Ordre Public and arbitration in Norway

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1. Introduction

I was asked to enquire whether there are features in the Norwegian regime regarding *ordre public* (public policy) that can negatively affect the attractiveness of carrying out arbitral proceedings in Norway. The answer is that *ordre public* is not an obstacle to the efficiency of arbitration.

Arbitral awards are final and binding. Unless the parties specifically agree that the award may be appealed before a second arbitral tribunal (which happens very rarely, if at all), there will be no possibility to re-evaluate the merits of the decision. However, courts have the possibility to exercise control on arbitral awards, albeit to a restricted extent. In Norway, the conditions for challenging the validity of an award rendered in Norway or to refuse enforcement in Norway of an award are to be interpreted in the light of the UNCITRAL Model Law and of the New York Convention.

One of the most important principles in this regard is that court control is not a review of the merits of the award. The court is not allowed to review the arbitral tribunal's assessment of facts, evaluation of evidence or application of law.

The foregoing means that an award is final and binding, even though it contains errors of fact or errors of law. The ground for invalidity or refusing enforcement at issue here, violation of public policy, does not depart from this principle. Public policy is not violated simply because the award has wrongly applied the governing law. Even when the allegedly wrongly applied provisions are mandatory, there is no automatic effect on public policy. Public policy is affected only if the result of the award seriously infringes fundamental principles of the Norwegian socio-economic system. The socio-economic values that are fundamental in a certain system, constitute its *ordre public*. It is, in other words, not the technical content of a legal rule, that may constitute public policy, but the underlying principles. The foregoing corresponds to the regime laid down in the Model Law and in the New York Convention, and its application is fairly harmonized.

However, one area is debated: the intensity of the control the court may exercise when assessing whether an award infringes public policy. In this area, there are two approaches: the minimalist and the maximalist.

The typical example would be an award that raises issues of competition law or of corruption, areas that generally are deemed to have the character of public policy. If the arbitral tribunal considered those issues and concluded that public policy is not infringed, will the court be bound by this conclusion when it exercises it control? In other words, will the court be precluded from making its independent public policy evaluation? This is the minimalist approach. Or will the court have the power to independently make this determination? This is the maximalist approach.

In Norwegian law the question has not been discussed very extensively, but there is a fair basis to affirm that the maximalist approach applies. This is aligned with the approach of the Model Law and of the New York Convention.

Section 2 below introduces the applicable legal sources, in Norway and internationally; section 3 presents the issue of the intensity of the court's control; section 4 sets forth the effects of court control in respect of jurisdiction, for the purpose of setting a term of comparison; section 5 discusses court control in respect of public policy; section 6 analyses the two different approaches, the minimalist and the maximalist; section 7 explains the implications that EU law may have in this area; section 8 analyses the Norwegian approach, and section 9 contains some concluding remarks.

2. The sources

A court who controls the validity or the enforceability of an award derives its jurisdiction from the applicable law. In case of challenge to the award's validity, the applicable law is the arbitration law prevailing in the place

of arbitration. In case of the award's enforcement, the applicable law is, in the 159 countries who ratified it,[2] the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

In Norway, court control on arbitral awards is regulated in the 2004 Arbitration Act (the "AA"). The AA adopts the UNCITRAL Model Law on International Commercial Arbitration,[3] and is interpreted in its light. [4] It also implements the New York Convention.

The grounds for invalidity of arbitral awards rendered in Norway, regulated in § 43 of the AA, correspond to the grounds for annulment contained in article 34 of the Model Law. The grounds for refusing enforcement of awards (irrespective of where the awards are rendered), regulated in § 46 of the AA, correspond to the grounds for refusing enforcement contained in article V of the New York Convention and in article 36 of the Model Law. These two provisions, §§ 43 and 46 of the AA, contain similar grounds for invalidity and unenforceability. Literature and case law on validity are relevant also to enforcement, and vice versa.[5]

The applicable provisions make it clear that court control is not meant to be an appeal. Court control is not the same as a review of the award in the merits, neither in respect of the assessment of facts nor in respect of the application of law.[6] The direct consequence of this limitation of court control is that an award is final and binding, even if it contains errors of fact or errors of law. This is the basis upon which the system of arbitration, as we know it today, rests: international conventions, national laws, courts of law, legal doctrine and practitioners support the aim that arbitration

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2 For an updated status, *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

3 http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

4 The objective of harmonization of the AA with the Model Law and the New York Convention is confirmed, i.a., in the Ministerial proposal for the AA, Ot.prp. nr. 27 (2003-2004), 25.

5 The interchangeability (mutatis mutandis) is confirmed in Ot.prp. nr. 27 (2003–2004), 75 and 110. On the interchangeability of the international sources, see Gary Born, *International Commercial Arbitration* 2nd ed., Kluwer Law International 2014, 3186, 3340; Giuditta Cordero-Moss, *International Commercial Contracts,* Cambridge University Press 2014, 224.

6 See the Report by the Law Commission who drafted the AA: NOU 2001:33, para 8.11.

is to be an effective and efficient means of dispute resolution. To achieve this aim, they widely recognize that awards must be final and binding. Effectiveness and efficiency of arbitration are important principles of arbitration law, and at the origin of the widespread arbitration-friendly attitude that has characterized legislation and case law in the past decades.

