CHAPTER I INTRODUCTION

A *Introduction*

Global trade liberalisation after World War II has been the prime catalyst for the rapid growth in international trade and investment.[1] The growth in international trade in turn increases the size and complexity of international commercial transactions, and consequently an increase in business disputes in relation to transnational agreements arises.[2] In dealing with these disputes, the parties to international commercial transactions are increasingly electing to utilise Alternative Dispute Resolution (ADR) methods, especially international commercial arbitration, so as to avoid the drawbacks of litigation in national courts.

Over the last two or three decades, international arbitration has become a leading method for resolving disputes arising from international trade and commerce through the use of one or more arbitrators rather than through the national courts. It is generally accepted that international arbitration is an efficient, enforceable, consensual and impartial method to resolve international commercial disputes.[3] However, the efficiency and enforceability of international arbitration ultimately depends on whether the arbitral awards can be enforced against the losing party.[4] In practice, the losing party may refuse to comply with the award at the place of arbitration: setting aside[5] proceedings. It is thus vital that the winning party has an efficient legal mechanism to enforce the award in the country where the losing party may have assets. Thus, transnational recognition and enforcement of foreign arbitral awards has increasingly been a major issue in international commercial arbitration.

To resolve the difficulty in enforcing the foreign arbitral awards in the enforcing court, the United Nations General Assembly adopted the *United Nations Convention on the*

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[1] Ann Harrison and Helena Tang, 'Trade Liberalization: Why So Much Controversy?' in Roberto Zagha and Gobind T Nankani (eds), *Economic Growth in the 1990s: Learning from a Decade of Reform* (World Bank, 2005) 133; Anthony P. Thirlwall, *Trade, Trade Liberalisation and Economic Growth: Theory and Evidence* (The African Development Bank, 2000) <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00157660-FR-ERP-63.PDF> 24; See also Ashok Parikh and Corneliu Stirbu, *Relationship between Trade Liberalisation, Economic Growth and Trade Balance: An Econometric Investigation* (Hamburg Institute of International Economics, 2004) <http://ageconsearch.umn.edu/bitstream/26267/1/dp040282.pdf> 18-19.

[2] Winston Stromberg, 'Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes' (2007) 40(4) *Loyola of Los Angeles Law Review* 1337, 1339.

[3] Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Thomson Reuters, 2011) 7-8.

[4] Albert Jan van den Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions' (1987) 2 *ICSID Review* 439.

[5] Setting aside an arbitral award is the declaration made by a competent authority that an arbitral award is rejected. As a result, the arbitral award becomes unenforceable in that State, and according to art V(1)(e) of the *New York Convention*, the recognition and enforcement of such award is likely to be refused in another State.

Recognition and Enforcement of Foreign Arbitral Awards in 1958 (known as the '*New York Convention*').[6] The *New York Convention* is the principal international instrument that 'seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.'[7] The *New York Convention* requires the national courts of each Contracting State to give effect to arbitration agreements and to recognise and enforce arbitral awards made in the territory of another State or considered as non-domestic; however, both reciprocity and commercial reservations are permitted.[8] There remain, however, some difficulties in the enforcement of foreign arbitral awards since the *New York Convention* includes a list of grounds for the refusal of the recognition and enforcement of foreign arbitral awards.[9] One such ground is the 'public policy exception'. Relying on the public policy exception under art V(2)(b) of the *New York Convention*, the court of the Contracting State where recognition and enforcement is sought may refuse to recognise and enforce the award if it is against the 'public policy' of that country.[10] The *New York Convention*, however, does not provide a precise meaning of 'public policy'. Instead, the Convention allows the competent authorities of the enforcing

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[6] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf> (New York Convention).

[7] A non-domestic arbitral award is an award which is made in the territory of the State of enforcement but is treated as a foreign award under the law of that State due to some foreign elements, eg, the applicable law in the arbitration proceedings is the arbitration law of another State; See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")* United Nations Commission on International Trade Law <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

[8] Article I of the *New York Convention* provides:

> 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
> 2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
> 3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

[9] Article V of the *New York Convention.*

[10] Article V(2) of the *New York Convention* provides:

> 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:
>
> > (a) The subject matter of the difference is incapable of settlement by arbitration under the law of that country;
> > (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

State to determine what comes within the definition of public policy for that State. Thus, the public policy exception could potentially be varied from one State to another. This gives rise to controversies and inconsistencies in judicial application of the public policy exception to the recognition and enforcement of foreign arbitral awards among States Parties to the *New York Convention*.

