Public Policy and the Recognition and Enforcement of a Foreign Arbitral Award

Pasit Assawawattanaporn[1]

Leela Gedkhuntod[2]

Abstract

In Thailand, the ground for refusing or setting aside an arbitral award related to the term "public policy" in New York Convention is stipulated in the Thai law as "peace and good morals of people". Similar to the term "public policy", the term "peace and good morals of people" is undefined and is interpreted by the Thai courts on a case by case basis. It is found that in several cases, the Supreme court and the Supreme administrative court interpreted the term in a broad manner, and it could intervene the process of arbitration. This article proposes that it is essential for national courts to interpret the public policy narrowly. Such an approach would help to increase the use of arbitration as a method for dispute resolution in Thailand.

Arbitration proceedings conclude in the publication of an award that is final and binding on all parties. The expectation is that the losing party would and should comply with the decision. However, in most cases, the losing party will inevitably attempt to challenge the award rather than comply. Typically, the losing party would apply to oppose to challenge the recognition and enforcement of the award at the court of the place where the enforcement is sought. The grounds for setting aside an award or rejecting its enforcement are specified firstly in the New York Convention and also in the national law of arbitration of each country. The limited grounds for challenging or setting aside the award are designed to promote arbitration as an effective tool to solve international commercial disputes.

Among the many grounds for refusing the enforcement of an award, there is the public policy of a country. In Thailand, this ground is stated in Section 40, paragraph 3.2.b and Section 44 of the Arbitration Act 2002 that courts have the power to refuse the recognition and enforcement of a foreign arbitral award when its recognition and enforcement is contrary to Thailand's public policy.

The Sections of the Arbitration Act 2002 just mentioned, restate the content of Art. V paragraph 2.b.1 of the New York Convention of the Recognition and Foreign Arbitral Award 1958. The

[1] *Pasit Assawawattanporn,LLB. (2nd class Hons.) at Thammasat university, LLM. From University of Pennsylvania and Harvard Law School, Barrister at Law from New York State, Ph.D from Mahidol University. Currently he is a Managing Director of Thailand Arbitration Center and also acts as a lecturer and speaker in several law schools of Thailand, Email: Pasit.a@thac.or.th*

[2] *Leela Gedkhuntod, LLB. (2nd Class Hons) at Thammasat university, LLM. at Thammasat University, Thai Barrister at law : The Institute of Legal education of Thai Bar association. Currently she is working as a legal counsel at Thailand Arbitration Center. Email* : leela.g@thac.or.th

term "public policy" is not defined in the Convention and its meaning is interpreted differently in each jurisdiction. Accordingly, national courts have broad discretion in interpreting public policy. As in the New York Convention, Art. 34.2 of the UNCITRAL Model Law similarly does not define "public policy". It is important to note that under Thai law, the ground to challenge an arbitral award based on public policy need not be raised by a party as such. The court can do so ex officio.

In Thai law, public policy is defined as "peace and good morals of people". As can be seen, the definition is vague and leaves room for either a broad or narrow interpretation, at the discretion of the courts. However, the Supreme Administrative Court, has issued guidelines to the interpretation of the public policy ground. According to these guidelines, public policy aims to protect the common interest of the country[3] and parties cannot derogate from public policy in favour of their interests otherwise it could endanger the security of the nation's economy and the society[4].

Based on an analysis of the past decisions of the Supreme Court and the Supreme Administrative Court in relation to the refusal of recognition and
enforcement of arbitral awards on the public policy ground makes it is possible to make the following observations:

(1) The rules applicable to the appointment of the arbitrators as agreed by the parties and the whole process[5] or the arbitrator's impartiality and independence in performing his/her duties[6] may be reviewed based on 'public order and good morals of people';

(2) Starting a new arbitration on the same issue between the same parties once the final award is rendered in the first arbitration proceeding may also be examined based on the public policy ground[7];

(3) The public policy ground may also be relied upon to review an arbitral award made based on a contract, the subject matter of the dispute referred to arbitration, which is illegal;

