Setting aside or non-enforcement of arbitral awards in international arbitration on the public policy ground — a regional perspective

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Introduction

An award in international commercial arbitration (ICA) is only liable to be set aside, or refused recognition or enforcement, on the grounds contained in Arts V(1)(a)-(e) and V(2)(a)-(b) of the New York Convention (NYC), and Arts 34 and 36 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (Model Law).[1] These grounds are concerned with the structural integrity of the arbitration proceedings[2] and not the merits of an arbitral award.[3] One of the grounds upon which a court may refuse enforcement of an arbitral award is if it finds that the award is in conflict with the public policy of that state.[4]

The concept of public policy

It has been suggested that an award should only be set aside on the public policy ground if it is contrary to "truly transnational" public policy.[5] International public policy is confined to violation of fundamental conceptions of legal order in the country concerned; or norms that embody and reflect fundamental notions of morality and justice.[6] The ground was defined by Sir Anthony Mason NPJ in *Hebei Import & Export*[7] as meaning "contrary to the fundamental conceptions of morality and justice of the forum". Public policy considerations "should be approached with extreme caution".[8] It has been said that "(i)t is never argued at all but when other points fail". The same case described public policy considerations as "a very unruly horse and when once you get astride it, you never know where it will carry you".[9] Public policy will necessarily differ from forum to forum[10] and the Model Law like the NYC does not prescribe a universal standard of public policy however a breach of natural justice has been internationally accepted as a violation of generic "procedural public policy".[11] It is suggested that "most national courts have adopted the narrower standard of international public policy, applying substantive norms from international sources".[12]

Australian position

In Australia an ICA award will not be set aside, or denied recognition, or enforcement, as contrary to public policy (by reason of a breach of natural justice or otherwise)[13] unless there exists real unfairness or real practical injustice in the conduct of the arbitration, or making of the award.[14] In ICA cases Australian courts will have regard to the critical international instruments in light of international and regional case law.[15] There are significant parallels between the Australian approach and that adopted in other countries in Asia.

Malaysia

The Malaysian Arbitration Act 2005 is based on the Model Law. In order to set aside an award on the public policy ground it needs to be established that there is a "conflict with the public policy of Malaysia in the narrow sense of something offending basic notions of morality and justice or something clearly injurious to the public good in Malaysia".[16] It has been held that Malaysian courts should follow an approach based on:[17]

> … comparative jurisprudence in the interests of maintaining comity of nations and a uniform approach to the model law, so far as that is possible, to the concept of "public policy" in relation to foreign awards.

Singapore

The Model Law is given force of law in Singapore.[18] A court may refuse enforcement of a foreign award if it finds that "enforcement of the award would be contrary to the public policy of Singapore".[19] The exception is construed narrowly.[20] An award will only be refused enforcement if it would "shock the conscience" or "violate the forum's most basic notions of morality.[21] There must be exceptional circumstances which violate the most basic notions of morality and justice, or are injurious to the public good.[22] Singapore courts will readily pay heed to international jurisprudence on the Model Law in describing the ambit of the ground.[23]

Hong Kong

The provisions of the Model Law have the force of law in Hong Kong subject to the Arbitration Ordinance Cap 609. The "contrary to public policy" ground which is narrowly construed[24] means "contrary to the fundamental conceptions of morality and justice of the forum".[25] The award must be "fundamentally [and obviously] offensive to that jurisdiction's notions of justice".[26] There must be "a substantial injustice arising out of an award which is so shocking to the court's conscience as to render enforcement repugnant".[27] The conduct complained of "must be serious, even egregious",[28] and only a sufficiently serious error which has undermined due process will suffice.[29]

China

While the "public policy" exception is not expressly included as one of the grounds in Art 260 of the Civil Procedure Law 1991 of the People's Republic of China (PRC), if the People's Court determines that the enforcement of the award goes against the social and public interest of the country it will not allow enforcement. According to commentators:[30]

> … a violation of public policy seems to require proof of an affront to the higher "social public interest" of China as a whole, whether it relates to the moral order of the country or the sovereignty of the Chinese courts. This difficult level of proof may explain why the [Supreme People's Court of China] has apparently vacated only one foreign arbitral award on public policy grounds since (at least) 2000.