To reduce the difficulties in recognition and enforcement of foreign arbitral awards caused by the public policy exception, the United Nations Commission on International Trade Law (UNCITRAL) produced the *UNCITRAL Model Law on International Commercial Arbitration*[11] (the '*Model Law*') which States can adopt wholly or partly as their domestic arbitration law. By following the intent of the *New York Convention*, the grounds to both setting aside and refusing the recognition and enforcement of arbitral awards under the *Model Law* mirror those of art V under the *New York Convention*. Consequently, the public policy exception is both a ground to set aside and to refuse the recognition and enforcement of arbitral awards under the *Model Law*.

Additionally, a number of organisations, judges, and scholars have attempted to provide interpretation guidelines for the public policy exception under the *New York Convention* to be interpreted as narrowly as the so-called 'international public policy'. Examples of these guidelines include the International Council for Commercial Arbitration (ICCA) guide to the interpretation of the 1958 New York Convention,[12] the International Law Association (ILA)'s Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,[13] and Judge Lloyd F. MacMahon's summary judgment in *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA).*[14] However, in practice, there is no common standard adopted by the Contracting States. One distinguishing factor might be

[11] *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law,* GA Res 40/72, UN GAOR, 6th Comm, 40th sess, 112th mtg, Agenda Item 135, UN Doc A/RES/40/72 (11 December 1985); as revised in 2006, *Revised Articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, paragraph 1, of the convention on the Recognition and Enforcement of Foreign Arbitral Awards, Done at New York, 10 June 1958,* GA Res 61/33, UN GAOR, 6th Comm, 61st sess, 64th mtg, Agenda Item 77, UN Doc A/RES/61/33 (4 December 2006). It is important to note that the Model Law is a non- binding document, and only some States adopted it either wholly or partly.

[12] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011).

[13] Committee on International Commercial Arbitration, International Law Association, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (New Delhi, 2-6 April 2002).

[14] *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA),* 508 F 2d 969, (2nd Cir, 1974).

that the Contracting States have different legal systems in that they adhere to either the common law or civil law systems. In addition, there has been another arguable issue in international commercial arbitration which is the use of the term 'public policy' in a common law system and the term '*ordre public*' in a civil law system.

In common law countries, such as The United Kingdom and the United States, the courts have generally adopted a pro-enforcement policy in relation to the enforcement of foreign arbitral awards and thus regard the 'public policy' ground for non-enforcement as an exception to be interpreted narrowly.[15] For instance, the application of the narrow approach to the public policy exception was confirmed by the English High Court of Justice, Queen's Bench Division (Commercial Court) in *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation*.[16] In this case IPCO and Nigerian National Petroleum Corporation (NNPC) entered into an agreement which required IPCO to undertake works for the design and construction of a petroleum export terminal in the Port Harcourt area of Nigeria. The agreement was governed by Nigerian law, and it contained an arbitration clause stating that arbitration proceedings would be taken place in Lagos in accordance with the *Nigerian Arbitration and Conciliation Act 1990*. The dispute occurred between the parties when the project, estimated in the contract to be done in 24 months, took 22 months longer to complete. Therefore, the dispute was submitted to arbitration, and the tribunal finally awarded IPCO USD 152 195 171 and Naira 5 000 000 on 28 October 2004. On 15 November 2004, the NNPC filed a petition seeking the setting aside of the award to the Federal High Court in Lagos.

While the setting aside case was still pending, IPCO sought the enforcement of the award in London. On 29 November 2004, the High Court ordered, ex parte, that the award be enforced. Then, the NNPC sought the setting aside of the enforcement order or the adjournment of the enforcement. In these proceedings, IPCO requested that if the enforcement was adjourned, NNPC should pay USD 50 million or a sum the court saw fit in security. One of the main arguments of NNPC in this case was the public policy exception

[15] Committee on International Commercial Arbitration, *Interim Report on Public Policy as a bar to Enforcement of International Arbitral Awards* (International Law Association, 2000) <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=15&ved=0CEMQFjAEOAo&url=http%3A%2F%2Fwww.ila-hq.org%2Fdownload.cfm%2Fdocid%2FE723662E-053C-415A-A4C7822577AE6B4F&ei=IIPTUaXeLIGCkwWS04CABQ&usg=AFQjCNFHXadopA03NVuxeHqmmHH1eRNOzw&bvm=bv.48705608,d.dGI&cad=rja>, 15-16.

