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THE SETTING ASIDE OF NATIONAL ARBITRAL AWARDS ON THE GROUND OF A VIOLATION OF SUBSTANTIVE PUBLIC POLICY IN AUSTRIAN ARBITRATION LAW

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ABSTRACT

Background: *Arbitration constitutes a party-autonomous adjudicatory system whose awards possess strong legal validity and are generally not subject to multi-instance review. Arbitral awards are binding and may be set aside only in cases of serious procedural or substantive violations, a principle underpinning all major arbitration regimes. The Austrian Code of Civil Procedure (ACCP) incorporates arbitral tribunals into the state system of legal protection and provides minimum guarantees that justify granting arbitral awards the same legal effect as ordinary court judgments (Section 607 ACCP). To address grave irregularities, Austrian law offers a single remedy: an action for setting aside under Section 611 ACCP, enabling the annulment of an award through a cassatory decision, typically by the Austrian Supreme Court. Violations of public policy represent a central ground for annulment across arbitral systems. Distinctively, Austrian law*

differentiates between procedural and substantive public policy violations—unlike the UNCITRAL Model Law and the German Code of Civil Procedure.

Method: *In the first stage, the author examined the relevant provisions of Austrian law currently in force in accordance with established legal methodology. In the course of historical interpretation, the predecessor provision was also taken into account. Comparable regulations in related legal systems were analysed. In a second step, an in-depth examination of Austrian supreme court case law was carried out. In order to define the concept of 'public policy' ('ordre public'), German supreme court case law and decisions of the European Court of Justice (ECJ) were also analysed. This result was compared with the findings from the evaluation of Austrian case law in order to identify differences and similarities.*

Results and Conclusions: *This study defines the concept of public policy in Austrian arbitration law through an analysis of national and international case law and a strict distinction between substantive and procedural public policy, as required by Section 611 para. 2 ACCP. It establishes that only infringements of the fundamental values of the Austrian legal system – namely the core principles of the Federal Constitution, the ECHR, and essential norms of criminal, private, procedural, and public law – constitute violations of substantive public policy. Case law illustrates which infringements meet this threshold. Due to the narrowly construed scope of Section 611 para. 2 no. 8 ACCP, this ground for setting aside does not allow review of factual or legal correctness of arbitral awards; erroneous arbitral awards must generally stand. Setting aside an arbitral award is justified only where an evident breach of fundamental values exists, provided there is sufficient domestic connection, and where the incompatibility concerns not merely the reasoning but the substantive outcome of the award.*

1 INTRODUCTION

Arbitration represents a party-autonomous system of adjudication. Arbitral awards have a high degree of legal validity. Unlike in state court proceedings, arbitration proceedings do not normally foresee several instances. Arbitral awards are binding and can only be set aside in the event of serious violations. These fundamental assessments form the basis of all known arbitration rules, with differences in detail. The Austrian Code of Civil Procedure (ACCP)[1] has integrated arbitration courts into the state legal protection system. At the same time, the legislator has undertaken to ensure certain minimum guarantees. These minimum guarantees justify granting arbitral awards (Section 607 ACCP) the same effect as judgments of ordinary courts.[2]

1 Austrian Code of Civil Procedure of 1 January 1895 'Zivilprozessordnung, ZPO' (amended 29 December 2025) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699> accessed 5 March 2026.

2 Hans W Fasching and Andreas Konecny (eds), *Zivilprozessgesetze*, vol 4/2 (3rd edn, Manz 2016) § 611 ZPO, mn 3.

In the case of particularly blatant violations, an arbitral award should not have the force of *res judicata/res arbitrata*. As part of the aforementioned state minimum guarantees, Austrian law provides for an action for setting aside (Section 611 ACCP) as the sole legal remedy against domestic arbitral awards. This is aimed at the retroactive removal of the effects of the arbitral award by a cassatory judgment of an ordinary court, usually the Austrian Supreme Court.[3]

In almost all arbitration rules, violations of public policy constitute an important ground for setting aside an arbitral award. A special feature of Austrian arbitration law is that it defines – unlike the UNCITRAL Model Law or Section 1059 para. 2 no. 2 of the German Civil Procedure Code (GCCP)[4] – violations of procedural public policy and substantive public policy as separate grounds for setting aside.

2 THE IMPACT OF PUBLIC POLICY IN AUSTRIAN ARBITRATION LAW

In Austrian arbitration proceedings, as well as in the recognition of foreign arbitral awards, public policy plays a role in several ways.

Grounds for setting aside domestic arbitral awards are both the violation of public policy under procedural law (Section 611 para. 2 no. 5 ACCP[5]) and the violation of public policy under substantive law (Section 611 para. 2 no. 8 ACCP).

Section 613 ACCP also refers to public policy under substantive law. If a court or an authority determines in other proceedings, for example, in enforcement proceedings, that a ground for setting aside pursuant to Section 611 para. 2 nos. 7 and 8 ACCP exists, the arbitral award is not to be observed in these proceedings.

Via the reference to the Austrian Enforcement Regulation (EO)[6] in Section 614 ACCP, public policy under recognition law (public policy under substantive and/or procedural law as public policy under enforcement law) applies to the recognition and declaration of enforceability of foreign arbitral awards (see Section 408 no. 2 and no. 3 EO).[7]

3 ibid

4 German Code of Civil Procedure of 30 January 1877 'deutsche Zivilprozessordnung, dZPO' (amended 5 December 2025) <https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html> accessed 5 March 2026.

5 See, Henriette Christine Boscheinen-Duursma, 'Violation of Procedural Public Policy as a Ground for Setting Aside under Austrian Arbitration Law' (2024) 8 Yearbook on International Arbitration and ADR 338.

6 Austrian Enforcement Regulation of 27 May1896 'Exekutionsordnung, EO' (amended 15 November 2023) <https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700> accessed 5 March 2026.

7 Cf., Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 'On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' [2012] OJ L 351/1, art 34, para 1; and, Austrian Enforcement Regulation (n 6) § 81 (4).

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While the setting aside proceedings take place in the state in which the arbitral award was issued (i.e., the arbitral tribunal has its seat), the recognition and enforcement proceedings of a foreign arbitral award take place before the jurisdiction of the court of the state in which the award is to be enforced.[8]

The declaration of enforceability and recognition of foreign enforcement titles (acts and deeds drawn up abroad) is governed by Sections 403 et seq. EO. Pursuant to Section 403 EO, foreign arbitral awards therefore require a declaration of enforceability in Austria in order to be enforced, unless they are to be enforced on the basis of an international agreement[9] or a legal act of the European Union without a separate declaration of enforceability.[10]

Section 408 EO states the grounds on which a declaration of enforceability can be refused. According to the prevailing opinion and established case law, the special provision of Section 408 no. 2 and no. 3 EO (formerly: Section 81 no. 4 EO previous version) is an exceptional rule that may only be used sparingly. Enforcement is only to be refused if the enforcement title is based on foreign legal concepts that are completely incompatible with the domestic legal system and therefore the enforceability of the foreign title is completely incompatible with the domestic legal system.[11] A violation of public policy would only be affirmed if the procedural rights of a party have been intolerably curtailed. For this purpose, the foreign proceedings as a whole must always be assessed on the basis of all circumstances.[12]

If the recognition and enforcement is not governed by the EO, but by provisions of international law[13] or by legal acts of the European Union, then the public policy of recognition law applies insofar as it is (still) provided for there.[14]

8 Fasching and Konecny (n 2) § 611 ZPO, mn 77; Marianne Roth, *Zivilprozessrecht* (17th edn, Jan Sramek Verlag 2022) 346.

9 See, Anton G Maurer, *The Public Policy Exception Under the New York Convention: History, Interpretation and Application* (JurisNet 2022) 73.

