

To: International Bar Association
Sub-Committee on Recognition and Enforcement of
Awards

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Subject: Public Policy and Montenegrin Arbitration Law in Practice

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1 Introduction

This report analyses the concept of public policy as applied in the context of recognition and enforcement and setting aside of arbitral awards in Montenegro ("Report").

Firstly, the Report briefly introduces the national legal framework for recognition and enforcement and setting aside of arbitral awards in Montenegro. Therewith, it focuses in particular on statutory regulation of public policy exception (Section 3). Further, the Report examines the notion of public policy endorsed by Montenegrin courts when deliberating on these issues (Section 4). The Report additionally encloses a catalogue of certain key decisions elaborating on the concept of public policy in this setting (Section 5). A table of these decisions is attached as appendix to this Report.

2 Legal Framework

2.1 General

In Montenegro, the recognition and enforcement and setting aside of arbitral awards is regulated by the newly adopted Arbitration Act ("MAA"). As a very fresh piece of legislation that

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entered into force on 26 August 2015, practice under the MAA is yet to be developed.¹

Montenegro is also signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("NYC")². Like other international treaties, NYC has supremacy over national legislation and is directly applicable in Montenegro. Nevertheless, there are still no available court decisions where Montenegrin courts directly relied and based their findings on NYC provisions.

2.2 *Public Policy in the context of Recognition and Enforcement of Arbitral Awards*

In terms of grounds for refusing recognition and enforcement of a foreign arbitral award, the MAA corresponds almost entirely to the UNCITRAL Model Law and NYC. With reference to public policy exception, MAA prescribes that recognition shall be refused:

"if the effects of arbitral award are contrary to the public policy of Montenegro."

The wording of this public policy exception in the MAA slightly differs from the NYC. In the same context, the convention provides that the recognition or enforcement of the award may be denied if the recognition or enforcement of the award would be contrary to the public policy of the country where this motion is filed. Despite the minor language distinction, it has not been argued so far that interpretation of public policy exception in MAA should deviate from the NYC.

Resembling the NYC in this respect, the MAA prescribes that the Montenegrin court shall *ex officio* observe the public policy exception when examining the request for recognition and enforcement of a foreign arbitral award.

2.3 *Public Policy in the context of Setting Aside of Arbitral Awards*

In respect of grounds for setting aside of an award, the MAA follows the provisions of the UNCITRAL Model Law. In relation to public policy, the MAA reproduces the analogous provision from the UNCITRAL Model Law. It provides that Montenegrin court shall set aside the arbitral award:

"if the award itself is contrary to the Montenegrin public policy."

Notably, this public policy exception is somewhat differently formulated than the public policy ground for refusing recognition and enforcement of a foreign arbitral

¹ Before the MAA, the matter of recognition and enforcement of arbitral awards was, until July 2014, governed by the old Montenegrin Conflict of Laws Act and afterwards by the new International Private Law Act; The procedure for setting aside the arbitral award was, prior to the MAA outlined by Civil Proceedings Act. Before 2004, the same procedure was regulated also by the old Montenegrin Conflict of Laws Act.

² Given that NYC was already applicable on the territory of Montenegro while it was part of the former Yugoslavia and state union with Republic of Serbia, Montenegro confirmed its succession to NYC shortly after its declaration of independence. In such capacity, NYC is part of the Montenegrin legal system as of October 2006.

award. It is yet to be seen whether the courts will attribute different meanings to public policy exception in these two procedures, and whether there are any justifications for that.

In the setting aside procedure, Montenegrin courts also consider the public policy exception on their own initiative.

3 Public Policy in National Court Practice

Since Montenegro is relatively young country³, case law addressing specifically the concept of public policy in this context is still very limited. Nevertheless, on several occasions, Montenegrin courts still discussed this issue specifically. From such practice, it appears that, in Montenegro, public policy had never led to annulment or denial of recognition of an award.⁴

In principle, Montenegrin courts observe the concept of public policy through the lens of rules of a general legal order permeating the essence of the state.

In its reasoning, courts relied primarily on the old Montenegrin Conflict of Laws Act, which described the public policy as:

*"foundations of social order established by Montenegrin constitution."*⁵

In line with such definition, courts held that the concept of public policy encompasses only the basic values and principles of the state's social order which, as such, are specified by the Montenegrin constitution. Thus, the courts considered that the public policy exception in this context does not embrace all mandatory norms of Montenegro, but only those principles that protect the essential values of the domestic legal order.

In order to depict the public policy concept, the court *exempli causa* referred to the following: a right to appeal, a right to legal assistance, provisions on the prohibition of the death penalty, prohibition of discrimination, a right to a fair trial and a trial before an independent and impartial tribunal established by the law. Moreover, the prohibition of abuse of rights and the principle of good faith were also recognized as part of the Montenegrin public policy.

Montenegrin courts limited their reasoning on public policy to general observations and did not provide any further, more detailed analysis. The courts thus failed to develop any distinction between substantive and procedural public policy and to contribute to such distinction.

³ Montenegro became independent in June 2006.

⁴ There is no available court practice scrutinizing specifically the issue of public policy in terms of recognition and enforcement of a foreign arbitral award. However, as interpretation of the public policy exception by the courts in setting aside framework was not specifically limited for this procedure, it seems that the Montenegrin courts would ascribe similar meaning to the public policy concept in context of recognition and enforcement of the foreign arbitral awards.

⁵ Article 4 of Conflict of Law Act;

Moreover, for the purpose of recognition and enforcement or setting aside of arbitral awards, the current Montenegrin court practice did not differentiate between domestic and international public policy.

Since the new International Private Law Act replaced the old Conflict of Law Act but failed to incorporate any definition of public policy, it remains to be seen whether further practice will follow the present position of case law. It is also to be tested whether the application of the new MAA will alter the current court practice on public policy exception.