[16] *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005] APP.L.R., (Commerical Court) (27 April 2005).

under s 103(3). Mr Justice Gross held that 'considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution'[17] and that '[t]he reference to public policy in s 103(3)[18] was not intended to furnish an open-ended escape route for refusing enforcement of [the] *New York Convention* awards.'[19] The court rejected the application to set aside the enforcement order since there was no sufficient ground to do so, and the enforcement of the arbitral award would not be contrary to English public policy. Then, after reviewing the NNPC case in the Nigerian Court, the court adjourned the enforcement order, ordered USD 13 million to be indisputably due to IPCO by NNPC, and required NNPC to provide security of USD 50 million in London.

In addition, the narrow approach of the public policy exception was also confirmed by the United States Court of Appeals, Second Circuit in *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA)*.[20] In this case, the parties entered into a construction agreement in November 1962 which contained an arbitration clause and a *force majeure* clause. The dispute arose when the Parsons & Whittemore Overseas Co., Inc. (Overseas) work crew left Egypt because of the Arab-Israeli Six Day War in 1967. At that time, Overseas Notified RAKTA and referred the incident as the force majeure event. However, RAKTA did not agree and sought damages for breach of contract. The dispute was brought to arbitration governed by the rules of the International Chamber of Commerce (ICC). In 1972, the arbitration tribunal awarded RAKTA for USD 312 507.45 in damages for breach of contract, USD 30 000 for RAKTA's costs, and three-fourths of the arbitrators' compensations.

Later, Overseas sought a declaratory judgment to prevent RAKTA from collecting the award out of a letter of credit made out in RAKTA's favour issued by the Bank of America at Overseas' request while RAKTA sought the confirmation and the enforcement of the foreign arbitral award. The district court rejected the grounds raised by Overseas and confirmed the award. Thus, the district court decision was appealed, and one of the grounds was the public policy exception under art V(2)(b) of the *New York Convention*. Judge Joseph Smith stated

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[17] Ibid 13.
[18] Section 103(3) of the *Arbitration Act 1996* (UK) provides:
Recognition or enforcement of the award may also be refused of the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.
[19] *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005] APP.L.R., (Commerical Court) (27 April 2005).
[20] *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA),* 508 F 2d 969, (2nd Cir, 1974).

that '[t]he general pro-enforcement bias informing the [New York] Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense'.[21] The court then affirmed the decision of the district court.

In Thailand, which is generally regarded as a civil law country, the Thai courts have been reluctant to adopt a pro-arbitration approach in relation to the enforcement of all arbitral awards. In fact, the Thai courts have recently adopted a broad approach to the concept of the public policy exception despite the fact that the *Thai Arbitration Act B.E. 2545* (2002)[22] is largely based on the *Model Law*. In particular, the public policy exception found in ss 40(2)(b) and 44 of the *2002 Thai Arbitration Act* are modelled on art 34(b)(ii)[23] and art 36(1)(b)(ii)[24] of the *Model Law*. The Thai courts' interpretation of the very broad public policy exception is evidenced in *The Expressway and Rapid Transit Authority of Thailand (ETA) v BBCD Joint Venture (BBCD)*,[25] *The Office of the Permanent Secretary, the Prime Minister's Office v ITV Public Company Limited*,[26] and *TOT Public Company Limited v True Corporation Company Limited*[27] which will be considered in Chapter III of this thesis.

Since the public policy exception is a ground for setting aside an arbitral award or refusing to recognise or enforce an arbitral award, the extensive interpretation of the public policy exception by Thai courts ought to sound as a cautionary warning to those who may, in the future, need to approach a Thai court for recognition and enforcement of an award granted by an arbitration tribunal. Basically, both Thai and foreign investors should be aware of the Thai courts' broad approach to the 'public policy' exception under ss 40(2)(b) and 44 of the *2002 Thai Arbitration Act* before requesting the enforcement of an arbitral award, making an

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[21] Ibid 974.

[22] *Arbitration Act, B.E. 2545* (Thailand) 23 April 2002, Government Gazette Vol. 119, Part 39 Kor. (Arbitration Act 2002 (Thailand)).

[23] Article 34(2) of the Model Law provides: Application for setting aside as exclusive recourse against arbitral award

> (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.