10 Cf., Katharina Plavec, 'Die Abschaffung des Exequaturverfahrens durch die Neufassung der EuGVVO' (2015) 1 Ecolex 9.

11 Case 3 Ob 211/05h (Austrian Supreme Court, 26 April 2006); Case 3 Ob 38/11a (Austrian Supreme Court, 22 March 2011); Case 3 Ob 154/10h (Austrian Supreme Court, 13 April 2011); Case 3 Ob 65/11x (Austrian Supreme Court, 24 August 2011); Case 3 Ob 46/13f (Austrian Supreme Court, 21 August 2013); Case 3 Ob 208/15g (Austrian Supreme Court, 17 February 2016); Case 3 Ob 10/17t (Austrian Supreme Court, 7 June 2017); Case 3 Ob 251/18k (Austrian Supreme Court, 20 February 2019); Case 8 Ob 129/24i (Austrian Supreme Court, 5 December 2024); Case 8 Ob 32/25a (Austrian Supreme Court, 25 April 2025); Case 5 Ob 45/25s (Austrian Supreme Court, 23 September 2025).

12 Case 3 Ob 251/18k (n 11); Case 3 Ob 80/22v (Austrian Supreme Court, 8 September 2022); Case 8 Ob 129/24i (n 11); Case 8 Ob 32/25a (n 11); Case 5 Ob 45/25s (n 11).

13 Cf. Veit Öhlberger, 'Vollstreckung ausländischer Schiedssprüche in Österreich und deren Formvoraussetzungen nach dem New Yorker Übereinkommen' (2007) 2 SchiedsVZ 77; Elisabeth Tretthahn-Wolski and Marija Dobric, 'Investitionsschiedssprüche nach den Additional Facility Rules sind nach dem New Yorker Übereinkommen 1958 vollstreckbar' (2022) 12 RdW 833.

14 Case 3 Ob 2/21x (Austrian Supreme Court, 24 March 2021); Case 3 Ob 7/23k (3 Ob 8/23g) (Austrian Supreme Court, 15 March 2023).

3 VIOLATION OF PUBLIC POLICY AS A GROUND FOR SETTING ASIDE

The grounds for setting aside an arbitral award are exhaustively listed in Section 611 para. 2 ACCP[15]. The following three grounds for setting aside are related to violations of public policy:

- no. 2. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
- no. 5. The arbitration proceedings were conducted in a manner that contradicts the fundamental principles of the Austrian legal system (procedural public policy);
- no. 8. The arbitral award contradicts the fundamental principles of the Austrian legal system (substantive public policy).

Of these, no. 2 – the denial of the right to be heard constitutes a prime example of a violation of public policy – and no. 5 concern formal public policy. No. 8 pertains to substantive public policy.

In the following, only the setting aside of domestic arbitral awards due to conflict with substantive public policy under Austrian law is described.

4 INCOMPATIBILITY OF THE ARBITRAL AWARD WITH SUBSTANTIVE PUBLIC POLICY

4.1. The concept of public policy in general

In international private and civil procedural law, public policy refers to fundamental domestic values and essential domestic legal principles. It therefore provides a guaranteed minimum legal standard for a fair outcome in a specific individual

15 Walter H Rechberger and Thomas Klicka (edn), *ZPO Zivilprozessordnung: Kommentar* (5th edn, Verlag Österreich 2019) s 611, mn 3; Walter H Rechberger, 'Die Widersprüchlichkeit eines Schiedsspruchs als Aufhebungsgrund nach österreichischem Recht' (2006) 4 SchiedsVZ 174; Hubertus Schumacher, 'Ein Schiedsspruch – und was nun? – Berichtigung, Erläuterung, Ergänzung und Aufhebung des Schiedsspruchs nach dem neuen österreichischen Schiedsverfahrensrecht' (2006) 2 SchiedsVZ 73; Fasching and Konecny (n 2) § 611 ZPO, mn 82; Nikolaus Pitkowitz, 'Die Aufhebung von Schiedssprüchen' in Michael Nueber (ed), *Handbuch Schiedsgerichtsbarkeit und ADR* (LexisNexis 2021) 426-7; Désirée Prantl, Stephanie Rohmann and Paul Adelt, 'Die Rechtsprechung des OGH zur Aufhebung von Schiedssprüchen seit dem SchiedsRÄG 2013' (2023) 338(7) Ecolex 559; Alexander Klauser and Georg Kodek, *Jurisdiktionsnorm und Zivilprozessordnung JN-ZPO* (18th edn, Manz 2018) s 611 ZPO, E 3; Roth (n 8) 347; Boscheinen-Duursma, 'Violation of procedural public policy (n 5) 338; Case 2 Ob 112/12b (Austrian Supreme Court, 17 June 2013).

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case.[16] German literature emphasises that it is not primarily a matter of enforcing indispensable or inviolable principles of one's own legal system, but of providing a minimum level of protection for those affected in the conflict of laws that is organised in a spatial and proportionate manner.[17] In contrast, the Austrian Supreme Court rules that the object of protection is not the subjective legal positions of the parties to the proceedings, but the domestic legal system, which is to be protected from the intrusion of completely incompatible legal concepts and from the intolerable violation of fundamental values.[18]

A reservation of public policy is a reservation in favour of domestic public policy. A distinction must be made between two variants: public policy under the conflict of laws and public policy under recognition law.

Conflict of laws public policy rules are concerned with the exceptional non-application of a foreign law if it is in substantial conflict with the principles of domestic law in an individual case (see Art 21 Rome I Regulation, Art 26 Rome II Regulation).

16 Jan Kropholler, *Internationales Privatrecht, einschließlich der Grundbegriffe des internationalen Zivilverfahrensrechts* (6th edn, Mohr Siebeck 2006) § 36, 245; Rainer Hüßtege and Heinz-Peter Mansel (eds), *BGB: Rom-Verordnungen, EuGüVo, EuPartVo, HUP, EuErbVO*, vol 6 (3rd edn, Nomos 2019) art 26 Rom II-VO, mn 1; Jan von Hein (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*: *Internationales Privatrecht II, Internationales Wirtschaftsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (art 50–253), WBVG*, Vol 13 (8th edn, CH Beck 2020) art 26 Rom II-VO, mn 12; Werner F Ebke, 'Das Internationale Privatrecht der Haftung des gesetzlichen Abschlussprüfers nach der Rom I-VO und der Rom II-VO' (2010) 109 ZVglRWiss 442; Dieter Henrich and Ulrich Spellenberg (eds), *Julius v Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Einführungsgesetz zum Bürgerlichen Gesetzbuche, IPR, Rom II-VO (Internationales Recht der außervertraglichen Schuldverhältnisse)* (14th edn, De Gruyter 2013) art 6 EGBGB, mn 43; Hans-Theodor Soergel, *Bürgerliches Gesetzbucg mit Einführungsgesetz und Nebengesetzen (BGB)*, vol 27/1: Rom II-VO; Internationales Handelsrecht, Internationales Bank- und Kapitalmarktrecht (Thomas Pfeiffer ed, 13th edn, Kohlhammer 2019) art 26 Rom II-VO, mn 7; Harm P Westermann, Barbara Grunewald and Georg Maier-Reimer (eds), *Erman Bürgerliches Gesetzbuch: Handkommentar*, vol 1 (15th edn, Cologne Otto Schmidt 2017) art 6 EGBGB, mn 1; Christian Armbrüster and others (eds), *Julius v Staudingers Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen, art 11–29 Rom I-VO, art 46 b, c EGBGB, Internationales Vertragsrecht*, vol 2 (14th edn, De Gruyter 2013) art 21 Rom I-VO, mn 1; Roth (n 8), 352; Frank-Bernd Weigand and Antja Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration* (3rd edn, OUP 2019) para 20.546.