(4) When arbitrators wrongfully apply the law or misinterpret the provisions applicable[8]or apply a law that is no longer in force[9], the public policy exception may also be engaged;

[3] Supreme court judgement no. 840/2561
[4] Supreme court judgement no. 8265/2559
[5] Supreme court judgement no. 8714/2554

[6] Supreme court judgement no. 2557/2559

[7] Supreme court judgement no. 13535-13536/2556

[8] Supreme court judgement no. 2503/2562

[9] Supreme Administrative court judgement no. อ.1259/2559

(5) When the contract from which the dispute arose is, in principle legal, but the purpose parties ascribe to that contract is illegal[10], again the public policy exception may apply Examples can be found in the case of a loan contract with a prohibited

rate of interest[11], contraction contracts breaching building law[12], the wrongful application of prescription[13], violation of the law regulating bankruptcy[14], the participation of private companies in state-own business[15], violation of the law governing telecommunications[16]and when the arbitrators' decision favours the losing party.[17]

It is submitted that the guidelines and the Supreme Court's decisions do not seem to permit a clear understanding of what exactly is meant by the phrase the "peace and good morals of people". In the result, public policy has to be considered on a case by case basis. 'Peace and good morals of people' are fluid concepts. The meaning to be given to the phrase and how it is to be interpreted must, ultimately, depend on the context in which the inquiry is undertaken. The context is in turn, dependent on the prevailing state of the economy, social conditions and the era. What was considered acceptable in the past may not be acceptable today. For example, ,previously it was possible to pay to 'win'

at a public auction. Today, this is considered bribery and is forbidden by the law. Such contracts are against the 'good morals of people' as it is presently understood and accepted by society. So, such contracts would have to be considered null and void. The challenge of interpreting 'public policy' under Thai law may seem difficult. However, it is argued that it is no more difficult than trying to define the scope of 'public policy' in international cases. Indeed, in those cases, the challenge may be even greater since each jurisdiction may have a different view of 'public policy' within their own borders. It is possible that at the international level,

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[10] Supreme Administrative court order no. อ.18/2558

[11] Article V (2) of New York Convention 1958 states that

"(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that :….
(b) The recognition or enforcement of the award would be contrary to the public policy"

[12] Article 34 (2) An arbitral award may be set aside by the court specified in article 6 only if:
(b) the court finds that :
(ii) the award is in conflict with the public policy of this state

[13] Supreme Administrative court order no.48/2555

[14] Supreme Administrative court order no. อ.1054/2558

[15] Supreme court judgement no. 2231-2233/2553

[16] Supreme court judgement no. 1273/2543

[17] Supreme court judgement no. 11102/2551

'public policy' may be understood differently depending on the jurisdiction and the jurisdiction's own national interests.

The lack of clarity and consistency in the interpretation of 'public policy' appears to have given rise to the phenomenon of some national courts using public policy as an excuse to refuse the award's enforcement. Indeed some of these cases suggest that the courts involved may have relied upon reasons that do not normally fall within the scope of public policy y to reject the award or to create the opportunity to review the merit of the same[18].

In the circumstances, in view of the 'undefined boundaries' of the public policy exception, we would argue that it is essential for national courts to interpret the public policy in the narrowest way possible. Doing so, courts will help to reduce the abuse of the public policy exception to undermine arbitral awards. The net result, then, would be a signal to encourage the use of arbitration as a method for dispute resolution, as parties opting for arbitration to resolve their disputes would then, have the assurance that their choice of dispute resolution would be honoured.

[18] Supreme court judgement no. 1985/2541, Supreme court judgement no. 11454/2555, Supreme Administrative court judgement no. ๐ . 824/2556 and Supreme Administrative court judgement no ๐ . 698-699/2558, Supreme court judgement no.1985/2541, Supreme court judgement no. 11454/2555, Supreme court judgement no. ๐ . 824/2556 Supreme Administrative court judgement no ๐.698-699/2558