The provisions regulating court control on arbitral awards represent the limit of tolerance that legal systems have in respect of arbitral awards. As seen above, an award containing errors of fact or errors of law shall be confirmed as valid and shall be enforced. However, an award rendered by an arbitral tribunal whose jurisdiction did not rest on a valid and binding arbitration agreement is not valid (§ 43 (1) (a) of the AA and article 34(2)(a)(i)of the Model Law) and not enforceable (§ 46 (1) (a) of the AA, article 36(1)(a)(i) of the Model Law and article V(1)(a) of the New York Convention); an award rendered as a result of a proceeding that did not give each of the parties the possibility to present its case is not valid (§ 43 (1) (b) of the AA and article 34(2)(a)(ii) of the Model Law) and not enforceable (§ 46 (1) (b) of the AA, article 36(1)(a)(ii) of the Model Law and article V(1)(b) of the New York Convention); an award rendered in excess of the jurisdiction granted on the arbitral tribunal is not valid (§ 43 (1) (c) of the AA and article 34(2)(a)(iii) of the Model Law) and not enforceable (§ 46 (1) (c) of the AA, article 36(1)(a)(iii) of the Model Law and article V(1)(c) of the New York Convention); an award rendered by an arbitral tribunal that was not constituted in accordance with the parties' agreement or the applicable law, or as a result of proceedings that did not comply with the parties' agreement or the applicable procedural rules is not valid (§ 43 (1) (d) and (e) of the AA and article 34(2)(a)(iv) of the Model Law) and not enforceable (§ 46 (1) (d) and (e) of the AA, article 36(1)(a)(iv) of the Model Law and article V(1)(d) of the New York Convention); an award rendered on a non-arbitrable object is not valid (§ 43 (2) (a) of the AA and article 34(2)(b)(i) of the Model Law) and not enforceable (§ 46 (2) (a) of the AA, article 36(1)(b)(i) of the Model Law and article V(2)(a) of the New York Convention); an award infringing fundamental principles (public policy) is not valid (§ 43 (2) (b) of the AA and article 34(2)(b)(ii) of the Model Law) and not enforceable (§ 46 (2)

(b) of the AA, article 36(1)(b)(ii) of the Model Law and article V(2)(b) of the New York Convention).

3. The intensity of court control

There is a certain tension between the principle that court control is not a review of the award on the merits, on one hand, and the courts' power to set aside an award or refuse its enforcement, on the other hand.

This becomes clear particularly when the court exercises control on a matter that already has been considered by the arbitral tribunal. As was seen above, there is an exhaustive list of issues the court may evaluate. If the tribunal has not considered those issues at all, the tension does not become evident: the court exercises its power and this does not interfere with an evaluation already made by the tribunal. It may interfere with the award if the outcome is that the award is set aside or not enforced. However, it does not interfere with the tribunal's evaluation of the particular issues regarding the validity of the arbitration agreement, the parties' legal capacity, the violation of public policy, etc., because the tribunal has not evaluated these issues.

All the above mentioned issues underlying the courts' power to control arbitral awards may, however, conceivably have been already evaluated by the arbitral tribunal. The Tribunal may have considered whether the arbitration agreement met the applicable form requirements or whether a party had legal capacity to enter into it, and it may have concluded in the affirmative, thus proceeding to solving the dispute in the merits and rendering an award. Yet the courts may have a different opinion of the same issues and may conclude that the award shall be set aside or refused enforcement. The same reasoning may be made in respect of the other grounds for setting aside or refusing enforcement: the tribunal may have considered its constitution, the procedure followed under the dispute, the scope of its power, the arbitrability of the disputed object,

or the conformity of the award with public policy; the tribunal may have concluded that there were no violations. Yet the court may have a different opinion, and it may exercise its power to set aside the award or refuse its enforcement.

The abovementioned tension between the principle of the award's finality and court control becomes, therefore, particularly evident in case of concurrent, and diverging, evaluations of the same issue carried out by the tribunal and by the court.

Internationally, the matter has been perhaps mostly discussed in connection with public policy. There seems to be an inconsistency in the answer to the question, depending on the context in which it arises. This will be addressed in the following sections. To give a term of comparison, I will start discussing, in section 4 below, another of the abovementioned issues: whether there is a valid and binding arbitration agreement.

4. Kompetenz-Kompetenz and court control

In connection with the existence and validity of the arbitration agreement, the doctrine of *Kompetenz-Kompetenz* was developed. According to this doctrine, an arbitral tribunal has the competence to decide on its own competence.[7] The main implication of this doctrine is that a tribunal does not have to suspend the proceeding in case the validity of the arbitration agreement is questioned. The arbitral tribunal has the power to make a decision on the existence and validity of the arbitration agreement and, if the decision is in the affirmative, the tribunal may proceed with the substantial aspects of the dispute.

[7] Born, *International Commercial Arbitration,* cit., paras 1046–1252; Christophe Seraglini and Jérôme Ortscheidt, *Droit de l'arbitrage interne et international,* Domat Montchrestien, 2013, paras 664f. See also John James Barcelo, "Kompetenz-Kompetenz and Its Negative Effect — A Comparative View", *Cornell Legal Studies Research Paper* No. 17-40, 11 September 2017, Available at SSRN: https://ssrn.com/abstract=3035485.

This principle has been affirmed, i.a., in article 16 of the Model Law and in § 18 of the AA. A system that even more clearly gives priority to the arbitral tribunal's evaluation of its competence is France, where the so-called *effet négatif de la compétence-compétence* was developed.[8] According to this doctrine, courts must refer the dispute to arbitration whenever they are seized with a dispute which is subject to an arbitration agreement. Also under the Model Law a court must refer the dispute to arbitration if there is an arbitration agreement. However, in the wording of article 8 of the Model Law and § 7 of the AA, the court refers to arbitration "unless it finds that the agreement is null and void, inoperative or incapable of being performed." This wording opens for a thorough examination by the court of the existence, validity and effectiveness of the arbitration agreement. The French Civil Code of Procedure goes further and restricts the court's examination.[9]The only possibility courts have at this stage, is to make a cursory review of the arbitration agreement. If the court is *prima facie* satisfied that the arbitration agreement exists and is valid, it shall refer the dispute to arbitration. The underlying idea is that it is for the arbitral tribunal to make a deeper evaluation of its competence.

What do the AA, the Model Law and the French *effet négatif de la compétence-compétence* provide as to the effects for the court of the tribunal's decision on its own competence?

The same issue of competence that was decided by the tribunal may be put forward for the purpose of challenging the validity of the award or of preventing its enforcement. Paragraph 43(1)(a) of the AA and article 34(2)(a)(i) of the Model Law say that the court may set aside an award if it finds that the arbitration agreement did not exist or was invalid, or that a party was under some incapacity. The same can be said for French law: article 1492 No 1 of the Civil Procedure Code gives the court the power

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8 Emmanuel Gaillard and John Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration,* Kluwer Law 1999, paras 660, 671 ff.; Emmanuel Gaillard, "L'effet négatif de la compétence-compétence", in Jacques Haldy, Jean-Marc ´ Rapp and Phidias Ferrari (eds), *Etudes de procédure et d'arbitrage en l'honneur de Jean-François Poudret*, Faculté de droit de l'Université de Lausanne 1999, 387–402; Seraglini and Ortscheidt, *Droit de l'arbitrage interne et international,* cit., paras 664f.