17 Hüßtege and Mansel (n 16) art 26 Rom II-VO, mn 1; Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht* (9th edn, CH Beck 2004) s 16, 520 et seq, where general concepts of justice are emphasised; increasingly focussing on sovereign ideas of sovereignty Christian von Bar and Peter Mankowski, *Internationales Privatrecht: Allgemeine Lehren*, vol 1 (2nd edn, CH Beck 2003) s 7, mn 258, "type of pressure relief valve"; on the public policy provisions in European secondary law Aurelia Colombi Ciacchi, *Internationales Privatrecht, ordre public européen und Europäische Grundrechte* (ZERP-Diskussionspapier 1, Zentrum für Europäische Rechtspolitik 2008) 7; Soergel (n 16) art 26 Rom II-VO, mn 9.

18 Case 1 Ob 33/00k (Austrian Supreme Court, 28 March 2000); Case 3 Ob 251/18k (n 11); Case 5 Ob 45/25s (n 11).

A violation of public policy under recognition law exists if the enforcement order is based on foreign legal concepts that are completely incompatible with the domestic legal system. Consequently, the foreign judgment or arbitral award is exceptionally refused recognition or is exceptionally not declared enforceable. Occasionally, the latter is summarised under the concept of public policy under enforcement law.[19]

The cases of application of the reservation of public policy under recognition law are divided into two categories. Public policy under substantive law is when a foreign decision is refused recognition under national law on substantive grounds. The term "substantive public policy" covers violations of substantive law on the one hand and of conflict of laws on the other.[20] Public policy under procedural law is used to describe cases in which the foreign proceedings are incompatible with fundamental principles of national law, for example, because they have violated fundamental procedural principles applicable under national law.[21]

There are parallels in the formulation between public policy under the conflict of laws and public policy under recognition law. Both types of public policy must be applied restrictively.[22] However, the respective principles of interpretation cannot be applied arbitrarily, as each of these two variants of public policy applies at a different level. The reservation of public policy under conflict of laws already intervenes in the question of the applicable law. It can therefore suspend provisions of a foreign legal system in individual cases. The reservation of public policy under the law of recognition, on the other hand, only intervenes at a later stage. It can prevent the recognition or enforcement in member states of a foreign judgment or arbitral award that has already been issued.[23] However, a judgment from another Contracting State/Member State may not be refused solely on the grounds that the court of the State in which enforcement is sought considers that national or European Union law has been incorrectly applied in that judgment.[24]

19 Colombi Ciacchi (n 18) 19; Hans Dolinar and Ray Lanier, 'Public Policy Objections to the Recognition and Enforcement of Foreign Arbitral Agreements and Awards: Perspectives on Austrian and American Law' in Peter Jabornegg and Karl Spielbüchler (eds), *Festschrift für Rudolf Strasser zum 70 Geburtstag* (Manzsche Verlags und Universitätsbuchhandlung 1993) 35; Roth (n 8) 353; cf. Case 3 Ob 89/85 (Austrian Supreme Court, 30 October 1985); Case 3 Ob 88/89 (Austrian Supreme Court, 15 November 1989); Case 3 Ob 126/89 (Austrian Supreme Court, 13 December 1989); Case 3 Ob 251/18k (n 11).

20 See, Case VII ZB 28/13 (German Supreme Court, 24 April 2014) mn 13.

21 ibid

22 Klauser and Kodek (n 15) s 611 ZPO, E 33/2; Case 9 Ob 27/12d (Austrian Supreme Court, 24 April 2013); Case 18 OCg 3/15p (Austrian Supreme Court, 23 February 2016); Case 3 Ob 36/25b (Austrian Supreme Court, 16 April 2025).

23 Case 3 Ob 89/85 (n 19); Case 3 Ob 251/18k (n 11).

24 Case 3 Ob 233/06w (Austrian Supreme Court, 22 February 2007).

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Occasionally, a distinction is also made between public policy under recognition law and public policy under setting aside law. This distinction, if it is considered to exist at all, is not taken into account in this article.

4.2. Definition of public policy by the ECJ, German and Austrian Supreme Court

According to the ECJ's definition, public policy must be understood '*as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State*'.[25] According to Austrian case law, a violation of European public policy can only be assumed if there is a serious disregard of fundamental EU standards.[26] Following the Eco Swiss judgment of the ECJ, Art 101 and 102 TFEU (Treaty on the Functioning of the European Union) are regarded as part of public policy.[27] The violation of these standards can be successfully asserted in an action for setting aside, taking into account the prohibition of *révision au fond*.[28]

According to the case law of the German Supreme Court, the public policy examination must ask

> 'whether the result of the application of the foreign law contradicts the basic ideas of the German regulation and the concepts of justice inherent in them to such an extent that we consider it unacceptable'.[29]

25 Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade* and *Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL* (ECJ, 23 November 1999) ECLI:EU:C:1999:575, para 30; following this Armbrüster and others (n 16) art 21 Rom I-VO, mn 8; Hüßtege and Mansel (n 16) art 26 Rom II-VO, mn 5; Hein (n 16) art 26 Rom II-VO, mn 18; Soergel (n 16) art 26 Rom II-VO, mn 10.

26 Case 3 Ob 233/06w (n 24); Case 2 Ob 22/14w (Austrian Supreme Court, 18 February 2015); Case 5 Ob 72/16y (Austrian Supreme Court, 1 March 2017); in more detail on the relationship between arbitration law and European public policy, Paul Oberhammer, 'Gemeinschaftsrecht und schiedsrechtlicher ordre public' (1999) 2 RdW 62.

27 Case C-126/97 *Eco Swiss v. Benetton* (ECJ, 1 June 1999) ECLI:EU:C:1999:269.; Oberhammer, 'Gemeinschaftsrecht (n 26); Rechberger and Klicka (n 15) s 611 ZPO, mn 29; see also, Case 2 Ob 22/14w (n 26); Case 5 Ob 45/25s (n 11).

28 Rechberger and Klicka (n 15) s 611 ZPO, mn 29; Alex Reidlinger and Diana Ionescu, 'Die Überprüfung von Schiedssprüchen durch staatliche Gerichte hinsichtlich möglicher Verstöße gegen EU-Wettbewerbsrecht: Die Genentech-Entscheidung des EuGH vom 7 Juli 2016 (C-567/14)' [2017] ÖZK 9; Case 2 Ob 22/14w (n 26).

29 E.g., Case IV ZB 501/68 (German Supreme Court, 17 September 1968); Case IX ZR 127/87 (German Supreme Court, 28 April 1988); Case IX ZB 82/90 (German Supreme Court, 16 September 1993).

According to the established case law of the Austrian Supreme Court, public policy (conflict of laws) refers to the legal principle according to which a rule applicable under the general principles of private international law is not to be applied if its application is intolerably offensive to the domestic sense of justice[30] and contains legal ideas that are completely incompatible with the domestic legal system.[31]

Because the public policy clause represents an exception that is contrary to the system, the most restrictive use is generally required. A simple inequity of the result is just as insufficient as the mere contradiction of mandatory Austrian regulations. The first essential prerequisite is that fundamental values of the Austrian legal system are the subject of the violation. The second essential prerequisite for the application of the reservation clause is that the result of the application of foreign substantive law and not merely this law itself is objectionable and, moreover, that there is a sufficient domestic connection.[32] The fundamental principles of the Federal Constitution, but also of criminal

30 Case 7 Ob 218/74 (Austrian Supreme Court, 7 November 1974); Case 3 Ob 224/75 (Austrian Supreme Court, 15 June 1976); Case 7 Ob 14/79 (Austrian Supreme Court, 28 June 1979); Case 1 Ob 33/00k (n 18); Case 3 Ob 221/04b 79 (Austrian Supreme Court, 26 January 2005); Case 3 Ob 154/10h (n 11); Case 9 Ob 34/10f (Austrian Supreme Court, 28 February 2011); Case 3 Ob 65/11x (n 11); Case 3 Ob 10/17t (n 11); Case 4 Ob 233/19x (Austrian Supreme Court, 21 February 2020); Case 2 Ob 207/20k (Austrian Supreme Court, 25 November 2021); Case 5 Ob 42/22w (Austrian Supreme Court, 1 December 2022).

