

Public policy as ground for setting aside or non-enforcement of international arbitral awards: Asian perspective

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Abstract

Arbitration has gained importance for setting down the disputes outside the court. In order to have a time and money saving mechanism encouragement has been made to follow international conventions among of which is the New York Convention which governs the rules related to recognition and enforcement of a foreign arbitral award. Public Policy has been one of the crucial defence that has been stated under the New York Convention under Article V (2) (b). It is therefore interesting to study the scope of public policy and this will encourage in having a better understanding of this exception in reality. As matter of fact, due to lack of concrete definition, it has become a matter of serious concern where the countries have interpreted public policy by following certain principles in order to achieve international recognition in the business community.

The author postulates that public policy plays a vital role in encouraging good trade relations with other countries. Due to a drastic increase in a number of cross-border activities the courts are facing challenges at the time of interpreting the public policy defence. It is essential to note that most of the signatory parties have not defined public policy properly and this has led rise to many difficulties. Subsequently, the paper will explore the significant role played by the New York Convention and Model Law in the Asian countries such as China, Japan, India, Vietnam, Pakistan, Singapore, and Malaysia. Further, suggestions will be given to encourage foreign investment in order to promote international arbitration by following this defence.

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Introduction

In the society nowadays encouragement is given to those activities, which could help in promoting trade and commerce activities around the world. Today we see that in the field of commercial trade emphasizes is made on to have a healthy trade relationship worldwide. Due to the rise in a number of cross-border transactions, there is a need to safeguard the interest of the parties under such situation the arbitration mechanism plays a vital role instead of going to the court.² A brilliant example is the New York Convention which is one of the prime pillars, which emphasizes on maintaining international standards.³ Also, the UNCITRAL Model Law motives in encouraging such practices and many countries legal system are based on it in order to promote international commercial activities.⁴

The author postulate the ground of public policy which is among those grounds which are considered for setting aside or refusing recognition and enforcement of an arbitral award which is stated under Article V (2)(b) of the New York Convention. The paper explores that in order to maintain harmony and uniformity in the commercial sector, it is the need of the hour to have a proper understanding and know the significance of public policy defence in the international arbitration aspect. In Asian parameter, there are countries, which belong to the common, civiland mixed legal system, and their laws are made to satisfy the basic needs of their respective countries. Subsequently, we can understand that in order to have better economic growth the countries need to make their jurisdiction arbitration friendly. By keeping this perspective in mind, public policy defence would motivate in maintaining a pleasant situation for achieving the objectives set behind the New York Convention.⁵It is, therefore, interesting to study the public policy exception as it has been considered as an unruly horse due to the unpredictable outcome,which it gives.⁶ This paper will reflect on the significance of the New York Convention in order to have certain enforcement of foreign arbitral awards.

The New York Convention depicts that recognition and enforcement of aforeign arbitral award can be refusedif it is contrary to public policy of that particular country. Moreover, the UNCITRAL Model Law emphasizes on having a uniform template so that countries can

²John K. Arthur, *The essential elements of international arbitration and its yin and yang -steadfast crucial support and limited interference –A regional perspective*, PERADI, (July 25, 2018), <https://www.peradi.or.id/files/untitled-attachment-00036.pdf>.

³SormehBouzarjomehri&EisaAmini, *Public Policy as ground for refusal of International Arbitral Award-A comparison between different judicial practice* , 9 J. POL. L. 81, 81(2016).

⁴John K. Arthur, *supra* note 2.

⁵SormehBouzarjomehri ,*supra* note 3, at 86.

⁶YuxiangLiu, Camilla Andersen et al., *The unruly horse in China: The enforcement of foreign awards and public policy*, 19 INT'L TRADE BUS. L. REV. 73, 73 (2016).

follow it.⁷ Generally, the concept of public policy comprises of elements such as public interest, morality, and security.⁸ It is essential to note that public policies vary from country to country. The New York Convention has not prescribed any definition for public policy.⁹ Therefore, fewer countries have defined and other countries have broadly or narrowly interpreted public policy defence in order to cope up with the rest of the world. Although in order to overcome the challenges, which countries come across, are required to be settled down with the passage of time in order to achieve the ultimate goal of the New York Convention.