9 French Code of Civil Procedure, article 1448.

to set aside the award if the arbitral tribunal did not have jurisdiction. The same say § 46(1)(a) of the AA, article 36(1)(a)(i) of the Model Law and article V(1)(a) of the New York Convention, in respect of enforcement. Neither the AA, the Model Law, the French Civil Procedure Code nor the New York Convention, however, explain the relationship between the tribunal's competence to decide on its own competence, and the court's power to control the award.

According to the prevailing doctrine, the court retains its power to determine the existence and validity of the arbitration agreement, or the parties' capacity to enter into it, even if the tribunal already has evaluated the matter.[10] This may result in a different outcome from the one to which the tribunal came and may lead to setting aside the award or refusing its enforcement. In practice, this means that the award has no preclusive effect and the mentioned issues ultimately are subject to the court's evaluation. This approach is supported also in France.[11] The theories of *Kompetenz-Kompetenz* and of *l'effet négatif de la compétence-compétence,* which were developed to enhance the autonomy and thus the efficiency of arbitration, do not go as far as to affirm that the tribunal's determination of the existence and validity of the arbitration agreement are final and the court owes deference to the tribunal's determination.

5. Public policy and court control

The rule on public policy is dealt with in the same provisions addressing annulment or non-enforcement due to lacking jurisdiction. The only difference suggests that conflict with public policy is considered to be a more serious defect of the award than the wrong determination by the tribunal of its competence: while the ground relating to existence or

[10] Gaillard and Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration,* cit., paras 658 and 688; Seraglini and Ortscheidt, *Droit de l'arbitrage interne et international,* cit., para 971.

[11] See references in footnote above.

validity of the arbitration agreement has to be raised by one party, the ground relating to public policy can be raised *ex officio* by the court.

By giving the court the power to consider the matter of public policy *ex officio,* the applicable sources show that it is not possible to delegate to the parties the decision of whether the issue of conformity with public policy shall be considered. It should be expected that neither should it be possible to delegate to the tribunal the determination of whether public policy was infringed. The logical consequence is that the court's power to exercise its control notwithstanding the arbitral tribunal's determination of the same issue is at least equally preserved in respect of public policy, as it is in respect of the tribunal's competence. As was seen in section 4 above, the award does not have preclusive effects in respect of the tribunal's determination of its own competence. Similarly, there should be no preclusive effects in respect of the tribunal's determination of conformity with public policy.

However, in connection with public policy there is no unitary approach to the effects for the court of the tribunal's determination. Two opposed doctrines were developed to define the degree of control that courts may exercise on the award's conformity with public policy. [12] The Paris Court of Appeal[13] developed the minimalist doctrine, according to which courts owe deference to the tribunal's evaluation. The Dutch Court of Appeal[14] developed the maximalist doctrine, according to which courts may independently evaluate whether *ordre public* is infringed. The maximalist approach has effects that are comparable with the effects recognized by the doctrine of *compétence-compétence* and of *l'effet négatif de la compétence-compétence*; according to this approach, the court may carry out its independent evaluation of the issue. The minimalist approach goes further in affirming the finality of arbitral awards, and assumes

[12] Luca Radicati di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23 *Am. Rev. Int'l Arb.* 49; Seraglini and Ortscheidt, *Droit de l'arbitrage interne et international,* cit., para 982.

[13] Cour d'appel Paris, 1e ch., 18.11.2004, Rev arb. 2005 751 (*Thalès Air Defence v. Euromissile*).

[14] Gerechtshof Haag, 24.3.2005, NJF 2005/239, TvA 2006/24 (Marketing Displays International Inc. v. VR Van Raalte Reclame B.V).

that the tribunal's determination of the public policy issue has preclusive effects for the court.

For both approaches, the starting point is that court control is not meant to re-open the dispute that was decided by the award. In particular, the court may not review the arbitral tribunal's assessment of facts, evaluation of evidence and application of law. When the court has to determine whether the award is compatible with public policy, however, the two approaches diverge.

According to the maximalist approach, the court may independently evaluate whether the award leads to a result that violates public policy, irrespective of whether the arbitral tribunal already has considered the same matter. This means that the court may independently evaluate the evidence that was already evaluated by the arbitral tribunal and may form its own opinion of the disputed facts. Furthermore, the court may independently evaluate how the law shall be applied. All this is done solely for the purpose of ascertaining whether the award violates public policy. This is not made for the purpose of reviewing whether the tribunal correctly interpreted the evidence or applied the law. This means that the court may not annul or refuse enforcement of an award simply because the law was applied wrongly. If the error has not seriously affected fundamental principles, the award must be affirmed and enforced.

The minimalist approach assumes that the court shall limit itself to verifying whether the arbitral tribunal has considered the matter. If the arbitral tribunal has concluded that public policy was not violated, the court has to accept this conclusion. Hence, according to the minimalist approach, the arbitral tribunal's evaluation of whether the award is compatible with public policy is binding on the court. The award has, therefore, preclusive effect.

The minimalist approach is particularly represented in France.[15] However, French case law recently seems to have embraced the maximalist approach, at least in areas such as corruption and money laundering.[16]

6. Minimalist or maximalist approach?

By postulating that the court owes deference to the evaluation that the tribunal made of the conformity of the award with public policy, the minimalist theory effectively delegates to the arbitral tribunal the assessment of this ground for annulment and for refusing enforcement.

The question is whether this delegation of power is compatible with the structure of arbitration as a means of dispute settlement. As was explained above, the grounds for annulment or for refusing enforcement may be seen as the limit of tolerance within which states find it acceptable to delegate their judicial powers to a private system of justice.