[24] Article 36 of the Model Law provides: Grounds for refusing recognition or enforcement

> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> > (b) the court finds that:
> >
> > > (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

[25] *The Expressway and Rapid Transit Authority of Thailand (ETA) v BBCD Joint Venture (BBCD)* [2006] 7277/2549 (Supreme Court of Thailand).

[26] *The Office of the Permanent Secretary, the Prime Minister's Office v ITV Public Company Limited* [2006] 349/2549 (Supreme Administrative Court of Thailand).

[27] *TOT Public Company Limited v True Corporation Company Limited* [2012] 1660/2555 (Central Administrative Court of Thailand).

agreement, or even investing in Thailand. For instance, the case of *Walter Bau AG v The Kingdom of Thailand*[28] is a good example where the successful party did not apply to the Thai courts for the enforcement of the arbitral award pursuant to the 1961 and 2002 investment treaties between Germany and Thailand. In this case, the dispute was arbitrated in Geneva, Switzerland. The arbitration tribunal rendered the award to Walter Bau AG for damages and interest in 2009. In 2011, instead of requesting the enforcement in the competent authority in Thailand, Walter Bau AG filed a petition to the United States District Court Southern District of New York seeking the recognition and enforcement of the arbitral award. As a result, the United States District Court Southern District of New York recognised and enforced the arbitral award in favour of Walter Bau AG and against Thailand.[29] After that, Thailand appealed the decision to the United States Court of Appeals, Second Circuit in 2012, and the court affirmed the decision of the lower court. Assumedly, Walter Bau AG did not trust the Thai courts to enforce the award due to their practice of interpreting the public policy exception broadly in similar cases.

Additionally, another crucial concern about Thai arbitration law is that the *2002 Thai Arbitration Act* does not differentiate between the law for enforcing domestic arbitral awards and that for enforcing foreign arbitral awards. Accordingly, Thai courts exercise the same standard for enforcing both domestic and foreign awards. Moreover, Thailand adopts the concept of *ordre public* which is commonly used in civil law countries rather than the concept of public policy used in common law countries. This can be implied from the language in the *2002 Thai Arbitration Act* that a court shall have the power to refuse the enforcement of an arbitral award if it appears that the enforcement of the award is contrary to public order or good morals. In addition, the concept of 'public order or good morals' in Thailand is obviously perceived as a domestic or broad one.

Even though, there are still some issues to be aware of, the reliance on arbitration clauses for business agreements is growing in Thailand. The Thai Arbitration Institute, one of the main arbitration institutes in Thailand, reports that the number of disputes and the amount in disputes have grown rapidly and continuously. In 2010-2012, the Thai Arbitration Institute, Court of Justice resolve disputes in relation to 124, 119, and 143 cases respectively for amounts of approximately 51 billion, 110 billion, and 9 billion Thai baht respectively.

[28] *Werner Schneider (as liquidator of Walter Bau AG) v The Kingdom of Thailand*, 11-1458-cv (2nd Cir, 2012).
[29] *Werner Schneider (as liquidator of Walter Bau AG) v The Kingdom of Thailand*, 10 Civ. 2729 (DAB) (SD NY, 2011).

Thailand is a member of the World Trade Organisation (WTO) which aims to create a fair trade competition[30] and to 'reduce and eliminate governmental trade barrier'.[31] Moreover, Thailand is a member of the Association of Southeast Asian Nations (ASEAN), and at the end of 2015, it became a member of ASEAN Economic Community (AEC).[32] As a result, the ten member nations of AEC[33] have agreed to operate a highly competitive economic region under a free trade policy which will increase the number of international business transactions between the countries. Since the conflict of laws and the reliability of national courts vary among the Member States, international arbitration is expected to be the common dispute resolution method in the AEC. In the ASEAN legal and judicial cooperation workshop in Cambodia in July 2012, representatives from the ASEAN Senior Law Officials Meeting (ASLOM), ASEAN Member State judicial bodies, and the ASEAN Secretariat discussed the challenges including the national implementation of international treaties and international arbitration.[34] Undoubtedly, international arbitration is recognised as an issue by ASEAN's Member States. Thus, if Thai arbitration law is still vague and not beneficial to the parties, Thailand will not be regarded by the parties as a suitable place of investment or arbitration. Until now, there has been no solid intention on the part of the Thai legislature or Thai government to resolve this issue. While arbitration is acknowledged as the best dispute resolution mechanism for business, a uniform approach to legislation and its interpretation is needed in the world of business. This thesis argues that arbitration law reform is needed for Thailand in order to protect Thai traders and promote international business.