31 Case 7 Ob 14/79 (n 30).

32 Case 6 Ob 242/98a (Austrian Supreme Court, 24 September 1998); Case 1 Ob 33/00k (n 18); Case 4 Ob 199/00v (Austrian Supreme Court, 13 September 2000); Case 5Ob131/02d (Austrian Supreme Court, 25 June 2002); Case 3Ob221/04b (Austrian Supreme Court, 26 January 2005); Case 8 Ob60/05i (Austrian Supreme Court, 30 May 2005); Case 3 Ob 242/05t (Austrian Supreme Court, 15 February 2006); Case 7 Ob 236/05i (Austrian Supreme Court, 26 April 2006); Case 3 Ob 211/05h (n 11); Case 3 Ob 49/06m (Austrian Supreme Court, 30 May 2006); Case 1 Ob 13/07d (Austrian Supreme Court, 27 February 2007); Case 2 Ob 50/08d (Austrian Supreme Court, 10 April 2008); Case 9 Ob 53/08x (Austrian Supreme Court, 20 August 2008); Case 9 Ob 70/10z (Austrian Supreme Court, 22 October 2010); Case 7 Ob 200/10b (Austrian Supreme Court, 19 January 2011); Case 3 Ob 38/11a (n 11); Case 9 Ob 34/10f (n 30); Case 3 Ob 65/11x (n 11); Case 3 Ob 186/11s (Austrian Supreme Court, 12 October 2011); Case 2 Ob 9/12f (Austrian Supreme Court, 28 March 2012); Case 1 Ob 180/12w (Austrian Supreme Court, 11 October 2012); Case 2 Ob 206/12a (Austrian Supreme Court, 24 January 2013); Case 9 Ob 27/12d (n 22); Case 6 Ob 138/13g (Austrian Supreme Court, 28 August 2013); Case 2 Ob 238/13h (Austrian Supreme Court, 27 November 2014); Case 2 Ob 22/14w (n 26); Case 8 Ob 28/15y (Austrian Supreme Court, 24 March 2015); Case 8 Ob 53/15z (Austrian Supreme Court, 27 May 2015); Case 18 OCg 2/15s (Austrian Supreme Court, 19 August 2015); Case 7 Ob 142/15f (Austrian Supreme Court, 16 October 2015); Case 3 Ob 208/15g (n 11); Case 18 OCg 3/15p (n 22); Case 18 OCg 2/16t (Austrian Supreme Court, 28 September 2016); Case 18 OCg 6/16f (Austrian Supreme Court, 2 March 2017); Case 3 Ob 10/17t (n 11); Case 1 Ob 24/18p (Austrian Supreme Court, 21 March 2018); Case 18 OCg 2/18w (Austrian Supreme Court, 9 October 2018); Case 7 Ob 145/18a (Austrian Supreme Court, 26 September 2018); Case 3 Ob 153/18y (Austrian Supreme Court, 19 December 2018); Case 3 Ob 249/18s (Austrian Supreme Court, 23 January 2019); Case 3 Ob 251/18k (n 11); Case 2 Ob 170/18s (Austrian Supreme Court, 29 January 2019); Case 4 Ob 230/18d (Austrian Supreme Court, 25 April 2019); Case 18 OCg 1/19z (Austrian Supreme Court,

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law, private law and procedural law must be understood as fundamental values covered by public policy, whereby it is not the way or the reasoning, but the result of the arbitral award that is decisive for compatibility. It is not sufficient for the law or legal relationship itself to be contrary to public policy; enforcement must also be unacceptable for the domestic legal system (public policy under the law of recognition).[33]

4.3. Definition of the Concept of 'Substantive Public Policy' Pursuant to Section 611 para. 2 No. 8 ACCP

4.3.1. General Information

Pursuant to Section 611 para. 2 no. 8 ACCP, an arbitral award must be set aside if the award contradicts the fundamental values of the Austrian legal system (ordre public). The wording "contradicts the fundamental values of the Austrian legal system (ordre public)" represents a compromise between the wording of Section 595 para. 1 no. 6 first case ACCP previous version, which is based on Section 6 IPRG, and Art V para. 2 lit b NYC.[34]

The ground for setting aside under Section 595 para.1 no. 6 case 2 ACCP previous version (violation of the arbitral award against mandatory legal provisions, the application of which cannot be waived by a choice of law by the parties even in the case of a matter with a foreign element pursuant to Section 35 IPR Act) was not adopted in Section 611 para. 2 ACCP in line with the UNCITRAL Model Law.[35] Only for the specially protected groups of consumers[36] and employees do Section 617 para. 6 no. 1 ACCP and Section 618 ACCP continue to provide for this ground for setting aside.[37]

15 May 2019); Case 3 Ob 13/19m19z (Austrian Supreme Court, 19 November 2019); Case 4 Ob 233/19x (n 30); Case 6 Ob 7/20b (Austrian Supreme Court, 25 June 2020); Case 3 Ob 71/20t (Austrian Supreme Court, 2 September 2020); Case 2 Ob 207/20k (n 30); Case 18 OCg 2/21z (Austrian Supreme Court, 22 September 2021); Case 5 Ob 42/22w (n 30); Case 3 Ob 7/23k (n 14); Case 8 Ob 32/25a (n 11).

33 Case 3 Ob 221/04b (n 30); cf. Roth (n 8) 352; Dolinar and Lanier (n 19) 35.

34 Paul Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts* (Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen 27, Manz 2002) 135; Fasching and Konecny (n 2) § 611 ZPO, mn 157; Roth (n 8) 353; Dolinar and Lanier (n 19) 35; Maurer (n 9) 53 et seq, 67 et seq.

35 On the considerations behind this Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts* (n 34) 136; Fasching and Konecny (n 2) § 611 ZPO, mn 158, 159; Weigand and Baumann (n 16) para 20.526.

36 Continuing, Dietmar Czernich, 'Anwendbares Recht zur Bestimmung der Verbrauchereigenschaft im Schiedsverfahren' (2014) 5 RdW 251.

37 For further information cf., Fasching and Konecny (n 2) § 617 ZPO, mn 51; § 618 ZPO, mn 22.

4.3.2. Ex Officio Consideration

Unlike the ground for setting aside under Section 611 para. 2 no. 5 ACCP, the ground for setting aside the arbitral award on the ground that it conflicts with public policy under substantive law must be observed not only upon application but also ex officio (Section 611 para. 3 ACCP). If the ground for setting aside the violation of public policy under substantive law is established in other official proceedings or court proceedings, this means that the arbitral award does not have to be observed in these proceedings pursuant to Section 613 ACCP.[38]

4.3.3. Restrictive Application

As the substantive public policy clause represents an exception that is contrary to the system, the most sparing use is generally required.[39]

The content of the protected fundamental values of Austrian law cannot be defined in detail and is also subject to change over time.[40] According to established case law, the "fundamental values of the Austrian legal system" are understood to be the fundamental principles of the Federal Constitution, the principles of the ECHR, criminal law, private law, procedural law and public law.[41]

A simple inequity of the result is just as little sufficient as the mere contradiction of mandatory Austrian provisions.[42] The circle of fundamental values protected by the legal system is more restricted than the area of mandatory law.[43] Fundamental values are the indispensable principles that characterise Austrian law.[44] Compatibility is not determined by the method or the reasoning, but by the result of the arbitral award.[45]

It is not sufficient for the right or legal relationship itself to be contrary to public policy; enforcement must also be unacceptable for the domestic legal system.[46] The decisive factor

38 Walter H Rechberger, 'Die Reform des österreichischen Schiedsrechts' (2008) 25 Ritsumeikan Law Review 120; Rechberger and Klicka (n 15) s 611 ZPO, mn 31; Fasching and Konecny (n 2) § 611 ZPO, mn 156, s 613 ZPO, mn 16; Elmar Buchstätter, *Gerichtliche Kontrolle im Schiedsverfahren* (Jan Sramek Verlag 2026) 224.