There is evidently an increasing reluctance on the part of the courts in the PRC to invoke "public policy" type grounds.[31]

India

The Indian Arbitration and Conciliation Act 1996 is based on the Model Law and the public policy exception is framed in Model Law terms. The broad interpretation of "public policy" used for setting aside a domestic arbitration award in India will not be applied to enforcement of an ICA award,[32] and courts are slower to invoke public policy in cases involving a foreign element than when purely municipal legal issues are involved.[33] Enforcement of an ICA award will only be able to be opposed on grounds of "public policy" when the award is contrary to:

- the fundamental policy of Indian law;[34]
- the interests of India;
- justice and morality;[35] or
- in addition, if it is patently illegal.[36]

Japan

The Japanese Arbitration Law 2003[37] is based on the 1985 Model Law with a few limited variations.[38] The Arbitration Law provides that an arbitral award may be set aside or refused recognition or enforcement if "the content of the arbitral award is in conflict with the public policy or good morals of Japan".[39] Japanese courts have narrowly interpreted "public policy" in light of the purposes of the Arbitration Law. While there are no published Supreme Court cases defining the term "public policy",[40] the lower courts have concluded that if arbitral proceedings violated the public policy of Japan, this would mean that "the content of the arbitral award is in conflict with the public policy or good morals of Japan".[41] The public policy exception has rarely been successful in Japan.[42]

South Korea

South Korea is a Model Law country which interprets the public policy ground restrictively and narrowly in light of the need for certainty and stability in international commercial transactions.[43] The Supreme Court has stated that the public policy exception was intended to protect only the most fundamental moral beliefs and social order in the enforcing country.[44] The Supreme Court has ruled that "recognition or enforcement may be refused on public policy grounds only if the consequences would be against the good moral and social order of the country". The existence of fraud in the arbitration would be valid grounds to refuse enforcement under Art V(2)(b).[45]

Conclusion

The approach of Australian courts in construing the "public policy" ground of examining the *lex arbitri* in the context of the NYC and the Model Law, in light of international and regional case law is in accord with international, and in particular, Asian practice. Its emphasis on comparative jurisprudence will cultivate a uniform approach to the interpretation of the Model Law and the concept of "public policy" in ICA, as well as the development of an "internationally recognised harmonised procedural jurisprudence"[46] and the comity of nations.

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Footnotes

1. *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; 295 ALR

596; [2013] HCA 5; BC201301035 at [53]–[54]. The International Arbitration Act 1974 (Cth) (IAA) gives the force of law in Australia to the Model Law: s 16.