B *Thesis Statement*

This thesis argues that the law and practice concerning the application and interpretation of the public policy exception under the *Thai Arbitration Act B.E. 2545* (2002) are problematic. In order for Thailand to fulfil its obligations and be an attractive place of investment and arbitration, Thai arbitration law reform with respect to the public policy exception is inevitably required.

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[30] World Trade Organization, *Understanding the WTO* (5th ed, 2015) 10-13.
[31] Mitsuo Matsushita, 'Basic Principles of the WTO and the Role of Competition Policy' (2004) 3(2) *Washington University Global Studies Law Review* 363, 363.
[32] The ASEAN Secretariat, *ASEAN Economic Community Factbook* (February 2011) <http://www.thaifta.com/thaifta/portals/0/asean_aecfactbook.pdf>.
[33] The ten member nations of the AEC are Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.
[34] ASEAN Secretariat News, *U.S. Supports ASEAN to Strengthen High-Level Legal Networks* (31 July 2012) <http://www.asean.org/us-supports-asean-to-strengthen-high-level-legal-networks/>.

As a Contracting State of the *New York Convention*, Thailand is obliged to apply and interpret the public policy exception as a ground to refuse the recognition and enforcement of foreign arbitral awards in accordance with the Convention. However, the failure of the *2002 Thai Arbitration Act* to provide precise guidance to the courts on how the public policy exception should be applied has resulted in an incompatibility with the *New York Convention*, and that needs to be resolved.

In addition, the improvement of Thailand's arbitration law is one of the mandates of the current Thai government.[35] An effective and efficient alternative dispute resolution system is a must to facilitate the disputes that will arise from the increased international trade when Thailand, a Member State of the Association of Southeast Asian Nations (ASEAN), becomes part of the ASEAN Economic Community (AEC).

In order to formulate a set of practical recommendations for Thai arbitration law reform, the international framework and the current Thai arbitration law will be examined to identify the problems that need to be addressed. In addition, the arbitration laws and the important cases decided in countries that are the most popular places of arbitration[36] will be examined.

C *Significance of the Research*

This thesis identifies the problematic issues concerning the public policy exception under the *2002 Thai Arbitration Act* and highlights the incompatibility between the application and interpretation of the public policy exception under the Act and that of the *New York Convention*. This thesis also makes recommendations for Thai arbitration law reform to eliminate the identified difficulties, to earn the confidence of investors, and to promote Thai economic growth. Moreover, the review of arbitration law is one of the goals of the current Thai government as it prepares for the increase of international trade between the AEC members.

This thesis will provide detailed insights into the problems with respect to applying the public policy exception under the *2002 Thai Arbitration Act*, examine the Thai judicial practice in dealing with the public policy exception, and provide appropriate recommendations to resolve the difficulties highlighted.

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[35] Office of the Permanent Secretary for Defence, *Consensual Framework for Reforming Thailand in Regard to Law and Judicial Administration* (2014) <library2.parliament.go.th/giventake/content_nrcinf/nrc2557-issue3-reform01.pdf>.

[36] Simon Greenberg, Jason Fry and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration (International Chamber of Commerce (ICC)*, 2012) 199-201.

D *Purpose of the Research*

This thesis aims to examine and critically analyse the problems arising from the various interpretations of the concept of 'public policy' as a bar to the recognition and enforcement of a foreign arbitral award. The expansive interpretation of the public policy exception in Thailand is an important factor affecting the development of Thai arbitration law, Thai arbitration system, and the growth of the Thai economy. The major purpose of this research is to determine and analyse the scope and substance of the concept of 'public policy' as the exception to recognition and enforcement of foreign arbitral awards in common law countries such as Singapore, the United Kingdom, and the United States, and in civil law countries such as France, Germany, and Switzerland. In addition, the research will focus on finding the balance between the pro-enforcement bias under the *New York Convention* and the public policy of the enforcing State. Moreover, the research aims to make some recommendations for the arbitration law reform in Thailand so as to modernise and universalise the interpretation of the public policy exception. Accordingly, Thai cultures and norms will be taken into consideration.

In this regard, the thesis will address the following:

1. Examine whether the *New York Convention* has achieved its goal of providing uniform standards to guide courts and limit their discretion in refusing enforcement of arbitral awards.