39 Pitkowitz (n 15) 454; Roth (n 8) 349; Weigand and Baumann (n 16) para 20.546; Dolinar and Lanier (n 19) 35; from recent case law, e.g. . Case 18 OCg 1/19z (n 32); Case 3 Ob 13/19m (n 32); Case 4 Ob 233/19x (n 30); Case 6 Ob 7/20b (n 32); Case 3 Ob 71/20t (n 32); Case 2 Ob 207/20k (n 30); Case 18 OCg 2/21z (n 32); Case 5 Ob 42/22w (n 30); Case 3 Ob 7/23k (n 14).

40 Pitkowitz (n 15) 454; Fasching and Konecny (n 2) § 611 ZPO, mn 161.

41 Fasching and Konecny (n 2) § 617 ZPO, mn 160; Case 3 Ob 13/19m (n 32); Case 18 OCg 2/21z (n 32); Case 3 Ob 7/23k (n 14); Case 18 OCg 1/24g (n); Case 5 Ob 45/25s (n 11).

42 Case 7 Ob 200/10b (n 32); Case 5 Ob 45/25s (n 11).

43 Pitkowitz (n 15) 454; Klauser and Kodek (n 15) s 611 ZPO, E 33; Case 18 OCg 5/21s (Austrian Supreme Court, 15 December 2021).

44 Fasching and Konecny (n 2) § 617 ZPO, mn 160; aus der jüngeren rechtsprechung Case 3 Ob 13/19m (n 32); Case 18 OCg 2/21z (n 32); Case 5 Ob 42/22w (n 30); Case 3 Ob 7/23k (n 14).

45 Klauser and Kodek (n 15) s 611 ZPO, E 33/1; Case 3 Ob 221/04b (n 30); Case 5 Ob 272/07x (Austrian Supreme Court, 1 April 2008); Case 2 Ob 22/14w (n 26).

46 Case 3 Ob 221/04b (n 30); Case 3 Ob 242/05t (n 32).

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for the public policy test is not the way or the reasoning, but the result of the arbitral award.[47] The review must not only cover the operative part of the arbitral award itself, but also the legal transaction on which it is based.[48] In its review, the court is not bound by the arbitral tribunal's findings of fact.[49] The object of protection is not the subjective legal positions of the parties to the proceedings, but the domestic legal system, which is to be protected against the intrusion of legal ideas that are completely incompatible with it and against the intolerable violation of fundamental values.[50]

4.3.4. Relativity of Public Policy and Prohibition of a Révision au Fond

Another essential prerequisite for the application of the reservation clause is a sufficient domestic relationship.[51] When examining the reservation clause, a graduated standard of review is applied depending on the extent and significance of the domestic connection (relativity of public policy).[52] A reference to another Member State of the European Union may also be sufficient if the possible violation of public policy arises from substantive standards of Union law.[53]

An arbitral award may not be reviewed from a legal or factual perspective. An obvious violation of the fundamental values of the legal system is therefore required for the affirmation of a violation of public policy.[54] This criterion of obviousness follows from the prohibition of a *révision au fond*.[55] It is now used throughout the more recent European regulations on the public policy reservation.[56]

47 Fasching and Konecny (n 2) § 611 ZPO, mn 163; Case 3 Ob 221/04b (n 30); Case 2 Ob 22/14w (n 26); Case 18 OCg 3/15p (n 22).

48 Fasching and Konecny (n 2) § 611 ZPO, mn 163; Case 1 Ob 1104/28 (Austrian Supreme Court, 15 January 1929).

49 Fasching and Konecny (n 2) § 611 ZPO, mn 163.

50 Case 1 Ob 33/00k (n 18); Case 3 Ob 251/18k (n 11); Case 3 Ob 7/23k (n 14); Case 5 Ob 45/25s (n 11).

51 Pitkowitz (n 15) 455; recently Buchstätter (n 38) 212-3; Case 18 OCg 6/16f (n 32); Case 3 Ob 10/17t (n 11); Case 1 Ob 24/18p (n 32); Case 18 OCg 2/18w (n 32); Case 7 Ob 145/18a (n 32); Case 3 Ob 153/18y (n 32); Case 3 Ob 249/18s (n 32); Case 3 Ob 251/18k (n 11); Case 2 Ob 170/18s (n 32); Case 4 Ob 230/18d (n 32); Case 18 OCg 1/19z (n 32); Case 3 Ob 13/19m (n 32); Case 4 Ob 233/19x (n 30); Case 6 Ob 7/20b (n 32) Case 3 Ob 71/20t (n 32); Case 2 Ob 207/20k (n 30); Case 18 OCg 2/21z (n 32); Case 5 Ob 42/22w (n 30); Case 3 Ob 7/23k (n 14).

52 Pitkowitz (n 15) 455; Prantl, Rohmann and Adelt (n 15) 562; Buchstätter (n 38) 212; Case 3 Ob186/11s (Austrian Supreme Court, 12 October 2011); Case 18 OCg 7/19g (Austrian Supreme Court, 6 March 2020), specifically on the transfer of this assessment to the arbitration proceedings.

53 Prantl, Rohmann and Adelt (n 15) 562; Case 18 OCg 7/19g (n 52).

54 Fasching and Konecny (n 2) § 611 ZPO, mn 161, with reference to the case law of the German Supreme Court.

55 Pitkowitz (n 15) 454; Prantl, Rohmann and Adelt (n 15) 562; Case 5 Ob 272/07x (n 45); further to the ban on *révision au fond* Emmanouil Mavrantonakis, *Das Verbot der révision au fond im internationalen Handelsschiedsverfahren: Zur Bindung des staatlichen Gerichts an die schiedsgerichtlichen Sachverhaltsfeststellungen und zu den erforderlichen Ausnahmen* (Veröffentlichungen zum Verfahrensrecht 177, Mohr Siebeck 2021) passim; Buchstätter (n 38) 215.

56 Fasching and Konecny (n 2) § 611 ZPO, mn 161, who is in favour of adopting the principle of obviousness in Austrian law.

The ground for setting aside pursuant to Section 611 para. 2 no. 8 ACCP does not provide a legal basis for clarifying whether and to what extent the arbitral tribunal has correctly resolved the questions of fact and law raised in the proceedings in the arbitral award outside the limited scope of review of public policy illegality.[57] As a matter of principle, erroneous arbitral awards must therefore generally be tolerated and cannot be reviewed merely on their merits.[58]

4.4. Examples of Violations of Substantive Public Policy and Negative Examples

4.4.1. Arbitrary Application of the Law by the Arbitral Tribunal

The prohibition of a *révision au fond* also corresponds to the legal situation in Germany, which is identical in this respect, although recent case law considers an exception to be "at most" possible in the event of arbitrary application of the law by the arbitration tribunal. The Austrian Supreme Court has now endorsed this legal opinion.[59] It now consistently rules that an exception to the prohibition *of révision au fond* is considered possible (only) in the event of arbitrary application of the law by the arbitral tribunal. However, arbitrariness can only be derived from a repeated blatant misjudgement of the legal situation or if the judge has disregarded essential procedural results without an obvious reason.[60] Furthermore, international decision-making harmonisation must not be disproportionately disturbed.[61]

