamental principles of procedural fairness of that State...

Explanatory Report:

261. The reference in sub-paragraph (c) overlaps with the procedural safeguards and fundamental principles regarding notification in sub-paragraph (a), and with the concerns regarding procedural fairness in the face of fraud in sub-paragraph (b). This overlap should ensure that adequate procedural protection is provided to parties facing recognition and enforcement proceedings regardless of the particular way in which those issues are dealt with in the requested State

EXPLANATORY NOTE PROVIDING BACKGROUND ON THE PROPOSED DRAFT TEXT AND IDENTIFYING OUTSTANDING ISSUES

Preliminary document No 2 - April 2016

166. The Working Group discussed whether the second part of the provision (addressing the judgment's incompatibility with fundamental principles of procedural fairness of the requested State) should be omitted, as it lays down a very general standard that may be subject to different understandings. However, this part of the provision was carefully drafted to accommodate **those States that have a relatively narrow concept of public policy** (and treat procedural fairness and natural justice as distinct from public policy) and want to make sure that there is some language about procedural fairness. An additional reason for the emphasis on procedural fairness is to acknowledge that in some States fundamental principles of procedural fairness (also known as due process of law, natural justice or the right to a fair trial) are **constitutionally mandated**.

...and situations involving infringements of security or sovereignty of that State

Explanatory Report:

265. Despite this addition, the scope of this provision is no different from the scope of the equivalent provision in the HCCH 2005 Choice of Court Convention. The addition **simply reflects the greater potential** for issues involving infringements of security or sovereignty to arise in the context of this Convention than under the HCCH 2005 Choice of Court Convention.

- 2005 Convention assumes choice by the parties

Nationality of the public policy exception

...of the requested State

Note 189 of the Explanatory Report:

A proposal to include the term “international public policy” in the text of Art. 7(1)(c) was discussed during the negotiations of the Convention. See Work. Doc. No 136 of February 2017, “Proposal of the delegation of Uruguay” and the related discussion in the Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 7, paras 91-105. During the discussions, while the proposal received some support, some delegations noted that they were unfamiliar with the term “international public policy” and expressed concerns in respect of its inclusion in the text of the Convention.

«*International*» public policy?

- Public policy = the enforcement state's fundamental principles («of the requested state»)
- In some systems:
 - «public policy» = all mandatory rules of the state («positive ordre public»)
 - «international public policy» = the state's fundamental principles (that must be applied also in international setting)
 - «*French* international public policy»
- In some scholarly works:
 - «truly international public policy»

The enforcing state's public policy

Explanatory Report:

263. The exceptional character of the public policy defence means that it is not sufficient for the party opposing recognition or enforcement to point to a mandatory rule of the law of the requested State that the foreign judgment fails to uphold. Indeed, this mandatory rule may be considered imperative for domestic cases but not for international situations. The public policy defence of sub-paragraph (c) should be **triggered only where such a mandatory rule reflects a fundamental value**, the violation of which would be manifest if enforcement of the foreign judgment was permitted. **In some jurisdictions, this is referred to as “international public policy” as distinguished from “internal public policy”.**