2. *Kanoria v Guinness* [2006] EWCA Civ 222; [2006] All ER (D) 290 (Feb); [2006] 2 All ER (Comm) 413 at [30] cited by the Hong Kong Court of Appeal in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1; [2012] 3 HKC 498; [2012] HKCU 971 at [7] per Tang VP (with whom Kwan and Fok JJA agreed) cited in *Cameron Australasia Pty Ltd v AED Oil Ltd (subject to deed of company arrangement)* [2015] VSC 163; BC201503256 at [20] (Croft J).
3. *AKN v ALC* [2015] SGCA 18 at [37] (Menon CJ), Singapore Court of Appeal.
4. NYC, Art V(2)(a) and (b); Model Law, Arts 34(2)(b)(ii) and 36(1)(b); IAA, s 8(7); see also Malaysian Arbitration Act 2005, s 37(1)(b)(ii); Arbitration Law 1999 (Indonesia), Art 66.
5. In France traditionally ICA awards could only be rejected on the grounds of public policy or *ordre public* if there was shown to be a contravention of international public policy: NCCP Article 15002 *Societe Impex v Societe PAZ*, Judgment of 18 May 1971, Cour de Cassation, [1972] DS Jur 37.
6. See *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387; (2014) 144 ALD 471; [2014] FCAFC 83; BC201405606 at [76] (*TCL* case).
7. *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111 at 130F; [1999] 1 HKLRD 665; [1999] 2 HKC 205.
8. *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1987] 2 All ER 769 at 779; [1990] 1 AC 295 at 316 (Donaldson MR, with Woolf and Russell LJJ agreeing).
9. *Richardson v Mellish* (1824) 2 Bing 229 at 252; 130 ER 294 at 303.
10. KH Shahdadpuri "Natural Justice Fallibility in Singapore Arbitration Proceedings" (2014) 26(2) *Singapore Academy of Law Journal* 562 at 576–7, [40] and [42].
11. Above n 10.
12. Pieter Sanders (ed) *ICCA Guide to the interpretation of the 1958 New York Convention* ICCA, Schiedam 2011 p 107.
13. Or on the other grounds in Model Law, Arts 34 and 36: see above n 6, at [111].
14. Above n 6. For a more detailed case note of the TCL case, see: John K Arthur "Setting aside and objecting to enforcement of arbitral awards on the public policy ground, and for breach of the rules of natural justice" (2014) 1(6–10) *ADR* 134 at 134–5.
15. Above n 6, at [75]–[76]; *International Relief and Development Inc v Ladu* [2014] FCA 887; BC201407777 at [169] (Kenny J).
16. *Majlis Amanah Rakyat v Kausar Corp Sdn Bhd* [2009] 1 LNS 1766.
17. Above n 16. This approach is along the same lines as the Australian approach seen in the *TCL* case, above n 6.
18. By its International Arbitration Act 1994, s 3.
19. IAA (Singapore), s 31(4)(b).
20. *AJU v AJT* [2011] SGCA 41 and according to one commentator there has been no instance where the Singapore courts have refused to enforce an arbitral award on the grounds of public policy: Nish Shetty *Public Policy and Singapore Law of International Arbitration* 25 March 2015 Clifford Chance Memorandum to Members of the IBA Recognition and Enforcement of Awards Subcommittee.
21. *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR (R) 597; [2006] SGCA 41. See also, *AJU v AJT*, above n 20; *AQU v AQV* [2015] SGHC 26 *AKN v ALC* [2015] SGCA 18 *Coal & Oil Co LLC v GHCL Ltd* [2015] SGHC 65.
22. *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*, above n 21.
23. *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*, above n 21, at [59].
24. *Shanghai Fusheng Soya-Food Co Ltd v Pulmuone Holdings Co Ltd* [2014] HKCFI 894 per Hon Mimmie Chan
25. See above n 7.
26. Bokhary PJ in *Hebei Import & Export,* above n 7, explained (at p 123H-I).
27. *A v R* [2009] 3 HKLRD 389; [2010] 3 HKC 67; [2009] HKCU 632 at [23] (Reyes J).
28. *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)*, above n 2, at [94] (Tang VP).
29. *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)*, above n 2, at [105].
30. Henry (Litong) Chen and B Ted Howes "The Enforcement of Foreign Arbitration Awards in China" (2009) 2(6) *Bloomberg Law Reports*, see: http://www.mwe.com/info/pubs/BLR_1109.pdf.
31. Above n 30, see Conclusion.
32. *Shri Lal Mahal Ltd v Progeto Grano Spa* (2014) 2 SCC 433 at [22], [25] (SC).
33. Above n 32.
34. The "fundamental policy of Indian law" was discussed in *ONGC Ltd v Western Geco international Ltd* (2014) 9 SCC 263, seen as a regressive step for the non-interference trend in Arthad Kurlekar, *ONGC v Western GECO — A new impediment in Indian Arbitration*, 7 January 2015, http://kluwerarbitrationblog.com.
35. Above n 32 relying upon *Renusagar Power Co Ltd vs General Electric Co* 1994 AIR 860,; 1994 SCC Supl (1) 644 at [66].
36. *ONGC v Saw Pipes* 2003 (5) SCC 705 *Associate Builders v Delhi Development Authority* 2014 (4) ARBLR 307.
37. Law No 138 of 2003 which came into force on 1 March 2004.
38. See Hiroyuki Tezukaand Yutaro *Kawabata Re IBA Subcommittee on Recognition and Enforcement of Awards Country Report — Japan* (30 June 2015).
39. Japanese Arbitration Law 2003, Arts 44(1)(viii), 45(2)(ix), and 46(8); see above n 38.
40. Above n 39, under Arts 44, 45, and 46, see above n 38.
41. See above n 38; and see, *KK Kouno v Y Inc* LEX/DB No 25473502, (Tokyo Dist Ct 13 June 2011), upheld in *Y Inc v KK Kouno* LLI/DB No L06720791 (Tokyo High Ct 13 March 2012)

upheld the Tokyo District Court's judgment; in that case the court set aside an arbitral award on the basis that it offended Japanese procedural public policy in that the arbitrator had taken a central fact as being undisputed although it was in fact disputed between the parties.

42. Baker and Mackenzie *Dispute Resolution Around the World — Japan* (2011) Enforcement of arbitration awards, p 17 www.bakermckenzie.com.
43. Beomsu Kim and Benjamin Hughes "South Korea: receptive to foreign arbitration awards?" (Dec 2009–Jan 2010) *Asian Counsel* 26 www.shinkim.com referring to Korean Supreme Court Dec No 89Daka20252, 10 April 1990.
44. Korean Supreme Court Dec No 89Daka20252, 10 April 1990 and Korean Supreme Court Dec No93Da53504, 14 February 1995 cited in above n 43.
45. Korean Supreme Court, 2006Da20290, Decided on 28 May 2009.
46. Rt Hon Sir Michael Kerr "Concord and Conflict in International Arbitration" (1997) 13 *Arbitration International* 122 at 125–6.