4.4.2. Obvious Violations of Fundamental Provisions of EU Law

Obvious violations of fundamental provisions of EU law also constitute a violation of public policy under substantive law. These include violations of Art 101 and 102 TFEU or European state aid law.[62] According to case law, a public policy violation of the arbitral

57 Walter H Rechberger (ed), *ZPO Zivilprozessordnung: Kommentar* (4th edn, Verlag Österreich 2014) s 611 ZPO, mn 11; Fasching and Konecny (n 2) § 611 ZPO, mn 162; Christoph Liebscher, Paul Oberhammer and Walter H Rechberger (eds), *Schiedsverfahrensrecht*, vol 2 (Verlag Österreich 2016) para 11-118; Pitkowitz (n 15) 427; Dietmar Czernich, 'Die Rechtsprechung des OGH als zentrale Instanz in Schiedssachen' (2016) 22 ÖJZ 1002; Klauser and Kodek (n 15) s 611 ZPO, E 33/6; Case 5 Ob 272/07x (n 45); Case 2 Ob 206/12a (n 32); Case 9 Ob 27/12d (n 22); Case 2 Ob 22/14w (n 26); Case 18 OCg 2/15s (n 32); Case 3 Ob 10/17t (n 11); Case 3 Ob 190/21v (3 Ob 201/21m) (Austrian Supreme Court, 26 January 2022); Case 18 OCg 1/24g (Austrian Supreme Court, 17 October 2024).

58 Case 18 OCg 3/15p (n 22).

59 ibid

60 Prantl, Rohmann and Adelt (n 15) 562; Case 3 Ob 153/18y (n 32); Case 3 Ob 190/21v (n 57); Case 18 OCg 5/21s (n 43); Case 18 OCg 1/22d (Austrian Supreme Court,4 May 2022).

61 Fasching and Konecny (n 2) § 611 ZPO, mn 162; Case 3 Ob 221/04b (n 30).

62 Rechberger and Klicka (n 15) s 611 ZPO, mn 29; Oberhammer, 'Gemeinschaftsrecht (n 26) 62; Fasching and Konecny (n 2) § 611 ZPO, mn 165; Paul Oberhammer, 'Europäisches Beihilferecht und schiedsrechtlicher ordre public' (2012) 1 GesRZ 29; Case 3 Ob 115/95 (Austrian Supreme Court,

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award is to be denied due to the inseparability of the purchase obligation and the quantity reduction clause. The question of whether the arbitral award violates EU antitrust law and the applicable standard of review would therefore not be prejudicial.[63]

Simple violations of mandatory Union law, on the other hand, do not constitute a violation of public policy.[64] This applies, for example, to combined know-how agreements and trademark licence agreements (bottling agreements).[65]

According to case law, there may be a violation of public policy under substantive law if the plaintiff for setting aside was de facto forced to submit to an arbitration clause due to a monopoly situation. In this case, the Austrian Supreme Court considers it justifiable to scrutinise substantive public policy more strictly.[66]

The reason for setting aside under Section 611 para. 2 no. 8 ACCP is affirmed in the case of violations of mandatory provisions of antitrust law.[67] A violation of substantive public policy was also affirmed in the case of contradictions with commercial law provisions, e.g. incompatibility with price-fixing regulations, competition law provisions, foreign exchange law, and import and export regulations.[68]

The commercial agent's claim for compensation based on Section 24 HVertrG and the Commercial Agents Directive is to be qualified as an overriding mandatory provision.[69] A commercial agent who has worked predominantly in the territory of the European Union is entitled to an unwaivable claim to compensation payment even if the principal has its registered office outside the EU and the agency agreement provides for the application of non-European law in which such a claim is not recognised. An arbitration clause to this effect must therefore be refused recognition due to a breach of public policy under substantive law, as the result achieved by non-compliance with this overriding rule is unacceptable.[70]

23 February 1998); Case 5 Ob 72/16y (n 26); Case 2 Ob 22/14w (n 26); crit. Christian Aschauer and Lukas Klever, 'Schiedsvereinbarung und zwingender Ausgleichsanspruch des Handelsvertreters – kritische Überlegungen zu OGH 5 Ob 72/16y' (2018) 140(6) JBL 406 <https://doi.org/10.33196/jbl201806040601> accessed 5 March 2026.

63 Case 2 Ob 22/14w (n 26).

64 Case 3 Ob 115/95 (n 62); Case 3 Ob 233/06w (n 24).

65 Fasching and Konecny (n 2) § 611 ZPO, mn 165; Case 3 Ob 115/95 (n 62).

66 Pitkowitz (n 15) 455; Case 18 OCg 6/16f (n 32).

67 Fasching and Konecny (n 2) § 611 ZPO, mn 165.

68 ibid; Buchstätter (n 38) 228.

69 Rechberger and Klicka (n 15) s 611 ZPO, mn 29; Case 5 Ob 72/16y (n 26), citing Case C-381/98 *Ingmar v Eaton* (ECJ, 9 November 2000) ECLI:EU:C:2000:605; Case C-184/12 *Unamar v Navigation* (ECJ, 17 October 2013) ECLI:EU:C:2013:663; Buchstätter (n 38) 228.

70 Case 5 Ob 72/16y (n 26); see also, Wendelin Moritz, 'Der international-zwingende Charakter des Ausgleichsanspruchs' (2018) 1 WBL 1.

The substantive public policy is violated in the case of fundamental violations of consumer protection provisions; this applies, for example, to unfair terms in consumer contracts (Art. 6 of Directive 93/13/EEC and Section 6 para. 2 no. 7 KSchG).[71]

4.4.3. Fundamental Violations of Employee, Tenant, Creditor Protection Provisions or Exorbitantly Inflated Cost Estimate, Violation of Constitutional Personal Rights and Violation of the Principle that No One Can Be a Judge in their Own Case

A violation of the public policy is affirmed in the case of fundamental violations of employee, tenant, or creditor protection provisions.[72]

An exorbitantly excessive award of costs may violate public policy under substantive law.[73] Litigation funding does not constitute a violation of public policy.[74]

However, a general principle that the costs of arbitration proceedings may not be higher than the costs of comparable state proceedings cannot be found in the legal system.[75] Nor does it constitute grounds for setting aside an arbitral tribunal's decision on costs if it deviates from supreme court case law on the reimbursement of costs.[76]

A violation of public policy under substantive law is affirmed in the event of a violation of Section 16 of the Austrian Civil Code (ACC)[77], as the general ideas of constitutionally guaranteed fundamental rights are incorporated into the private law system via this provision.[78]

The reservation clause also applies in the case of expropriation without compensation.[79]

71 Fasching and Konecny (n 2) § 611 ZPO, mn 165 Liebscher, Oberhammer and Rechberger (n 57) para 4-72; Christian Koller and Katharina Plavec, '60 Jahre NYÜ und der OGH: Eine Retrospektive' (2018) 10 Ecolex 887; Case 3 Ob 144/09m (Austrian Supreme Court, 22 July 2009); Case C-40/08 *Asturcom Telecomunicationes SL v Rodriguez Nogueira* (ECJ, 6 October 2009) ECLI:EU:C:2009:615.

72 Fasching and Konecny (n 2) § 611 ZPO, mn 165; Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts* (n 34) 136.

73 Rechberger and Klicka (n 15) s 611 ZPO, mn 30; Pitkowitz (n 15) 455; in general, in casu negating Case 18 OCg 2/18w (n 32).

74 Prantl, Rohmann and Adelt (n 15) 562; Case 18 OCg 5/21s (n 43).

75 Pitkowitz (n 15) 455; Case 18 OCg 2/18w (n 32).

76 Prantl, Rohmann and Adelt (n 15) 562; Case 18 OCg 12/19t (Austrian Supreme Court, 15 January 2020).

77 Austrian Civil Code of 1 June 1811 'Allgemeines Bürgerliches Gesetzbuch, ABGB' General Civil Code for all German hereditary lands of the Austrian Monarchy (amended 29 December 2025) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=bundesnormen&Gesetzesnummer=10001622> accessed 5 March 2026.