2. Examine the concept of 'public policy' as a bar to the recognition and enforcement of foreign arbitral awards in terms of its substantive and procedural meanings.

3. Identify different approaches to the concept of 'public policy' in civil law and common law systems.

4. Assess and evaluate the scope of the public policy exception for the recognition and enforcement of foreign arbitral awards applied in common law and civil law countries such as the France, Germany, Singapore, Switzerland, United Kingdom, and the United States in order to acquire appropriate guidance for Thai arbitration law reform.

5. Make relevant reform proposals that provide an effective and universal guidance for the interpretation of the public policy exception to enhance arbitration law development and to promote the Thai economy.

E *Core Research Questions*

1 *Does the New York Convention provide a precise definition of the public policy exception that should be applied to foreign arbitral awards? And, to what extent has the New York Convention achieved its goal of providing a uniform standard to guide national courts and limit their discretion in refusing the recognition and enforcement of foreign arbitral awards on the public policy ground?*

There are two competing public policy goals, which are equally important, in the *New York Convention*. First, the pro-enforcement bias favours the finality of arbitral awards in order to enhance the use of international arbitration. Second, the public policy exception serves as a safeguard to refuse the enforcement of unjust arbitral awards in order to protect the society. The latter public policy goal is found in art V(2)(b) of the Convention as a ground for a national court to refuse the recognition and enforcement of foreign arbitral awards. In effect, this article defers the question of what might offend 'public policy' to the discretion of the courts of the 'country where recognition and enforcement is sought' (art V(2)). This means that the States may use their definition of public policy exception for their countries to make a decision. However, this needs to be balanced with the well acknowledged international standard which takes a narrow approach. This thesis will explore what is the accepted standard of the public policy exception and discuss how the ambiguity affects the application and interpretation of the public policy exception in detail in Chapter II.

In terms of the achievement of the *New York Convention* regarding the goal to limit national courts' discretion in allowing the public policy exception to bar the recognition and enforcement of foreign arbitral awards, this thesis will examine how national courts in various jurisdictions apply and interpret the public policy exception. This point will be discussed in Chapter IV.

2 *Thailand is a Contracting State of the New York Convention which refers to the public policy exception as a ground to refuse the recognition and enforcement of foreign arbitral awards. Is the standard of the public policy exception applied in Thailand compatible with that of the New York Convention?*

Since Thailand ratified the *New York Convention* in 1959,[37] it is bound to the provisions therein. The public policy exception is a ground to refuse the recognition and enforcement of foreign arbitral awards in art V of the *New York Convention*; therefore, it is suitable for Thailand to apply the public policy exception to foreign arbitral awards in accordance with the Convention. Notwithstanding, as mentioned earlier in this Chapter, Thai courts did apply the public policy exception broadly, and that seems to oppose the international standard.

Chapter III of this Thesis will examine the current Thai arbitration law and identify the problematic issues with respect to the public policy exception whether it is compatible to the standard of the *New York Convention*.

3 *What should be an appropriate uniform standard for striking the balance between the public policy exception as a bar to the enforcement of foreign arbitral awards and the pro-enforcement bias under the New York Convention?*

The pro-enforcement bias under the *New York Convention* aims to enhance the finality of foreign arbitral awards and promote the use of international commercial arbitration. Therefore, the pro-enforcement bias is beneficial to international trade as a whole. However, it cannot be denied that the public policy of a State is also important. Since both policies are significant, the only way to achieve both policies is applying them in a balanced way in order to set an acceptable standard.

There are a number of guidelines provided by international organisations, judges, and scholars to set out a uniform framework for the application and interpretation of the public policy exception. The guidelines will be examined and discussed in Chapter II and V.

4 *Are there any differences between the common law and civil law approaches to the concept of 'public policy' based on the public policy exception under the New York Convention?*

As mentioned above, there was a debate on the differences between the terms 'public policy', commonly used in common law countries, and '*ordre public*', commonly used in civil law countries. Even though the International Law Association (ILA) has concluded that both terms are interchangeable, it is questionable whether the practice of national courts in applying the public policy exception are using the same standard in different legal systems.

[37] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* United Nations <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf>.