Public policy



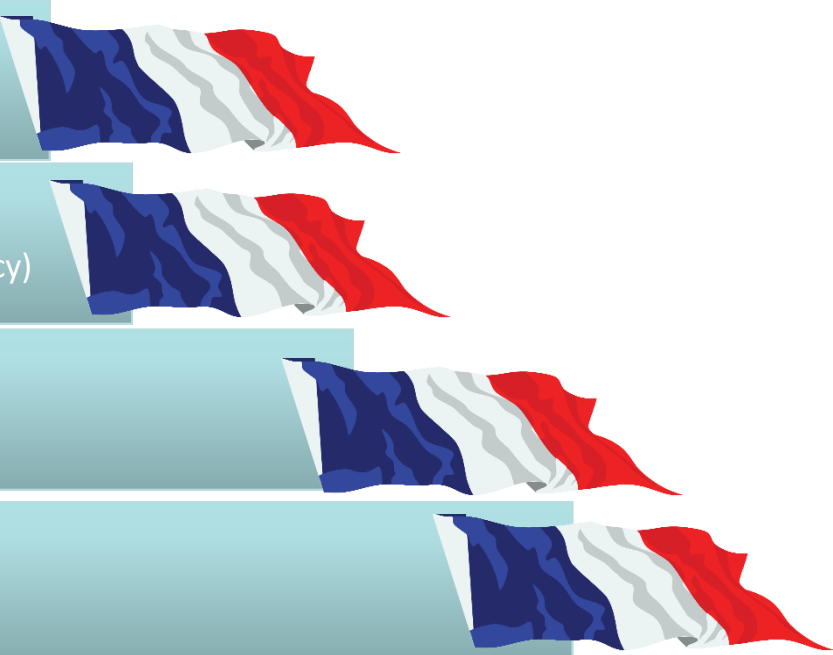
Truly international public policy

Public policy
(negative/international)

Overriding mandatory rules
(positive/domestic public policy)

Mandatory rules

Non mandatory rules



Intensity of court control

Article 4

General provisions

2. There shall be **no review of the merits** of the judgment in the requested State. [...]

Parallels with intensity of court control under NYC

Minimalist theory

- Court owes deference to arbitral tribunal's evaluation
 - **Cour d'appel Paris**, 1e ch., 18.11.2004, Rev arb. 2005 751 (*Thalès Air Defence v. Euromissile*)
 - Tribunal federal, 4A_532/2014, 4A_534/2014, 29.1.2015 (only as regards the fact finding)

Maximalist theory

- Court evaluates issue ex novo
 - Gerechtshof Haag, 24.3.2005, NJF 2005/239, TvA 2006/24 (*Marketing Displays International Inc. v. VR Van Raalte Reclame B.V*)
 - Bundesgerichtshof, 3.3.2016, I ZB 2/1 (Achmea referral)
 - Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. and others, [1999] 3 All ER 864 , 885
 - C-126/97 (*Eco Swiss*),
 - C-281/16 (*Achmea*) (obiter)

For corruption and economic crime:

- **Cd'A Paris**, 4.11.2014, nr. 13/10256, Cd'A Paris, 25.11.2014, nr. 13/1333, Cd'A Paris, 7.4.2015, nr. 14/00480, Cd'A Paris, 14.4.2015, nr. 14/07043, Cd'A Paris, 21.2.2017, nr. 15/01650, Cd'A, 8.11.2016, nr. 13/12002, Cd'A, 16.1.2018, nr. 15/21703, Cd'A Paris 17.11.2020 nr 18/02568, Cd'A Paris 27.10.2020 nr 19/04177, Cd'A Paris 25.5.2021 nr 18/27648 Cd'A Paris 25.5.2021 nr 18/18708
- **Cass. Civ. 1ère**, 23.3.2022, No. 17-17.981 (*Belokon v. Kyrgyzstan*), Cass. 7 September 2022, No 20-22.118

Diverging views on the object of the evaluation

Minimalist theory

- As the tribunal already has determined the issue,
- And only manifest breaches are relevant,
- The enforcing court may not review the tribunal's assessment

Maximalist theory

- Object of the assessment is not the tribunal's determination of the issue,
- But the effects of enforcing the decision.
- Even though issue already determined by the tribunal, the parameters of the evaluation are different

Compare: Court control on jurisdiction under NYC

- Pre-award:
 - Art 16 Model Law: Arbitral tribunal decides on its own competence (Kompetenz-Kompetenz)
 - Negative effect of Kompetenz-Kompetenz (France): courts are not competent
- Post-award:
 - Art 34(2)(a)(i), 36(1(a)(i) Model Law, art V(1)(a) New York Convention:
 - The courts decide independently on incapacity or invalidity of the arbitration agreement
 - France: The courts decide independently

Maximalist approach and no review of the merits

- Basis for the independent evaluation of public policy compatibility:
 - Deference to tribunal's assessment of fact
 - 4_A/136/2016, 4A_74/2019 (Swiss Federal Tribunal)
 - Deference unless serious allegations
 - 2020 EWHC 1584 (Comm)
 - Assessment of the decisions' record and reasoning
 - 93 Fed.Appx.1 (2004) (US)
 - Full review of fact and law
 - LF-2018-123987 (Norway)

Incidental questions

Incidental questions

Article 4 (2)

There shall be no review of the merits of the judgment in the requested State. There may only be **such consideration as is necessary** for the application of this Convention.