This paper will explore the ground of public policy and an attempt will be made to explain how Asian countries have followed this approach and further efforts will be made by the author for encouraging uniformity in the interpretation of New York Convention under the ambit of public policy.

The concept of public policy exception- Asian perspective

This section of the paper will reflect on the way the understanding, which the legal system of Asian courts have about public policy defence in order to set aside or refuse the enforcement and recognition of an arbitral award. The paper will explore the practice prevailing in countries such as Vietnam, China, Pakistan, Singapore, Sri Lanka, Malaysia, Japan, and India.

For example, Vietnam is a country where its economy has increased to 7.08 percent in 2018 in the last six months.¹⁰ From this, we can understand that emphasizes is made on to encourage trade and commerce activities by Vietnam around the world. Vietnamese arbitration law reflects that an arbitral award will be set aside if it is contrary to the basic principles of Vietnam. The laws are based on Model Law provision, which is stated under Article 34(2)(b)(ii).¹¹ The Vietnamese law has not defined public policy rather the Act has emphasized on fundamental principles of Vietnamese legal system.¹² In another word, we can

⁷JahnviSindhu, *Public policy and Indian Arbitration: Can the judiciary and the legislature rein in the 'Unruly Horse'?*, 58 J. I.L.I. 424, 424 (2016).

⁸FARSHAD GHODOOSI, *INTERNATIONAL DISPUTE RESOLUTION AND THE PUBLIC POLICY EXCEPTION* 3 (1sted. 2017).

⁹Suryansh Singh Kushwah, ShreyashGoyal et al., *Foreign awards International Commercial Arbitration: Recognition, Enforcement and challenges to an award*, 1 S.I. INDIAN J. L. INT'L AFF. 71, 71(2017).

¹⁰Koushan Das, *Vitenameconomy's sees strong growth in the first half of 2018*, VIETNAM BRIEFING (July 5, 2018), <http://www.vietnam-briefing.com/news/vietnams-economy-sees-strong-growth-in-the-first-half-of-2018.html/>.

¹¹Nguyen Phuong Linh, *Vietnam's recognition and enforcement of foreign arbitral awards and preparation for EVFTA*, WTI (July 26, 2018), https://www.wti.org/media/filer_public/82/68/8268497d-4aa7-40b7-8b5e-3909ccef994/working_paper_no_18_2017_nguyen_et_al.pdf.

¹²Nguyen TheDuc Tam & Nguyen ThiThuyLinh, *Vietnam case update: Recognition and enforcement of foreign arbitral awards*, INTERNATIONAL ARBITRATION ASIA (July 27, 2018),

say that if an arbitral award is violating fundamental principles existing in Vietnam under such situation the award will be refused. One can understand the significance of the New York Convention as Vietnam has been party to it from 12 September 1995.¹³

Pakistan has been party to the New York Convention since 1958,¹⁴ where the public policy defence has been broadly interpreted by their courts. According to their Act, an award will be refused for recognition and enforcement if it occurs there is the existence of illegal act, causes harm to the good government at the domestic or global level, or it affects the practice of justice. In addition, if there is danger caused to the family life and also if it has caused bad impact on the economic interest of the public under such circumstances an award can be refused.¹⁵

Within the perspective of this article, China is the country which has the biggest economy in the Asian region and in order to maintain its standards Chinese's arbitration law has encouraged the practice of investment and efforts are made to comply with the New York Convention.¹⁶ China has accessed the New York Convention on 22 January 1987.¹⁷ The Chinese arbitration law has mentioned that an award will be not being enforced if the People's Court finds that the enforcement of the arbitral award is violating the social and public interest of China.¹⁸ It is important to note that the term 'public policy' has not been used instead the Act has reflected on the importance of social and public interest of China. It has not expressly mentioned the word 'public policy' but the Civil Procedure Code has depicted on the importance of public policy defence in the form by using the term 'social and political interest' of China.¹⁹ On the basis of this reasoning, we can understand that the Chinese court has taken better caution at the time of applying this defence in reality.²⁰ The IBA Report on Public Policy shows the factors such as principles of law, fundamental interest of the Chinese's society, the safety of the country. Additionally, maintaining sovereignty as

http://www.internationalarbitrationasia.com/vietnam_recognition_and_enforcement_of_foreign_arbitral_awards

¹³*Contracting States, NEW YORK CONVENTION*, (July 26, 2018), <http://www.newyorkconvention.org/countries>.