78 Fasching and Konecny (n 2) § 611 ZPO, mn 165; Case 3 Ob 566/95 (Austrian Supreme Court, 31 August 1995), invalidity of the arbitral award of a stock exchange arbitral tribunal.

79 Fasching and Konecny (n 2) § 611 ZPO, mn 165; Peter Angst and Paul Oberhammer (eds), *Exekutionsordnung EO: Kommentar* (3rd edn, Manz 2015) § 79 EO, mn 687; Case 4 Ob 230/18d (n 32).

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An arbitral award is contrary to public policy if it violates the principle that no one can be a judge in their own cause.[80] A violation of substantive public policy also exists in the case of an arbitral award that was issued after the opening of insolvency proceedings against the assets of the defendant and obliges the defendant to make a payment that relates to an insolvency claim that was not filed in the insolvency proceedings.[81]

4.4.4. Contractual Penalties Without the Right to Mitigation, Deviation of the Arbitral Award from the Results of Criminal Proceedings and Exorbitant Default Interest Rates

Similarly, the possibility of moderating a contractual penalty is not a fundamental principle of Austrian law that must be taken into account in arbitration proceedings.[82]

If an arbitral award deviates from the results of criminal proceedings, this does not constitute a violation of either procedural or substantive public policy.[83]

An award of compensation for damages under a foreign legal system on the basis of an interest rate that is far higher than the domestic statutory default interest (in casu 26%) is not contrary to public policy. Nor is it contrary to public policy if compensation for interest on the loan can be demanded under a foreign legal system, even though the defaulting debtor was not informed of the imminent taking out of a bank loan.[84] The agreement of the statutory interest rate applicable in the country in question, even if it is far higher than the domestic statutory interest rate, can therefore be all the less contrary to public policy.[85] However, interest of more than 100% pa (in casu: 107.35%) not only exceeds the limits of immorality (Section 879 ACC), but also violates public policy under substantive law.[86] If, under a foreign legal system, compensation for interest on a loan can be demanded even though the defaulting debtor was not informed of the imminent taking out of a bank loan, this does not violate public policy under substantive law.[87]

4.4.5. Violations of a Statutory Prohibition

The reservation clause applies if a party has undertaken to provide a service to which it cannot effectively commit itself in a legal transaction. The same applies to an arbitral award that obliges a party to provide a service that violates a statutory prohibition.[88]

80 Fasching and Konecny (n 2) § 611 ZPO, mn 165.
81 ibid, with reference to a German decision.
82 Pitkowitz (n 15) 455; Case 18 OCg 1/17x (Austrian Supreme Court, 20 March 2018).
83 Rechberger and Klicka (n 15) s 611 ZPO, mn 30; Case 18 OCg 2/18w (n 32).
84 Case 6 Ob 511/84 (Austrian Supreme Court, 5 December 1985).
85 Case 7 Ob 229/98x (Austrian Supreme Court, 15 September 1998).
86 Fasching and Konecny (n 2) § 611 ZPO, mn 165; Koller and Plavec (n 71) 887; Case 3 Ob 221/04b (n 30).
87 Fasching and Konecny (n 2) § 611 ZPO, mn 164; Case 6 Ob 511/84 (n 84).
88 Fasching and Konecny (n 2) § 611 ZPO, mn 165, in each case quoting German literature.

However, an obvious imbalance between performance and consideration (even if this generally constitutes grounds for nullity under domestic law) does not constitute a violation of public policy under substantive law.[89] It does not violate public policy under substantive law if an acknowledgement is made on the basis of an oral declaration by a party that is minuted in the arbitral award.[90]

Nor does it constitute a violation of public policy under substantive law if the arbitral award is based on a claim that is to be categorised as a "vexatious exercise of rights" within the meaning of Section 1295 para. 2 ACC.[91] The award of damage compensation on the basis of contractual obligations under private law (indemnity and hold harmless) cannot constitute a violation of the fundamental values of the Austrian legal system.[92]

The agreement of a contingency fee (quota litis *agreement*) does not constitute a violation of public policy under substantive law.[93] Even a contract concluded with the intention of fulfilment (in lieu of payment), which is based on the due fee claim, does not violate public policy.[94] The agreement of deviating limitation periods[95] or a prohibition of set-off[96] is also not contrary to public policy.[97]

The award of monetary depreciation damages, the exclusion of liability for immaterial damages[98] or a collateral assignment without publicity[99] do not constitute violations of public policy under substantive law.[100]

4.5. Conclusions Regarding the Concept of Substantive Public Policy Drawn from the Case Groups Examined

The foregoing examples demonstrate that Austrian legal scholarship and case law do not regard substantive public policy as a mechanism for reviewing the merits of an arbitral award. Rather, it serves exclusively to safeguard the fundamental values and principles of the Austrian legal order. The analysed case groups consistently show that an award may be set aside only where its recognition or enforcement would lead to a result that is manifestly

89 ibid, § 611 ZPO, mn 164.
90 ibid
91 ibid; Koller and Plavec (n 71) 887; Case 3 Ob 65/11x (n 11).
92 Case 3 Ob 281/06d (Austrian Supreme Court, 22 February 2007).
93 Case 1 Ob 194/51 (Austrian Supreme Court, 4 April 1951); Buchstätter (n 38) 229.
94 Case 3 Ob 128/56 (Austrian Supreme Court, 25 April 1956).
95 Case 2 Ob 672/59 (Austrian Supreme Court, 1 April 1960); Case 1 Ob 317/97t (Austrian Supreme Court, 28 July 1998).
96 Case 3 Ob 84/01a (Austrian Supreme Court, 25 April 2001).
97 Fasching and Konecny (n 2) § 611 ZPO, mn 164.
98 Case 2 Ob 240/74 (Austrian Supreme Court, 31 October 1974).
99 Case 1 Ob 648/90 (Austrian Supreme Court, 11 July 1990); Case 1 Ob 649/90 (Austrian Supreme Court, 11 July 1990).
100 Fasching and Konecny (n 2) § 611 ZPO, mn 164.

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incompatible with those values. Accordingly, the decisive consideration is not whether the arbitral tribunal has committed an error of fact or law, but whether the outcome of the award results in an intolerable infringement of the fundamental values and principles underlying the Austrian legal system.

A common characteristic of the instances in which a violation of substantive public policy has been affirmed is that they concern fundamental rights, values and principles regarded as particularly worthy of protection by the Austrian legal order. These include constitutional principles and fundamental rights, essential norms of European Union law, especially competition law, mandatory rules protecting structurally weaker parties, and other fundamental values of the Austrian legal order. Austrian courts have therefore accepted violations of substantive public policy primarily where the award reflects an arbitrary application of the law, a serious disregard of fundamental provisions of EU law, an infringement of constitutionally protected personal rights, or legal consequences whose severity renders them incompatible with the fundamental values and principles of the Austrian legal order.

The negative examples further illustrate the exceptionally narrow scope of the public policy exception. Even significant errors in the assessment of facts or the application of substantive law do not, as such, amount to a violation of substantive public policy. Nor is it sufficient that the arbitral tribunal adopts a legal position that departs from prevailing case law or reaches a result that would not have been adopted by a state court. Such matters concern the correctness of the award and are therefore excluded from judicial review by virtue of the prohibition of a *révision au fond*. The doctrine of substantive public policy consequently functions not as an instrument for correcting erroneous decisions, but as an exceptional safeguard against outcomes that are fundamentally irreconcilable with the Austrian legal order.