The exhaustive list of these grounds is the result of a balancing of two conflicting interests: on the one hand, the interest in rendering arbitration efficient – which may seem to suggest as large finality as possible for the arbitral awards and as little interference as possible by the courts. On the other hand, the interest in ensuring that parties are not deprived of their access to justice, that principles of due process are safeguarded, that

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15 Swiss decisions apply the minimalist approach to the fact finding, see Tribunal federal, 4A_532/2014, 4A_534/2014, 29.1.2015. In the US, parties may exclude court control on the award's decision on jurisdiction, but only if they "clearly and unmistakably" delegated the issue to the tribunal, which is deemed to be a very high threshold: First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995), confirmed in Henry Schein, Inc. v. Archer and White Sales, Inc., 585 U.S. __ (2019).

16 See, in the areas of corruption and money laundering: Cour d'appel de Paris, 4.11.2014, nr. 13/10256; Cour d'appel de Paris, 25.11.2014, nr. 13/1333; Cour d'appel de Paris, 7.4.2015, nr. 14/00480; Cour d'appel de Paris, 14.4.2015, nr. 14/07043; Cour d'appel de Paris, 21.2.2017, nr. 15/01650; Cour d'appel de Paris, 16.1.2018, nr. 15/21703. *Contra*, see Cour d'appel de Paris, 20.1.2015, nr. 13/20318; Cour d'appel de Paris, 24.2.2015, nr. 13/23404. In the area of procedural fairness, see Cour d'appel de Paris, 8.11.2016, nr. 13/12002.

fundamental principles are not infringed – which may seem to suggest as large court control as possible.

According to this balancing of interests, as was seen in section 4 above the award does not have preclusive effects for the court who controls the existence and validity of the arbitration agreement or the parties' capacity to enter into it. The grounds for annulment and refusing enforcement relating to the arbitral tribunal's competence are meant to make sure that a party has willingly and validly accepted the consequences of the arbitration agreement. The control that courts exercise on the arbitral tribunal's competence goes to the very basis of the admissibility of arbitration as a private method of dispute settlement. In the name of arbitration efficiency, court control has been restricted and priority has been given to the tribunal, in various degrees, in the phase preceding the arbitration or under the arbitration proceedings, as was seen in section 4 above. After the award has been rendered, however, court control is intact. As was seen above, it does not seem to be controversial that courts maintain the power to make a full examination of the matter.

Some commentators have earlier suggested that courts owe deference to the tribunal's determination on the existence or validity of the arbitration agreement,[17] but this did not represent the prevailing view and has anyway been superseded by legislation.[18] Even in France, where the autonomy of arbitration is supported more than in any other legal system, it is not suggested that the tribunal's determination of this issue is final.

When the matter at issue is the compatibility of the award with public policy, however, a different approach is supported by the minimalist theory.

The ground for annulment and refusal of enforcement relating to public policy is meant to protect the most important values of the legal system. It can be seen as a condition upon which a legal system accepts that disputes may be subject to arbitration and excluded from the juris-

[17] For reference to a diverging interpretation of the old regulation in Germany see John J. Barceló III, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective", *Cornell Law Faculty Publications* 2003, 508, https://scholarship.law.cornell.edu/facpub/508, 1114–1136, 1131.

[18] Ibid.

diction of its courts. A legal system accepts that disputes may be finally decided by a private tribunal, instead of being decided by courts, as long as it is possible to ensure that certain basic principles are also respected in arbitration.

These basic principles may be of a procedural character, such as the right to be heard, and they may be of a substantive character, such as the principle against corruption, principles protecting free competition or principles protecting creditors. If the principles are sufficiently fundamental, they will be deemed to be part of public policy. As long as the court has the possibility to verify that these fundamental principles have been respected, it will not interfere with arbitration.

The ability of the court to verify that fundamental principles have been respected, however, would be illusionary if the court were bound by the assessment that the arbitral tribunal made of that very matter. Court control would not have a real function if the court's only role were to accept the evaluation made by the arbitral tribunal. Assume, for example, an arbitral tribunal that reveals to one party the content of internal deliberations, thus favouring it over the other party. An award rendered under these circumstances would obviously violate public policy. Should the court be bound to accept the tribunal's own evaluation, i.e. that discriminating between the parties and breaching the duty of confidentiality do not infringe fundamental principles? The evident answer is that the court has to evaluate the matter independently. The arbitral tribunal may not give validity to a discriminatory conduct, simply by saying that the conduct is valid. If this applies to public policy concerns of a procedural nature, why should it not apply also to public policy concerns of a substantive nature?

An explanation may be found in the observation that the minimalist theory is often put forward in connection with matters of competition law.[19] As known, since the CJEU decision in *Eco Swiss*[20] competition law

[19] Luca Radicati di Brozolo, *Arbitration and Competition Law: The Position of the Courts and of Arbitrators,* Arbitration International, 2011, 1–25; Giuditta Cordero-Moss, "Inherent Powers and Competition Law", in Franco Ferrari and Friedrich Rosenfeld (eds), *Inherent Powers in International Adjudication*, Juris 2018, 297–325, 306 ff.

[20] Case C-126/97, *Eco Swiss China Time Ltd. v. Benneton Int'l NV*, 1999 E.C.R. I-3079.

has been deemed a matter of public policy in the context of arbitration. Thus, awards rendered in disputes with competition law implications may potentially infringe public policy. When the court controls the compatibility of an award with public policy, it cannot express an opinion until it has verified whether competition law has been infringed and whether the infringement is serious enough to justify setting aside the award or refusing its enforcement. Determining whether competition law is violated, however, often requires complicated inquiries, that go way beyond the simple examination of the award and the applicable law. Some competition law infringements may be assessed after a relatively straight forward examination of the award. This applies particularly to awards regarding agreements which have as their object the prevention, restriction or distortion of competition within the internal market.[21] Also agreements that do not have as their object to restrict competition, but have nevertheless an effect on competition, may violate competition law. Assessing the implications of competition law for these agreements, however, assumes extensive and complex evaluations, among others considering possible economic benefits, indispensability and other aspects of the economic context.[22]

It is probably the desire to avoid these extensive inquiries that is at the origin of the minimalist theory. It would be costly, time consuming and complicated if the court had to repeat the complicated inquiries that have been carried out by the tribunal. While reasons of efficiency suggest that such complicated inquiries shall not be duplicated, it is questionable that the solution lies in affirming that the court owes deference to the determination made by the tribunal.