Case

- Dispute on licence agreement:
 - Breach of obligations to coordinate prices
 - Request of damages
- Defence: obligation is void as it violates EU competition law
- Contract chooses the law and courts of Ruritania
- Ruritarian court follows parties' choice
- Decision orders reimbursement of damages
- Damages are a substitute of contract performance
- Enforcing the decision is equivalent to ordering breach of competition law

Case

- Dispute on shareholders' agreement
 - One shareholder breaches obligation to make its board member vote for a capital increase with contribution in kind
 - Request for damages for breach of shareholders agreement
- Defence: obligation is void as it violates company law of the seat
- Contract chooses the law and courts of Ruritania
- Ruritarian court follows parties' choice
- Decision orders reimbursement of damages
- Damages are a substitute of contract performance
- Enforcing the decision is equivalent to ordering breach of company law

Explanatory Report

122. Consideration strictly limited. Paragraph 2 **recognises** that, while the primary principle is that no review of the merits of the foreign judgment is permitted, applying the Convention may require consideration of legal or factual issues connected to the foreign proceedings or the foreign judgment. This paragraph is worded to strictly constrain such consideration, ensuring respect of the primary obligation not to review the merits of the foreign judgment.

Explanatory Report

123. Under Article 5, for example, the court addressed must determine that the judgment is eligible for recognition and enforcement on the basis of the connection between the action giving rise to the judgment and the State of origin. That determination **may require identifying the legal or factual bases** of connection to the State of origin. For example, the application of Article 5(1)(a) may require that the court addressed consider facts relevant for **determining where a legal person had its habitual residence** (Art. 3(2)) at the time that person became a party to the proceedings in the State of origin. **Regardless of what the court of origin may have stated** in relation to that issue, if it was relevant at all, **the court in the requested State makes its own determination for the purpose of applying the Convention**. While this should not be understood as a review of the merits, Article 4(2) nevertheless implicitly cautions that such an exercise **may give the appearance of impugning the foreign judgment and should therefore be limited to what is strictly necessary for the proper application of the Convention**. The same holds for consideration of other paragraphs of Article 5 and other provisions of Chapter II, **in particular Article 7 (“refusal of recognition and enforcement”)** or Article 10 (“damages”) as well as provisions in Chapter I, in particular Article 1 (“civil or commercial”) and Article 2 (“exclusions from scope”).

Article 2

Exclusions from scope

2. A judgment is **not excluded from the scope** of this Convention where a matter to which this Convention does not apply arose merely as a **preliminary question** in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of **defence** does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

Explanatory Report

75. Preliminary questions are legal issues that must be **addressed before the plaintiff's** claim can be decided but which are **not the main object** or principal issue of the proceedings.⁷⁷ This paragraph recognises that legal issues within a judgment may be separate from one another but considered sequentially, with a decision on the principal issue predicated on a decision on another, preliminary question. For example, in an action for damages for breach of a sales contract (main object), the court might first have to decide on the capacity of a party to enter into such a contract (preliminary question), or in an action seeking the payment of corporate dividends (as the main object), the court might have to rule on the decision of the shareholders' meeting approving such payment (as a preliminary question). Preliminary questions are usually, but not always, introduced by the defendant by way of **defence**. Of course, whether the final judgment can be understood to depend on the answer to the preliminary question can arise irrespective of whether the decision on such a preliminary question is formally part of the final judgment.

⁷⁷ "Object" is intended to mean the matter with which the proceedings are directly concerned, and which is mainly determined by the plaintiff's claim. See Hartley/Dogauchi Report, paras 77 and 194. The terms "incidental questions" and "principal issue" are used in the Nygh/Pocar Report, para. 177.

Explanatory Report

76. Paragraph 2 provides that a judgment is not excluded from the scope of the Convention where one of the excluded matters is involved **merely as a preliminary question**, and in particular where it arises by way of defence. Thus, the application of the Convention is determined by the object of the proceedings. If the object of the proceedings in the court of origin falls within the scope of the Convention, as is the case in the examples mentioned above, this instrument applies. This provision should be read **in conjunction with Article 8**, which deals with the consequences of a ruling on a preliminary question, including whether a judgment that rules on such matters may circulate under the Convention (see *infra*, paras 277-287).