Taken together, the positive and negative examples indicate that Austrian scholarship and case law apply a cumulative three-step test when determining whether an arbitral award violates substantive public policy. First, the award must affect a value or principle that forms part of the fundamental legal order protected by the ordre public reservation. Second, the infringement must be manifest and sufficiently serious. Third, the incompatibility must concern the result of the award itself rather than merely its reasoning. The analysed case groups therefore confirm the consistently restrictive interpretation of Section 611 para. 2 no. 8 ACCP and demonstrate that substantive public policy operates solely as an ultimate safeguard for the fundamental rights, values and principles of the Austrian legal system and not as a substitute for appellate review of arbitral awards.

5 CONCLUSION

The objective of the study was to define the concept of public policy in the light of arbitration law. In doing so, the different manifestations of public policy were highlighted through an analysis of national and foreign arbitral awards. In view of the fact that Austrian arbitration law distinguishes between violations of substantive and formal public policy as grounds for setting aside an arbitral award, a strict distinction was made between these manifestations.

Based on the findings obtained in this way, it was possible to narrow down the criteria that generally constitute a violation of substantive public policy. The result was that only violations of the fundamental values of the Austrian legal system constitute a violation of public policy. According to the established case law of the Austrian Supreme Court, these include the fundamental principles of the Federal Constitution, the principles of the ECHR, criminal law, private law, procedural law and public law.

Finally, case law was used to show which legal violations were considered violations of substantive public policy and which were not. Due to the very restrictive interpretation of the concept of (substantive) public policy, the ground for setting aside under Section 611 para. 2 no. 8 ACCP does not provide a legal basis for clarifying whether and to what extent the arbitral tribunal correctly resolved the factual and legal issues raised in the proceedings in its award outside the narrow scope of review of public policy violations. Erroneous arbitral awards must therefore generally be tolerated and cannot be reviewed merely on their merits. Only an obvious violation of the fundamental values of the Austrian legal system justifies setting aside the arbitral award, provided that there is a sufficient domestic connection. In addition, it must be required that the obvious incompatibility does not merely concern the making or justification of the arbitral award, but also its result.

In Austrian arbitration law, the Austrian Supreme Court has recognised a violation of substantive public policy if an arbitral tribunal (i) has applied the law arbitrarily, which amounts to a repeated and obvious misjudgement of the legal situation; (ii) has issued an award that clearly violates fundamental provisions of EU law, including the mandatory antitrust rules under Articles 101 and 102 TFEU; (iii) disregarded mandatory standards for the protection of commercial agents, in particular the indispensable right to compensation under Section 24 of the Austrian Commercial Agents Act (HVertrG) and Directive 86/653/EEC; (iv) imposed exorbitant default interest – in one case, over 100% per annum – contrary to the fundamental values of the Austrian legal system; and (v) violated the constitutionally protected personal rights under Section 16 ACC, which incorporates the principles of fundamental rights into Austrian private law.

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Summary: 1. Introduction. – 2. The Impact of Public Policy in Austrian Arbitration Law. – 3. Violation of Public Policy as a Ground for Setting Aside. – 4. Incompatibility of the Arbitral Award with Substantive Public Policy. – *4.1. The Concept of Public Policy in General.* – *4.2. Definition of Public Policy by the ECJ, German and Austrian Supreme Court.* – *4.3. Definition of the Concept of 'Substantive Public Policy' Pursuant to Section 611 para. 2 no. 8 ACCP.* – *4.4. Examples of Violations of Substantive Public Policy and Negative Examples.* – *4.5. Conclusions Regarding the Concept of Substantive Public Policy Drawn from the Case Groups Examined.* – 5. Conclusion.

Keywords: *Arbitral Award; Public Policy; Ordre Public; Application for Setting Aside; Action for Setting Aside; Domestic Arbitral Awards; Foreign Arbitral Awards; Enforceability of Foreign Arbitral Awards; Set Aside; Annulment of Arbitral Awards.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СКАСУВАННЯ НАЦІОНАЛЬНИХ АРБІТРАЖНИХ РІШЕНЬ НА ПІДСТАВІ ПОРУШЕННЯ МАТЕРІАЛЬНОГО ПУБЛІЧНОГО ПОРЯДКУ В АРБІТРАЖНОМУ ПРАВІ АВСТРІЇ

Генрієтта Бошайнен-Дурсма

АНОТАЦІЯ

Передумови. *Арбітраж є системою вирішення спорів, заснованою на автономії волі сторін, у межах якої арбітражні рішення наділені обов'язковою юридичною силою і, як правило, не підлягають перегляду в декількох судових інстанціях. Арбітражні рішення є*

обов'язковими й можуть бути скасовані лише у випадках істотних процесуальних або матеріально-правових порушень — принцип, покладений в основу всіх провідних арбітражних режимів. Цивільний процесуальний кодекс Австрії (ZPO) розглядає арбітраж у межах державної системи правового захисту та встановлює мінімальні гарантії, які обґрунтовують надання арбітражним рішенням таких самих правових наслідків, як і рішенням державних судів (параграф 607 ZPO). Для усунення грубих порушень австрійське законодавство передбачає єдиний засіб правового захисту: позов про скасування арбітражного рішення відповідно до параграфа 611 ZPO, розгляд якого належить до компетенції Верховного суду Австрії. Порушення публічного порядку є однією з основних підстав для скасування арбітражних рішень у різних правових системах. Особливістю австрійського права, на відміну від Типового закону ЮНСІТРАЛ та Цивільного процесуального кодексу Німеччини, є розмежування порушень процесуального та матеріального публічного порядку.

Методи. *На першому етапі авторка дослідила чинні норми австрійського права відповідно до усталеної правничої методології. У межах історичного тлумачення було також враховано попередню редакцію відповідної норми. Було проаналізовано аналогічні правові приписи у споріднених правопорядках. На другому етапі було здійснено ґрунтовний аналіз судової практики Верховного суду Австрії. Для з'ясування змісту поняття «публічний порядок» (ordre public) також досліджено практику вищих судових інстанцій Німеччини та рішення Суду справедливості Європейського Союзу (CJEU). Отримані результати зіставлено з висновками, зробленими на основі оцінки австрійської судової практики, з метою виявлення розбіжностей і спільних рис.*

Результати та висновки. *Це дослідження розкриває зміст поняття публічного порядку в арбітражному праві Австрії на основі аналізу національної та міжнародної судової практики й чіткого розмежування матеріального та процесуального публічного порядку відповідно до абзацу 2 параграфа 611 ZPO. Доведено, що порушенням матеріального публічного порядку є лише такі порушення фундаментальних цінностей австрійського правопорядку, які стосуються основоположних принципів Федеральної конституції, Європейської конвенції з прав людини (ЄКПЛ) та основоположних норм кримінального, приватного, процесуального й публічного права. Судова практика наочно демонструє, які саме порушення досягають необхідного рівня серйозності. З огляду на вузьке тлумачення сфери застосування пункту 8 абзацу 2 параграфа 611 ZPO, зазначена підстава для скасування не допускає перегляду арбітражного рішення по суті спору (révision au fond) — тобто перевірки правильності встановлення фактів або застосування норм права; арбітражні рішення, навіть якщо вони містять помилки, як правило, залишаються в силі. Скасування арбітражного рішення є виправданим лише за умови очевидного порушення фундаментальних цінностей, за наявності достатнього зв'язку з національним правопорядком (Inlandsbezug), і лише тоді, коли несумісність із публічним порядком стосується не лише мотивів, а й суті результату арбітражного рішення.*

Ключові слова: *арбітражне рішення; публічний порядок; ordre public; заява про скасування; позов про скасування; національні арбітражні рішення; іноземні арбітражні рішення; примусове виконання іноземних арбітражних рішень; скасування; анулювання арбітражних рішень.*

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