A better route seems to be to rely on the narrow scope of the public policy rule, see section 9 below. If it is necessary to initiate a full-fledged inquiry to ascertain whether an award infringes competition law, it could be argued that the infringement is not so serious as to justify applying the

[21] These agreements are forbidden under article 101 of the TFEU. More extensively, Cordero-Moss, 'Inherent Powers and Competition Law', cit., 310 f.

[22] Commission Notice Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 2001 OJ (C 003) 2–30.

public policy ground. However, if, after having examined the award and the underlying evidence and documentation, the court finds reason to conclude that competition law was infringed, and that this infringement is so serious that it affects public policy, the award may be set aside or refused enforcement.

It has been suggested[23] that it should be possible to exercise court control by examining, in some detail, the reasoning of the award. Only in exceptional cases, such as when the award has no reasons, or the award did not consider the applicability of public policy rules, should the court be allowed to go further and examine the parties' pleadings or the evidence produced in the arbitral proceedings or, in extreme cases, to launch a full-fledged investigation. I can subscribe to this scale of court control's intensity, with one addition: in order to safeguard the efficacy of the public policy rule, I would add that the court may go further and examine the pleadings and the evidence also when the court does not find the award's reasoning convincing. With this addition, the intensity of court control corresponds to the criteria laid down by the maximalist theory.

The maximalist approach is not meant to give the court the power to review the tribunal's decision. As was seen above, public policy is not violated simply because the award has wrongly applied the governing law. Even when the allegedly incorrectly applied provisions are mandatory, there is no automatic effect on public policy. Public policy is affected only if the result of the award seriously infringes fundamental values in the socio-economic system. It is, in other words, not the technical content of a legal rule that may constitute public policy, but the underlying principles. The narrow scope of the public policy rule, therefore, prevents that court control becomes a review of the merits: an award may not be set aside simply because the tribunal did not accurately apply certain rules of law.

Also the minimalist theory developed from the desire to affirm the narrow scope of the public policy ground. The minimalist doctrine, as affirmed by the Paris Court of Appeal,[24] permits courts to set aside an

[23] Radicati di Brozolo, "Mandatory Rules and International Arbitration", cit., 63f.

[24] *Supra* footnote 12.

award or refuse its enforcement only if the violation of public policy is manifest, effective and concrete. As was seen above, these criteria have been interpreted so strictly that their application is equivalent to saying that the court owes deference to the determination made by the arbitral tribunal. It is only when the arbitral tribunal has not considered the matter, that the court may make an independent evaluation. This strict interpretation of the criteria, however, is not followed by the Paris Court of Appeal in respect of awards that deal with matters of corruption and of money laundering. [25] In these areas, the Court repeatedly carried out independent evaluations and concluded differently from the arbitral tribunal. Thus, the Paris Court of Appeal applies the maximalist approach in the context of corruption and money laundering. Moreover, the maximalist approach is applied also when existence and validity of the arbitration agreement are at issue, as was seen in section 4 above. As I argued above, in my opinion the maximalist approach is the preferable route also outside these areas.

7. EU-law

Even though the minimalist doctrine seems to be losing authority in its country of origin, France, it still enjoys wide support in the arbitration community because it accords with the traditional understanding that interference with party autonomy and the arbitral award shall be kept to a minimum.[26] The minimalist theory, however, may turn out to be detrimental to arbitration: as I will explain below, restricting the scope of court control creates the risk of reducing the scope of arbitrability.

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[25] *Supra* footnote 15.

[26] Radicati di Brozolo, "Arbitration and Competition Law", cit. Questioning that this is the prevailing opinion Seraglini and Ortscheidt, *Droit de l'arbitrage interne et international,* cit., para 983.

The close link between court control and arbitrability is apparent in some opinions by the CJEU Advocate General. In *CDC*, [27] AG Jääskinen argued for restricting arbitrability of matters relating to competition law, because arbitration does not ensure a uniform application of EU law. Similarly, in *Genentech*,[28] AG Wathelet pleaded for more extensive court control and criticised the minimalist approach, according to which court control may be exercised only in the case of manifest infringement of public policy, and only if the issue had not been examined in the arbitration proceeding. The requirement that only manifest infringements may trigger court control was criticised for making court control illusionary – because many restrictions of competition forbidden by EU law require complex evaluation and would escape review.[29] The requirement that the court owes deference to the decision made by the arbitral tribunal was criticised for being at odds with the system of review of compatibility with EU law.

In the view of the AG, as arbitral tribunals have no competence to refer to the CJEU questions for preliminary rulings, the responsibility for reviewing compliance with EU law must be placed with the courts and not with arbitral tribunals.[30] According to the AG opinion, the general principle of arbitration law, according to which a court may not independently review the substance of an award, does not prevent the court from considering the issue of compliance with competition law, even though the issue has already been considered by the arbitral tribunal – given that competition law is of fundamental importance in the EU legal order, and that the New York Convention permits to

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[27] Case C-352/13 *CDC Hydrogen Peroxide v. Evonik Degussa and Others* (ECLI:EU:C:2015:335), opinion of AG Jääskinen (ECLI:EU:C:2014:2443).

[28] Case C-567/14 *Genentech v. Hoechst and Sanofi-Aventis Deutschland* (ECLI:EU:C:2016:526), opinion of AG Wathelet (ECLI:EU:C:2016:177).

[29] Case C-567/14 (Genentech), AG Opinion, paras 64–67.

[30] Ivi, paras 59–62. The AG refers here to commercial arbitration. The same AG Wathelet expressed the opinion that in investment arbitration the arbitral tribunal is entitled to refer questions to the CJEU. This opinion, however, was not followed by the Court.

refuse enforcement for violation of public policy.[31] In its final judgment in the *Genentech* case, the CJEU ignored the matter and did not take a position on the scale from the AG's maximalist approach with automatic effects to the minimalist approach and the impossibility to evaluate the infringement's result under the specific circumstances. Therefore, there has not been any clarification on this point. Also in the first mentioned case, *CDC*, the CJEU chose not to decide these aspects, thus leaving open the question of whether the minimalist doctrine is compatible with EU law, or whether the maximalist doctrine shall be preferred.