77. Article 2(2) of the Convention refers to any matter “to which this Convention does not apply”, which captures matters excluded under Article 1(1), Article 2(1) or Article 18. Thus, for example, a judgment on contractual damages based on a finding that the defendant had the necessary capacity to contract – that finding being a matter that would otherwise be excluded under Article 2(1)(a) – **is not excluded from the scope of the Convention, although its recognition or enforcement may be refused under Article 8** (see *infra*, paras 285-286).

Limitation

Article 8

Preliminary questions

1. A **ruling** on a preliminary question **shall not be** recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.
2. Recognition or enforcement of a judgment **may be refused if**, and to the extent that, the judgment was **based on a ruling** on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

Explanatory Report

278. Under **Article 2(2)**, judgments that include preliminary rulings on excluded matters **are not, for that reason alone, excluded** from the scope of the Convention (see supra, paras 75-77). Article 8 deals with a separate issue, which is the recognition and enforcement of judgments **that rule** on preliminary questions dealing with excluded matters. [...]

279. **Structure of Article 8.** This provision contains two rules concerning rulings on preliminary questions. **Paragraph 1** excludes **rulings** on certain preliminary questions from recognition or enforcement under the Convention. **Paragraph 2** allows the court **addressed to refuse** to recognise or enforce judgments **that are based on rulings** on certain preliminary questions.

Explanatory Report

285. Paragraph 2 [...] **adds an additional ground for non-recognition to those contained in Article 7.** [...] Thus, for example, under paragraph 2, the court of the requested State may refuse recognition of a judgment on the nullity of a contract (main object), or a judgment awarding damages for breach of contract (main object), if and to the extent that, **it was based on a ruling** on the lack of capacity of a natural person to enter into such a contract (preliminary question).

- Not only if the court rendered a ruling
- Also if the court simply assumed the lack of capacity
 - Decision falls within the scope of the Convention, but may be refused enforcement
 - Not only addition to Article 7,
 - Also restriction of Article 4(2)

Overlaps with other exceptions

Overlaps

Explanatory Report (in respect of procedural fairness):

262. other defences under paragraph 1 overlap with the public policy defence, which should be interpreted accordingly [restrictively], **extending beyond the specifics** of the particular defences only where doing otherwise would be a “**manifest**” contradiction with **essential policies** of the requested State.

EXPLANATORY NOTE PROVIDING BACKGROUND ON THE PROPOSED DRAFT TEXT AND IDENTIFYING OUTSTANDING ISSUES

Preliminary document No 2 - April 2016

165. Article 7(1)(b) sets out the ground of refusal that the judgment was obtained by **fraud** in connection with a **matter of procedure**. Fraud is deliberate dishonesty or deliberate wrongdoing. Examples would be where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the requesting party (typically the plaintiff) deliberately gives the party to be notified (typically the defendant) incorrect information as to the time and place of the hearing; or where either party seeks to corrupt a judge, juror or witness, or deliberately conceals key evidence. While in some legal systems procedural fraud may be considered as **falling in the scope of the public policy** provision, this is not true for all legal systems: hence, it was deemed appropriate to include this provision (as was the case for the 2005 Choice of Court Convention, under Art. 9) **as a form of "clarification"**.

EXPLANATORY NOTE PROVIDING BACKGROUND ON THE PROPOSED DRAFT TEXT AND IDENTIFYING OUTSTANDING ISSUES

Preliminary document No 2 - April 2016

167. As indicated in the Hartley / Dogauchi Report with respect to the mirroring provisions in the 2005 Choice of Court Convention, there is considerable overlap among the exceptions laid down at sub-paragraphs (a) to (c) of Article 7(1) of the Proposed Draft Text since they all relate, partly or wholly, to **procedural fairness**. Thus, for example, if, owing to the plaintiff's fraud, the writ was not served on the defendant and he or she was unaware of the proceedings, the exceptions set out in sub-paragraphs (a) to (c) would all be potentially applicable.

Punitive damages

Article 10

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Overlap

Explanatory Report:

265. The Convention includes damages awards within its scope but allows a requested State to refuse to enforce a judgment to the extent that it involves an award of punitive or exemplary damages (Art. 10). In some States, where punitive or exemplary damages are not typically allowed, refusals to enforce such awards have been assessed under the public policy defence. **However, because Article 10 addresses punitive or exemplary damages, the public policy defence in subparagraph (c) should not be used to address challenges to the recognition or enforcement of judgments on that basis.** This further narrows the scope of the public policy defence under the Convention.

