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The Public Policy Exception under Article V(2)(b) of the New York Convention in the Time of Covid-19

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Exceptional times call for exceptional measures. We have all been experiencing a global pandemic for almost a year now. In an era where the legal exception tends to become the mainstream rule, one is left to wonder how far can this reversal of odds go. Is the global public health crisis susceptible to calling into question standard principles of international arbitration such as the recognition and enforcement of foreign arbitral awards under the New York Convention ("NYC")? Faced with this question, this post examines whether the global health crisis may give rise to requests for courts to refusal to recognise and enforce arbitral awards under Article V(2)(b) of the NYC and assesses the circumstances and conditions under which such claims may be upheld in court. The post reflects a more detailed analysis of these issues in light of the current global health crisis, contained in a recent publication assessing the public policy exception under Article V(2)(b) of the NYC (see Z. PRODROMOU, *The public order exception in international trade, investment, human rights and investment disputes*, Kluwer, 2020).

Article V(2)(b) of the NYC: How Does the Global Health Crisis Fit In?

Article V(2)(b) of the NYC provides that:

> "*2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> *(…)*
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country*".

The benchmark question is whether the current global health crisis theoretically fits into the public policy exception. The text of the NYC itself refrains from defining the term public policy, and leaves it up to the national courts enforcing foreign awards to interpret the term's meaning. Consequently, in the absence of a clear prohibition or definition otherwise, courts could read the

global health crisis into Article V(2)(b) on the face of the facts and situations mapped out immediately below.

Mapping out Concrete Situations where the Global Health Crisis may Give Rise to Claims under Article V(2)(b) of the NYC

The exception enshrined in Article V(2)(b) of the NYC concerns infringements of procedural and substantive public policy rules. The current global health crisis may give rise to claims related to both of these aspects of public policy.

1. Claims concerning the infringement of procedural public policy against the backdrop of the global health crisis

In the context of Article V(2)(b) of the NYC, procedural public policy concerns can include flaws in the adjudication of the case at issue by the competent arbitral tribunal. By way of example, due process infringements constitute issues of procedural public policy.

The local lockdowns combined with the series of bans on international flights and travel have forced arbitral tribunals to adapt to a brand new reality of remote, e-operation. Virtual hearings have become the new norm, all while arbitral tribunals seek to guarantee the unhindered continuation of proceedings in the interests of justice. Despite noble intentions, though, this instant digitalization of arbitration could raise serious questions from a due process standpoint. This is particularly so in the event one of the parties objects to a virtual hearing and prefers to postpone the proceedings, including to allow for a meeting in person. Arbitral institutions have shown good reflex and have issued a line of additional notes and guidance discussing the different options available to arbitrators seeking to strike a fair balance between procedural efficiency and due process. Notwithstanding these additional soft law tools, key questions of principle remain unanswered: Do virtual hearings and other electronic means of administration of arbitral proceedings adequately fulfil the parties' right to be heard in a meaningful manner and in line with the respective requirements of Article V(2)(b)? This includes the right to submit evidence, to comment upon evidence furnished by the other party, and the ability to cross-examine witnesses virtually. Moreover, the technology used to conduct virtual hearings could also raise questions on the confidentiality of the proceedings and the overall privacy and data protection of the parties involved. Based on the above, it would not come as a surprise if parties who are currently forced to take part in virtual arbitration proceedings subsequently rely on the intricacies raised above to seek to resist the recognition and enforcement of arbitral awards rendered after electronic hearings, based on the public policy exception under Article V(2)(b). Of course, the success of any such claims greatly depends on the facts surrounding the respective assertions. The more egregious the circumstances, the higher the prospects of success.

2. Claims concerning the infringement of substantive public policy against the backdrop of the global health crisis

The relevant case-law indicates that substantive public policy hinges on the protection of the

following key pillars: (a) fundamental principles pertaining to justice or morality; (b) rules serving the State's essential political, social or economic interests ("lois de police"); (c) duty of the state to respect obligations under international law; (d) the forum state's national interests; and (e) constitutional principles. From this universe, the protection of the forum state's national interests as well as the protection of the forum state's constitutional principles would be the most likely be employed by parties seeking to resist the recognition and enforcement of arbitral awards in the backdrop of the global health crisis. In *United World v. Krasny Yakor*, the Federal Arbitrazh Court of the Volgo-Vyatsky Region in Russia, held on appeal that the award in question was counter to the forum's substantive public policy due to the fact that it could lead to the respondent's bankruptcy, thereby affecting the forum's regional economy as a whole. Likewise, the Caribbean Court of Justice set aside the award under review in BCB Holdings, because it was determined to be contrary to the forum's core constitutional values of separation of powers and parliamentary sovereignty.

These lines of jurisprudence, which are unrelated to the health crisis, could be employed by analogy in at least two ways by parties seeking to resist the recognition and enforcement of arbitral awards due to Covid-19-related events. First, the resisting party could rely on the financial implications of the lockdown, or on other restrictive measures, to argue that these would be further magnified to the detriment of the economy should the foreign arbitral award in question be recognized and enforced. This is particularly so where there is evidence showing that the resisting party would face bankruptcy as a result of the enforcement proceedings in question or that such proceedings could have indirect, yet severe, financial implications for other market players associated with the resisting party. Second, and depending on the prevailing circumstances at the time, the resisting party could also rely on any applicable restrictive measures at the time, including special measures for the suspension of certain judicial and commercial or banking activities, and therefore argue that recognition and enforcement of a foreign arbitral award would contravene these restrictions and therefore run against the national interest and constitutional principle of protecting public health, and by extension, affect the national population.

Reading the Global Health Crisis into Article V(2)(b) of the NYC is also Supported by the Provision's Theoretical Underpinnings

Reading the global health crisis into Article V(2)(b) could be considered justified given that the content of the public policy exception is not meant to remain stable, but rather evolve over time. The non-static nature of the public policy exception is dictated by the need to capture fluctuations in prevailing societal circumstances. According to this evolutionary interpretation, the term 'public policy' is meant to encompass the most recent societal changes such as the current global health crisis. However, this conclusion does not necessarily compromise the need to construe the public policy exception narrowly or otherwise contravene the NYC's general pro-enforcement spirit. Quite the contrary, it shows that public policy constitutes a notion fluid enough to adjust to changing circumstances, including the outbreak of Covid-19. The application of Article V(2)(b) by courts in situations arising out of the current global health crisis, however, must be in line with the provision's exceptional nature, and must pay respect to the NYC's overall aims.

Final thoughts

International jurisprudence on the enforcement and recognition of arbitral awards shows that the public policy exception has only been upheld by courts on limited occasions. Based on this, the mere fact that the global health crisis may give raise to additional claims under Article V(2)(b) does not necessarily mean that these will inevitably tip the NYC's pro-enforcement balance. The provision has been traditionally applied extremely narrowly and has been upheld only on the face of exceptional procedural irregularities or in light of extremely dire financial conditions. All in all, the exception is expected to be invoked more often given the current unprecedented circumstances, but it does not run the risk of becoming the rule. The odds should not be reversed on this front.

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