Accordingly, this thesis will examine the legislation and practice of both common law and civil law countries in Chapter IV to determine whether there is any difference. While this thesis will predominantly refer to six countries: common law countries (Singapore, the United Kingdom, and the United States) and civil law countries (France, Germany, and Switzerland), other countries will be discussed relating to specific issues.

5 *What are appropriate proposals for reforming the Thai arbitration legislation in order to make the Thai judicial practice compatible with a balanced restrictive approach to the public policy exception with a view to promoting the finality and enforceability of arbitral awards?*

After exploring the expected standard under the *New York Convention*, identifying the problematic issues under the *2002 Thai Arbitration Act*, and examining how the selected jurisdictions deal with the said issues, the analysis of the information will be conducted in Chapter V. The international standard under the *New York Convention* obviously should not be violated because it is the standard Thailand committed to when it ratified the Convention. Thus, seeking to balance between the two policies, the pro-enforcement bias and the public policy of the enforcing State, is the best option.

All countries taken into account, for comparative purposes, in this thesis except Taiwan[38] are Contracting States of the *New York Convention*, thus they are also bound to the Convention. How these countries deal with what are considered to be problematic issues in Thailand would be helpful for creating model recommendations for Thai arbitration law reform. However, for the model recommendations to be practical and appropriate, the cultural context of Thailand will be considered.

F *Research Methodology*

The thesis will take a combined doctrinal and comparative legal research approach. Doctrinal legal research, which involves a rigorously textual analysis approach, is generally favoured in legal research.[39] Richard Posner described doctrinal work as:

> 'The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks,

[38] See *Member States of the United Nations United Nations* <http://www.un.org/en/members/>; *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Historical/Existing Values)* United Nations <https://treaties.un.org/pages/showDetails.aspx?objid=080000028002a36b>. Taiwan is not a Member State of the United Nations; therefore, it cannot be a Contracting State of the *New York Convention*. However, it has been claimed that Taiwan follows the international standard of the *New York Convention*.
[39] Sue Milne and Kay Tucker, *A Practice Guide to Legal Research* (Lawbook Co., 2008) 1.

> requiring vast knowledge and the ability (not only brains and knowledge and judgment, but also *Sitzfleisch*) to organize dispersed, fragmentary, prolix, and rebarbative materials. These are tasks that lack the theoretical breadth or ambition of scholarship in more typically academic fields. Yet they are of inestimable importance to the legal system and of greater social value than much esoteric interdisciplinary legal scholarship.'[40]

For these reasons, the doctrinal legal research methodology influences the legal system in many ways.[41] Likewise, the comparative legal research methodology, which examines the differences of legal systems to find the developments and tendencies under the legal systems as well as to clarify and to assess such changes,[42] is also considered to be 'a fundamental principle of legal research.'[43] Collectively, these methods will aid our understanding of the legal situation and help to recommend solutions for what have been identified as problems.

The first stage of the research will be a literature review that provides the historical background and discusses what is considered the international standard of the public policy exception under the *New York Convention*. A critical analysis of the interpretation of 'public policy' by Thai courts will then be undertaken, and in particular, this analysis will determine whether the approach adopted by the Thai courts is compatible with the *New York Convention* and the guidelines for interpretation of the public policy exception under art V(2)(b) of the *New York Convention*. Then, the legislation and judicial practice of international arbitration concerning the public policy exception in a number of selected countries of both common law and civil law systems as compared to the Thai approach will be examined. Furthermore, the research aims to identify whether law reform is needed in order to set up a standard of interpretation of 'public policy' and to propose amendments to the *Thai Arbitration Act B.E. 2545* (2002) in order to foster an efficient and compatible approach to arbitration law in Thailand.

Therefore, the thesis will analyse the relevant available literature about the interpretation of 'public policy' in international and regional communities, in regional cooperation, and in certain common law and civil law countries to consider whether they are compatible with the

[40] Richard A Posner, 'In Memoriam: Bernard D. Meltzer (1914-2007)' (2007) 74 *University of Chicago Law Review* 435, 437.
[41] Mathias M Siems, 'A World without Law Professors' in Mark Van Hoeche (ed), *Methodologies of Legal Research* (Hart Publishing, 2011) 79.
[42] Terry Huchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 102 and 105.
[43] Maurice Adams, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing, 2011) 229.

New York Convention and to help formulate a rationale for law reform of the arbitration process in Thailand to ensure that it operates efficiently. Both primary and secondary sources will be relied upon.