The matter was touched upon in a later case, *Achmea*. [32] The case regarded the annulment proceeding of an investment award[33] and was based on a referral by the German Supreme Court (BGH). [34] One of the invoked annulment grounds was that the award was null because the dispute was not arbitrable: as arbitral tribunals are not bound by the EU duty to apply EU law in a uniform way, the effective application of EU law would be endangered if the dispute had been arbitrable. This line of thought resembles the situation prior to *Mitsubishi*.[35] Prior to this seminal decision, US courts excluded arbitrability whenever the issues in dispute assumed the accurate application of norms reflecting important policies, such as competition law.

With *Mitsubishi*, the so-called second look doctrine was introduced: issues relating to important policies such as competition law can be arbitrated, because courts have the possibility to exercise control on

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31 Ivi, paras 70–72. The AG seemed to assume that any and all violations of competition law would amount to a violation of EU *ordre public*. This is not a correct assumption as the CJEU has repeatedly stated that only serious violations lead to infringement of *ordre public,* see Cases C-38/98 (Renault) and C-68/13 (Diageo). More extensively, see Cordero-Moss, 'Inherent Powers and Competition Law', cit., 309f.

32 Case C- 284/16 *Slovak Republic v Achmea BV* (ECLI:EU: C:2018: 158).

33 Achmea B.V. (former Eureko B.V.) v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13, 7.12.2012.

34 Bundesgerichtshof, 3.3.2016, I ZB 2/1.

35 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).*

awards.[36] The BGH requested the CJEU to confirm that there is no basis to restrict the scope of arbitrability, as long as the courts may control the award's compatibility with fundamental principles of the forum. Thus, the BGH embraced the second look doctrine introduced by *Mitsubishi* and endorsed the maximalist theory. Advocate General Wathelet[37] concurred with this line of thought. The CJEU however, did not accept this approach, and concluded that investment disputes are not arbitrable. Following the CJEU decision, the BGH has set aside the award, thus confirming the maximalist approach.[38]

However, the CJEU distinguished between investment disputes and commercial disputes, and specified that its conclusion did not apply to commercial disputes.[39] Also this time, therefore, for commercial arbitration the CJEU did not clarify the extent of court control that it expects for it to permit arbitrability of matters related to EU-law. The CJEU, however, seemed to indirectly endorse, as an *obiter dictum*, the Advocate General's assumption that, in controlling commercial arbitral awards, courts should follow the maximalist approach.

Rather than excluding arbitration automatically and *a priori*, simply on the basis that the dispute regards an area regulated by laws that require accurate application,[40] it is better to permit arbitration and verify at the stage of challenge or enforcement whether the award is compatible

[36] For a more extensive reasoning see Giuditta Cordero-Moss, "Mitsubishi: balancing arbitrability and court control", Horatia Muir Watt, Lucia Bíziková. Agatha Brandão de Oliveira and Diego Fernández Arroyo (eds.), *Global Private International Law, Adjudication without Frontiers*, Elgar, forthcoming.

[37] Case C-281/16 (Achmea) Opinion of AG Wathelet, (ECLI:EU:C:2017:699), paras 70–72; ibid paras 251–60. The principal argument in the Opinion is that investment arbitral tribunals meet the criteria contained in article 267 TFEU. Therefore, they are permitted to request the CJEU to give a preliminary ruling and are required to apply EU law, see paras 84–135. Supporting this position, Jürgen Basedow, 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) 32(4) *Journal of International Arbitration* 367. The CJEU, however, rejected this argument.

[38] BGH, 31 October 2018, ECLI:DE:BGH:2018:311018BIZB2.15.0

[39] For a criticism of the CJEU's reasoning see Giuditta Cordero-Moss, "Towards lean times for arbitrability?" Christoph Benicke, Stefan Huber (eds.), *Festschrift in honour of Herbert Kronke,* forthcoming.

[40] Radicati di Brozolo, "Arbitration and Competition Law", cit., at 58 casts doubt on the assumption that arbitration is not capable of an accurate application of the law.

with fundamental principles. This, however, assumes the maximalist approach. The minimalist theory runs the risk of depriving court control of any meaningful effect, thus encouraging a restrictive attitude towards arbitrability.[41]

8. The approach in Norway

In Norway, apart from my writings[42] there is no expressed position on the distinction between minimalist and maximalist approach. However, the Law Commission Report to the draft AA assumes that a court may independently review the arbitral tribunal's application of law, when this has implications of public policy. This appears in the course of the analysis of why the draft AA (and also the final version of the AA, see § 9(2)) explicitly confirms that the private law effects of competition law are arbitrable. The Law Commission makes the following observation (my translation):[43]

> "A consequence of the possibility to arbitrate the private law effects of competition law, is that arbitral awards may be rendered that are based on a wrong understanding of competition law. An arbitral award based on such a mistake may be set aside as invalid because it violates public policy (ordre public) pursuant to chapters 8 and 9 in the draft [§ 43 in the final version of the AA]. This was assumed in a European Court of Justice decision of 1999, the so-called Eco Swiss decision (C-126/97 Echo Swiss China Time Ltd. v. Benetton International N.V. (1999) ECR I-3055). It is fair to assume that invalidity on this basis only applies when violations of competition law are particularly serious."

41 More extensively, Cordero-Moss, «Mitsubishi», cit.

42 Giuditta Cordero-Moss (ed.), *Norsk ordre public som skranke for partsautonomi i internasjonale kontrakter og internasjonal tvisteløsning*, Universitetsforlaget 2018, at section 5.10.

43 NOU 2001:33, at section 8.5.3.

The Law Commission, therefore, assumes that the annulment court may find that an award violates public policy because the arbitral tribunal applied competition law wrongly. In order to come to this conclusion, the annulment court must have the possibility to independently evaluate the application of competition law in the particular case. This confirms that the Law Commission assumed the maximalist approach.