¹⁴*Ibid.*

¹⁵Nan Fung Textiles Ltd. v. Sadiq Traders Ltd., (1982)PLD Karachi 619.

¹⁶Sormeh Bouzarjomehri, *supra* note 2, at 85.

¹⁷*Supra* note 13.

¹⁸John K. Arthur, *supra* note 2.

¹⁹Zhang Yunyang & Zhao Ziyu, *China: Enforcement of International arbitral awards in China*, MONDAQ, (July 27, 2018), <http://www.mondaq.com/china/x/659666/Arbitration+Dispute+Resolution/Enforcement+of+International+Arbitral+Awards+in+China>.

²⁰*Ibid.*

well as good social customs of China is the prime concern of the Chinese arbitration mechanism while addressing matters related to this defence.²¹

Singapore has accessed the New York Convention in 1986²² and the Singaporean arbitration law has reflected on the importance of principles of morality and justice.²³ From this, we can conclude that the interpretation of public policy defence has been done narrowly.²⁴ The International Arbitration Act illustrates that enforcement of an arbitral award is not done as it shocks the conscience or morality of the forum.²⁵ Moreover, only in rarest of rare cases such ground of causing injury to public good has been noted under public policy defence.²⁶

Notably, the Sri Lankan Arbitration has provided a wider understanding of public policy. The Act of 1995 illustrates that an arbitral award would be set aside if there is the existence of illegal or immoral act.²⁷ The Sri Lankan courts have stated that an award can be refused also if there is a violation of fundamental principles of law and justice.²⁸ One need to keep in mind that public policy defence should not be misused and it has been used properly with caution by the Sri Lankan courts.²⁹ After becoming signatory party to New Convention on 30 December 1958 efforts are made by the lawmakers to make Singapore arbitration friendly.³⁰ Since 1985 Malaysia has accessed the New York Convention and focus has been made to encourage international commercial arbitration.³¹ The Malaysian courts have narrowly interpreted public policy exception by following the provisions of the Malaysian Arbitration Act 2005.³² It also includes ground such as any harm caused to public good will also amount to a violation of public policy.³³

The Article 44(1)(vii), 45(2)(ix) and 46(8) of the Japanese Arbitration Act have not stated any definition of public policy but the focus has been made on grounds such as good morals

²¹IBA Subcommittee, *Report on the Public policy exception in the New York Convention*, IBA NET, (July 28, 2018), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=C1AB4FF4-DA96-49D0-9AD0-AE20773AE07E>.

²²*Supra* note 13.

²³*Supra* note 21.

²⁴John K. Arthur, *supra* note 2.

²⁵John K. Arthur, *Setting aside or non enforcement of arbitral awards in international arbitration on the public policy ground – a regional perspective*, AUSTRALIAN ALTERNATIVE BULLETIN, (July 28, 2018), https://svensonbarristers.com.au/wpcontent/uploads/2017/07/17_december_2015__setting_aside_or_nonenforcement_of_arbitral_awards_in_international_arbitration_on_the_public_policy_ground__a_regional_perspective_sample.pdf.

²⁶PT AsuraniJasa Indonesia v. Dexia Bank S A, (2007) ISLR (R) 597.

²⁷Light Weight Body Armour v. Sri Lanka Army, (2007) BALR 10.

²⁸*Supra* note 27.

²⁹SAI RAMANI GARIMELLA & STELLINA JOLLY, PRIVATE INTERNATIONAL LAW, 396(1st ed. 2017).

³⁰*Supra* note 13.

³¹*Ibid.*

³²TanjungLangsat Port v. Trafigura Pre Ltd., (2016) AMEJ 0770.