- Not the same standard as para 262 (procedural fairness):

*”can go beyond the specifics when doing otherwise would be a “**manifest**” contradiction with **essential policies** of the requested State”.*

Overlap with public international law and constitutional principles

- Public policy is the sole ground to refuse enforcement and absorbs
 - Public international law:
 - C-633/22 Real Madrid Club de Fútbol v. *Société éditrice Le Monde* (freedom of expression).
 - Constitutional law
 - 4A-453/2021(Mortgage does not affect recognition of property)
 - Pacta sunt servanda only infringed if the decision refuses to apply a clause

Content of the public policy exception

Public policy: Autonomous frame and domestic content

- Not an appeal, but safeguarding the system's most important values
- Includes:
 - Domestic fundamental principles
 - Regional (EU) fundamental principles
 - Human Rights
 - ...
- Does not include:
 - Domestic mandatory rules
 - Domestic overriding mandatory rules
- Can include
 - The underlying principles of such rules
- Only if they are seriously infringed
 - Not any violation of competition law is infringement of ordre public
 - Not an appeal, but safeguarding the system's most important values

Explanatory Report

266. Although the availability of the public policy defence is widely accepted, it is **rarely successful** as a means of denying recognition or enforcement of a foreign judgment, particularly in civil or commercial matters. Examples where it has succeeded include: where the foreign court enforced a contract to commit an illegal act (**smuggling**), where the foreign judgment impinged on constitutionally guaranteed fundamental rights (**freedom of speech**), and where the foreign judgment enforced a **gambling debt**.

Public policy evolves

- Derivatives:
 - From unacceptable gambling debt to financial swaps
- Bribes:
 - From tax deductible business expenses to unacceptable corruption

When can public policy be infringed?

- Integrity of the process
- Protection of good morals
- Protection of public interests
- Protection of third parties
- Protection of weaker parties
- Integrity of the contract
- ...

Both procedural and substantive

Explanatory note:

166. The Working Group discussed whether the second part of the provision (addressing the judgment's incompatibility with fundamental principles of procedural fairness of the requested State) should be omitted, as it lays down a very general standard that may be subject to different understandings. However, this part of the provision was carefully drafted to accommodate **those States that** have a relatively narrow concept of public policy (and **treat procedural fairness and natural justice as distinct from public policy**) and want to make sure that there is some language about procedural fairness. An additional reason for the emphasis on procedural fairness is to acknowledge that in some States fundamental principles of procedural fairness (also known as due process of law, natural justice or the right to a fair trial) are constitutionally mandated.

Procedural

- Right to be heard
 - Not financial impossibility to participate: *Grow Biz v D.L.T. Holdings Inc.* 2001 PESCTD 27
 - Not exclusion from proceedings to ensure effectiveness: C-394/07, Cass. Civ. 9.5.13, 11021
 - Not strict formalism about deadlines: 4A_416/2020
- Independence and impartiality
- Corruption, fraud in the proceedings
 - Three-tiered test to admit new evidence (could not have been obtained, important influence, apparently credible): FACV No 6 of 2008 (Hong Kong)
 - Others: too important to preclude

Substantive – decision's dispositive

- Proportionality
 - Punitive damages
- Corruption
- Sanctions
 - Public policy is not the same as national policy (hostility between countries): 508 F.2nd 969 (2 Circ. 1974)
- Illegal contracts
 - Violation of foreign law: only if unacceptable under lex fori. Violation of foreign competence rules on fiscal exemption not unacceptable: granting exemptions is sovereign prerogative: Cd'A Paris 18/18708
- Freedom of expression
 - C-633/22
- Competition law
 - *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614
- Insolvency
 - Cannot enforce award against assets of debtor who is under insolvency abroad: 773 F.2nd 452 (2 Circ. 1985)
 - Others: award will be treated like any claim against estate
- Trade mark
 - Effect on internal market not necessarily unacceptable C-681/13 Diageo, C-38/98 Renault

Substantive – incidental question

- Competition law
- Company law
- Labour law
- Floating charge