It should also be pointed out that §§ 43 (2) (b) and 46(2)(b) of the AA provide that the court shall on its own motion verify the compatibility of arbitral awards with public policy. This means that the AA does not delegate to the parties the decision on whether a public policy evaluation shall be made or not. Matters of public policy are so important, that not even the parties' agreement may prevent the court from considering them. This suggests that the AA does not support the minimalist approach, which delegates the evaluation of public policy matters to the arbitral tribunal.

Furthermore, under these provisions, the court does not have the discretion to decide whether to annul or refuse enforcement of an award or not, once it has established that the award infringes public policy: according to the AA, the court *shall* annul or refuse enforcement of an award that is against public policy. In this respect, the AA differs from the Model Law and the New York Convention. These instruments give courts the power to apply the *ordre public* exception *ex officio,* but they do not expressly state that courts are obliged to annul or refuse enforcement of an award whenever they conclude that the award infringes public policy. The provision in the AA creates for the court not only the power, but also an independent duty to verify the compatibility of arbitral awards with public policy and to act thereon. In practice, there is no significant difference between the AA and the Model Law or the New York Convention, because the public policy assessment is discretionary. If a Norwegian court does not consider it appropriate to annul or refuse enforcement of an award, it may refrain from concluding that the award infringed *ordre public*.

In Norwegian legal literature, the applicability of the public policy rule is discussed particularly in connection with the *Eco Swiss* decision. The matter, however, is discussed not from the point of view of whether

courts may or may not independently evaluate whether the award is valid (i.e., whether they should follow the maximalist approach or the minimalist). The matter is discussed from the point of view of the scope of the provision on *ordre public* (i.e., whether *any* breach of competition law may justify the application of provision, or whether only serious breaches may do so).[44] In short, the discussion is about the scope of *ordre public*, and not about the court's ability to independently evaluate whether public policy was violated.[45]

Legal literature explains that the way in which it can be avoided that the provision on public policy results in a review of the merits, is to ensure that the scope of *ordre public* is narrow.[46] Among examples of awards that may infringe public policy, legal literature mentions awards deciding on claims based on betting or on crimes, or awards the enforcement of which would result in crimes.[47] Furthermore, if an award orders to pay damages for the breach of contract clauses that were void because they violated competition law, it is said that, in extreme cases, the court may annul the award.[48] It is further said that awards based on incorrect interpretation of facts or incorrect interpretation of the law, can violate public policy.[49]

Briefly, legal literature assumes, as do also the preparatory works of the AA, that the court is not bound by the award's evaluation, when it ascertains whether the award violates public policy. It must be assumed that the arbitral tribunal has considered the award to be valid, when it rendered an award that decided a claim based on betting or on a crime, or ordering an action that would result in a crime, or ordering to pay

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44 Borgar Høgetveit Berg (ed.), *Voldgiftsloven,* Gyldendal 2006, 330; Mads Magnussen and Simen M. Klevstrand, «Ugyldighetssøksmål mot voldgiftsdommer som strider mot konkurransereglene», in Borgar Høgetveit Berg and Ola Ø. Nisja (eds.), *Avtalt prosess,* Universitetsforlaget 2015, 214–236, 224–227, 230, 232–3; Geir Woxholth, *Voldgift,* Gyldendal 2013, 897–8.

45 I am not taking into consideration my own scholarship or the publications made in the framework of my research projects.

46 Berg, *Voldgiftsloven,* cit., 312–313; 327; Woxholth, cit., 892–3.

47 Berg, *Voldgiftsloven,* cit., 328.

48 Magnussen and Klevstrand, «Ugyldighetssøksmål mot voldgiftsdommer», cit., 228.

49 Berg, *Voldgiftsloven,* cit., 329; Magnussen and Klevstrand, «Ugyldighetssøksmål mot voldgiftsdommer», cit., 229.

damages for the breach of contract clauses that violated competition law, or based on an incorrect interpretation of facts or of the law. Yet in all these situations, legal literature affirms that it is possible for the court to apply the rule on *ordre public* and annul the award.

It seems reasonable to conclude that legal literature assumes that the court was not bound by the arbitral tribunal's explicit or implicit opinion that the award was valid. Hence, the court could independently evaluate the compatibility of the award with public policy. This entails that the court may independently evaluate the evidence that already was evaluated by the arbitral tribunal, and may form its own opinion of the disputed facts. Furthermore, the court may independently evaluate how the law shall be applied. The evaluation, however, is limited to the sole purpose of verifying whether the award affects public policy.

As regards the merits of the dispute, the court shall not substitute its views to the views of the arbitral tribunal. Should the court find that public policy is not affected, therefore, the court has to affirm the award as valid or enforce it even though it disagreed with the tribunal's evaluation of evidence or application of law. [50] Should, however, the court find that affirming the award would violate fundamental principles, the court shall set aside the award or refuse its enforcement, even though the tribunal considered its own award to be valid.

9. The scope of public policy

It is generally recognized that the rule on public policy shall be exercised restrictively. This applies both internationally [51] and under Norwegian law.[52] Only fundamental principles qualify as principles of public policy,

[50] Cordero-Moss, *Norsk ordre public,* cit., section 5.3.

[51] Born, International Commercial Arbitration, cit., 3312, 3647; Cordero-Moss, International Commercial Contracts, cit., 246ff.

[52] See section 8 above. For further references see Cordero-Moss, *Norsk ordre public,* cit., section 5.

and only serious infringements of these principles justify setting aside an award or refusing its enforcement. Public policy is not deemed to be infringed whenever there is a discrepancy between the award and the result to which a court would have arrived.

In *Eco Swiss*, the CJEU established that competition law is based on fundamental principles, because it is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.[53]

The Court said that the importance of the provision in question (at the time it was article 85 of the EC Treaty) "led the framers of the Treaty to provide expressly, in article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void".[54]

A parallel may be drawn with other areas of law in Norway. There is no general principle according to which a contract is void when it violates mandatory rules of law.[55] However, according to Norwegian legal literature, contracts that violate rules of company law are automatically void.[56] Company law has significant importance for the integrity of the market, and serious infringements of its most important principles may have relevance to public policy.