³³Majilis Amanah Rakyat v. Kausar Corp., (2009) 1 LNS 1766.

and social order that exist in Japan.³⁴ An enforcement of an arbitral award will be refused if fraud has been committed. The defence is also strictly interpreted by Japanese court so therefore an arbitral award can be set aside or refuse if the above ground prevail and this would be contrary to public policy of the country.³⁵It has got international acceptance after the New York Convention was accessed in 1961 by Japan.³⁶Furthermore, recent amendment has brought changes in the Indian arbitration law under Section 34(2)(b) and 48(2)(b) where now the public policy has been defined under Explanation 1 and 2 of the provisions. An effort has been made by Indian courts to have a narrow interpretation of public policy with this effort. It includes grounds such as fraud or corruption, morality or justice, confidentiality, admissibility of evidence in other proceedings and fundamental policy of Indian law will be considered under public policy defence as provided under Section 34(2) (b) of the Arbitration and Conciliation (Amendment) Act 2015. It is still an open question at present how much success the Indian courts have achieved with the recent amendment, which is still yet to be observed. Even after being a signatory part to the New York Convention on 10 June 1958 despite such long tenure the Indian practice in relation to public policy exception is uncertain at the current stage.³⁷

Significance of the New York Convention

The New York Convention has not been specific while mentioning public policy ground in order to set aside an arbitral award by the court. Due to the absence of a definition of public policy under the Convention, the countries are interpreting the public policy in their own way in order to practice international arbitration.³⁸As a matter of fact, the Asian countries stated above by the author reflects the different practices that are prevailing at present situation and we need to overcome the challenges that the respective countries are facing today due to the undefined and unclear understanding of the concept of public policy defence.³⁹ It has been observed that there are countries which have done a narrow interpretation of the public policy and some countries have a broad understanding of public policy exception. Consequently, the member states need to understand the objective set behind the New York Convention. Nevertheless, in the light of Model Law and the New York Convention the defence of public policy needs to be understood properly. For instance, an arbitral award recognition and

³⁴John K. Arthur, *supra* note 2.

³⁵*Ibid.*

³⁶*Supra* note 13.

³⁷*Supra* note 13.

³⁸Sormeh Bouzarjomehri, *supra* note 3.

³⁹*Ibid.*

enforcement can be refused if the court comes to the finding that the award is contrary to public policy of that country.⁴⁰

For instance, China has the highest rise in their FDI in recent years by indulging in the practice of investment and their way of interpretation of public policy varies from other countries like India, Japan, and Singapore etc.⁴¹ From this, we can learn that the public policy defence has been a debatable concept and due to unclear practice around the world, one needs to make a joint effort to improve the present situation.⁴²

Conclusion

Today public policy has become an important weapon but the concern at present is to have a uniform understanding of public policy under the New York Convention. To sum up, we need to encourage such practices which could result in the better economic growth of the countries.⁴³ In order to have certain and predictable results in the commercial sector, the ground of public policy should maintain international standards to encourage international trade and comity of nations.⁴⁴ Therefore, the Asian countries need to make a firm step to have a uniform interpretation of public policy so that it could result in strengthening their trade relationship with each other without any wastage of time and money.

⁴⁰UNCITRAL Model Law, art.34 & 36.

⁴¹Daniel Levy, Domenico Francavilla et al., *Protection of direct foreign investment- Public policy exception impact on foreign direct investment: "Court(non) enforcement of arbitration decisions based on Public policy exception"*, LAW SCHOOLS GLOBAL LEAGUE, (July 29, 2018), <https://lawschoolsgloballeague.com/wp-content/uploads/2017/01/Business-Law-Research-Group-Paper-2014.pdf>.

⁴²*Ibid.*

⁴³Sameer Sattar, *Enforcement of arbitral awards and public policy: Same concept, different approach?*, EMPLOYMENT LAW ALLIANCE, (July 30, 2018), <https://www.ela.law/Templates/media/files/Misc%20Documents/Enforcement-of-Arbitral-Awards-Public-Policy.pdf>.

⁴⁴John K. Arthur, *supra* note 2.