4 Catalogue of Particular Cases

4.1 Commercial Court in Podgorica, Case no. P. 1122/2012, Decision of 24 June 2014

This is the first instance decision in setting aside of the Montenegrin arbitral award in a dispute under a construction contract. The award was rendered in favour of the contractor, ordering the employer to pay a part of the amount claimed by the contractor. The contractor – plaintiff sought to annul the arbitral award alleging violation of the Montenegrin public policy.

It was argued that the award contravened Montenegrin public policy in particular given that: (i) the calculation of interest on the amounts awarded was null and void, (ii) the award was based on allegedly invalid evidence, (iii) the plaintiff was allegedly entitled to withhold payment of certain amounts to defendant, due to outstanding works and defects, (iv) the price for works was allegedly fixed and the awarded amount exceeded such fixed sum.

The court rejected the plaintiff's arguments providing the following reasoning:

- public policy relates to foundations of the society, which are indispensable for the existence and proper functioning of the state;
- public policy, as ground for setting aside of arbitral awards, should serve only to protect the core principles of Montenegrin public order when the award may jeopardize such principles;
- public policy comprises only of those mandatory domestic rules that are contained in the Montenegrin Constitution;

The judge further underlined that arbitral awards are final decisions and that, when reviewing the award in the setting aside procedure, the court should not act as a regular appellate instance and interfere with the merits of the award.

4.2 Commercial Appellate Court in Podgorica, Case no. Pž. 625/2014, Decision of 2 October 2014

This judgment relates to the plaintiff's appeal against the judgement described under 4.1 above.

The second instance court upheld the first instance court's position in respect of public policy argument. It openly confirmed that the court, in the setting aside

procedure, may not re-examine the arbitral tribunal's findings in relation with the applicable interest rates, otherwise it would have assumed the role of the appellate court.

4.3 *Supreme Court of Montenegro, Rev. I P. 8/2015, Decision of 12 February 2015*

When deciding on a motion for revision against the decision of the Commercial Appellate court described under 4.2 above, the Supreme Court of Montenegro further developed the concept of the public policy as follows:

"Public policy is narrower category than the set of the mandatory rules and includes only those domestic provisions that protect the most basic values of our order, because there are values of the domestic legal order which cannot be sacrificed. Exactly these values make our public policy, which encompasses rules of legal and social order that cannot be waived and that must be observed by national courts even when domestic provisions of private international law accept the application of the foreign law and the court."

4.4 *Basic Court in Podgorica, P. 3872/2014, 6 May 2015*

This case pertains to setting aside of an arbitral award ordering compensation of non-pecuniary damages. The plaintiff purported to set aside this award alleging violation of public policy.

It was argued that the tenor of the award was contrary to its rationale, and that the arbitral tribunal misapplied the substantive law in terms of grounds for liability and compensation.

The court rejected such public policy arguments and preserved the award. It was held that, although the invoked grounds could represent breaches of Montenegrin law, these breaches did not amount to violation of Montenegrin public policy. It was further underlined that the court in this proceedings might only assess whether the most important values of Montenegrin order were put at risk; the court should not evaluate whether the arbitral tribunal properly applied Montenegrin law.

4.5 *Higher Court in Podgorica, Gž. 2953/15-14, 10 November 2015*

In the appeal to decision P. 3872/2014 (see point 4.4 above), the plaintiff further argued that any decision rendered contrary to the law represents violation of the constitutional principles and principles underlying the legal order, and, as such, is also a violation of public policy.

The second instance court upheld the first instance judgment and lower court's findings on public policy argument.

5 Appendix

| No. | Identification of the decision | Summary of the public policy argument | Substantive | Procedural | Setting aside denied | Setting aside accepted |
|---|--|---|-------------|------------|----------------------|------------------------|
| Setting Aside of the Domestic Arbitral Award | | | | | | |
| 1. | Commercial Court in Podgorica, P. 1122/2012 24 June 2014 | Public policy is a category that does not encompass dispositive norms and even all mandatory norms of Montenegrin legal order; rather only those mandatory domestic rules that are prescribed by Montenegrin Constitution and that affect the legal and social order of the state. | n/a | | X | |
| 2. | Commercial Appellate Court, Pž. 625/2014 2 October 2014 | Only those mandatory norms that are established by Montenegrin constitution and that regulate the sole essence of the state represent the public policy of Montenegro. The court is not authorised to evaluate the application of the substantive law made by the arbitral tribunal by using the public policy exception. | n/a | | X | |
| 3. | Supreme Court of Montenegro, Rev. I P. 8/2015 12 February 2015 | Public policy should be interpreted restrictively, since it is a narrower category than the sum of all mandatory norms and includes only those domestic norms that protect the most appreciated values of Montenegrin legal order that cannot be sacrificed. | n/a | | X | |
| 4. | Basic Court in Podgorica, P. 3872/2014 6 May 2015 | Not all <i>ius cogens</i> norms represent a public policy, but only those prescribed by Montenegrin constitution. Thus, the breaches of Montenegrin contracts and torts law and civil proceedings law are not to be characterised as breaches of Montenegrin public policy. | n/a | | X | |
| 5. | Higher Court in Podgorica, | Public policy represents a set of mandatory rules of Montenegrin law that protect the basic values of Montenegrin | n/a | | X | |

| No. | Identification of the decision | Summary of the public policy argument | Substantive | Procedural | Setting aside denied | Setting aside accepted |
|-----|------------------------------------|---|-------------|------------|----------------------|------------------------|
| | Gž. 2953/15-14 10 November 2015 | order. In the context of setting aside the arbitral award, public policy cannot be interpreted as to include all applicable laws of Montenegro. | | | | |