Other situations in which serious breaches of the underlying principles may have public policy relevance are when third party interests or the reliance on the system are affected, such as in the field of property law or insolvency.[57] It is, however, important to emphasize that public policy is not infringed simply because certain mandatory rules were not applied accurately. It is only when the award significantly breaches important principles, that public policy may become relevant.

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53 C-126/97 (Eco Swiss), at para 36.

54 Ibid.

55 Cordero-Moss, *Norsk ordre public,* cit., section 5.5.1.

56 Mads H. Andenæs, Aksjeselskaper og allmennaksjeselskaper, 2016, s. 60; Mads H. Andenæs, Institutt for privatrettens skriftserie 175, 2009, s. 7–20, 7 ff.; Magnus Årbakke mfl., Aksjeloven og allmennaksjeloven, s. 331; Gudmund Knudsen, Institutt for privatrettens skriftserie 175, 2009, s. 37 Ibid., footnote 60.

57 For an extensive analysis see Cordero-Moss, *Norsk ordre public,* cit., chapter 8.

Furthermore, the public policy evaluation has to be made with regard to the specific case, and not merely on the abstract level of the rule. What is relevant is not violation of the principles, but the consequences that this may have in the specific case. It may be envisaged a situation where the underlying, fundamental principles are violated, but the consequences in the specific case are not unacceptable (for example, because the result is the same as if the rules had not been violated) – public policy would, in such situation, not be violated.

A question that can be raised is whether the result of an award may be deemed to be in contrast with public policy, when the only effect of the award is to order a party to pay reimbursement of damages, for example for breach of contract. Assume a contract that was not fulfilled by one party because it violated competition law. The defaulting party's defence is that fulfilling the contract would imply a violation of competition law. If the award orders that party to pay damages for breach of contract, is *ordre public* violated? Ordering a party to make a payment can hardly be seen to violate fundamental principles. Even where the order to pay is wrongful, there is no automatic relevance to fundamental principles. However, it must be considered that, by ordering payment, the award gives effect to the contract that was breached. If the contract violated fundamental principles, in the example, of competition law, the award is in practice giving effect to the violation of competition law. Where the tribunal's order to effect payment is based on the evaluation of an incidental question relating to fundamental principles, such as competition law, the effect of the award may go beyond the interests of the two disputing parties. The award may undermine the effectiveness of the regime of competition law, and thus affect fundamental principles.[58]

A similar reasoning is found in the field of Norwegian contract law and company law. Remedies for breach of invalid contracts are viewed as a substitute for contract performance and thus unlawful.[59] Similarly,

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[58] Giuditta Cordero-Moss, *Internasjonal privatrett på formuerettens område,* Universitetsforlaget 2014, 288–290; Cordero-Moss, *Norsk ordre public,* cit., section 5.4.

[59] Viggo Hagstrøm, *Obligasjonsrett,* 2nd ed., Universitetsforlaget 2011, 539.

liability for breach of a shareholders agreement may not be affirmed if implementing of the agreement violates company law.[60]

The CJEU made a similar reasoning, in respect of competition law, in the already mentioned *Eco Swiss* case. The issue for the arbitral tribunal had been whether a licensing agreement between two private parties had been lawfully terminated by one of the parties. The arbitral tribunal found that the early termination made by one of the parties was wrongful, and it ordered that party to pay damages to the other party. This award was challenged before the courts of the place of arbitration, the Netherlands. The Dutch Supreme Court referred to the CJEU a request for preliminary ruling on certain matters of procedural law and, more specifically, on whether EU competition law may be deemed to have public policy character. The CJEU, in its evaluation, went beyond the mere circumstance that the award regarded the early termination of a contract between two parties, and that the only effect of the award was to order one party to reimburse damages to the other party. The question of competition law was only incidental, and it had actually not even been raised before the arbitral tribunal. The award, therefore, was simply an award on contract matters. Nevertheless, the CJEU considered the award to be "in fact contrary to"[61] EU competition law. The Court observed that rules of competition law are fundamental principles of European law. On this basis, it found that an award that is in fact contrary to competition law, violates public policy in the sense of the New York Convention.[62]

The reasoning in *Eco Swiss*, therefore, supports the considerations that were made above: it should not be excluded that an award may have relevance to public policy, simply on the basis that the award only regards contractual matters and orders one party to pay a certain sum of money to the other party. Paying an amount of money to a contractual party, in itself, does not affect fundamental principles; but the award may have an impact on the effectiveness of rules that are meant to implement fundamental principles. The *Eco Swiss* decision is considered in the

60 Rt. 2007 s. 360 (Lyse Energi), para 62.

61 C-196/97 (Eco Swiss), para 41

62 Ivi, para 39.

preparatory works of the AA as representing the status of the law in Norway as regards application of the public policy rule.[63]

10. Conclusion

The provisions on *ordre public* laid down in the AA do not constitute an obstacle to the effectiveness of arbitration in Norway – at least not more than in many other countries generally considered to be favourable to arbitration. There is reason to assume that Norwegian courts will take the maximalist approach, and that they thus will independently evaluate whether *ordre public* is infringed or not, without being bound by the evaluation that the arbitral tribunal may have made of the same issue. This is aligned with the Model Law and the New York Convention.

The maximalist theory does not create a contradiction between the finality of the award and the court's control, because the rule on public policy has a narrow scope.

There is, undoubtedly, an overlapping: both the tribunal and the court evaluate the same issues. However, the court is not reviewing the merits of the award. Neither is the court acting as an appeal court on the issues underlying the grounds for annulment and for refusal of enforcement. The purpose of the court's review is not to ascertain whether the tribunal has accurately applied the law or has properly understood the evidence in respect of these issues. The court is carrying out its own, independent evaluation of these issues for the purpose of ascertaining whether the award is null or unenforceable. The court's review, therefore, is made according to the criteria and the standard applicable to annulment and enforcement. The threshold for annulling the award or refusing its enforcement is higher than the threshold a court would have if it was acting as an appeal court.

[63] NOU 2001:33, section 8.5.3.

The proper balance between the opposed interests of preserving effectiveness of arbitral awards on one hand, and ensuring respect of fundamental principles on the other, does not lie in restricting the court's ability to independently verify whether public policy was infringed. It lies in ensuring that the public policy rule has a narrow scope.