The following criteria were used to select the reference countries:

- Most popular places of arbitration, rated by the International Chamber of Commerce (ICC).[44] The said countries are France, Germany, Singapore, Switzerland, the United Kingdom, and the United States. Since Thailand is expected to be an attractive place of investment and arbitration, the legislation and practice of these countries should be taken into account.

- Countries which have been challenged by some of the difficult factual situations confronting Thailand: China, Indonesia, Japan, the Philippines, Russia, and Taiwan.

- Countries that are the Contracting States of the *New York Convention* from both common law countries (Singapore, The United Kingdom, and the United States) and civil law countries (France, Germany, and Switzerland.) Thus, any differences in approach between these countries by virtue of their legal system will become apparent. Consequently, a potential broad range of practical and appropriate recommendations for Thailand can be obtained. Taiwan has also been included as it has been claimed that Taiwan follows the *New York Convention*; even though, it is not a Contracting State.[45]

Thus, in order to provide the overview of the countries selected by the criteria mentioned above, the following table has been produced.

[44] See Greenburg, above n 36.
[45] Tiffany Huang and Amber Hsu, 'Taiwan' in Nancy M. Thevenin et al (eds), *The Baker & McKenzie International Arbitration Yearbook 2010-2011* (JurisNet, 2011) 113, 126.

Table 1.1: An Overview of the Countries Mentioned in This Thesis

Country	Legal System	Contracting State of the *New York Convention*	Reservations under the *New York Convention*[46]		Adopted the *Model Law*
			Reciprocity Reservation	Commercial Reservation	
China	Civil Law	Yes	/	/	Only for Hong Kong and Macao
France	Civil Law	Yes	/	-	No
Germany	Civil Law	Yes	/	-	Yes
Indonesia	Civil Law	Yes	/	/	No
Japan	Civil Law	Yes	/	-	Yes
The Philippines	Mixed	Yes	/	/	Yes
Russian Federation	Civil Law	Yes	*	-	Yes
Singapore	Common Law	Yes	/	-	Yes
Switzerland	Civil Law	Yes	-	-	No
Taiwan	Civil Law	No			Yes
The United Kingdom	Common Law	Yes	/	-	Only for Bermuda, British Virgin Islands, and Scotland
The United States	Common Law	Yes	/	/	Only for some states' laws: CA, CT, FL, GA, IL, LA, OR, and TX

[46] Article I(3) of the *New York Convention* allows a Contracting State to make a reciprocity reservation in order to be bound to the Convention on the basis of reciprocity and/or to make a commercial reservation to limit its obligation to apply the Convention to only commercial disputes as defined by the State's national law.

*'The Union of Soviet Socialist Republics will apply the provisions of this [New York] Convention in respect of arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment.'[47]

G *Scope and Limitations of the Study*

The principal purpose of this thesis is to examine and critically analyse the problematic application and interpretation of the public policy exception as a bar to the recognition and enforcement of foreign arbitral awards in Thailand. Thus, the *New York Convention*, of which Thailand is a Contracting State, is the main focus in this thesis. It should be noted that this thesis will cover not only foreign arbitral awards but also non-domestic arbitral awards[48] because such awards fall within the scope of the *New York Convention*.[49] In addition, since the *2002 Thai Arbitration Act* largely adopted the *Model Law*, it is taken into account. Notably, the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the '*Washington Convention*')[50] is not relevant to this thesis because Thailand signed but has not yet ratified the Convention. Also, the *Washington Convention* does not contain any public policy exception. Thus, the scope of this thesis will not address any disputes arising from investment treaties which are required to be settled under the *Washington Convention*.

It should be noted that this thesis will mainly focus on the application of the public policy exception to foreign arbitral awards made in the context of international commercial arbitration. However, certain aspects of arbitral awards arising from domestic arbitration will also be addressed in relation to the public policy exception.

Furthermore, according to the main purpose of this thesis, the scope of the thesis predominantly focuses on the study of the public policy exception in the context of an application to the competent court to refuse the enforcement of a foreign arbitral award under

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[47] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf> 5.

[48] See above n 7.

[49] Article I(1) of the New York Convention provides:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

[50] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

art V of the *New York Convention* and that of an international arbitral award under art 36 of the *Model Law*, rather than in the context of a challenge to set aside an arbitral award under art 34 of the *Model Law*. However, the public policy exception as a ground to set aside an arbitral award is still discussed in this thesis because setting aside an arbitral award is a ground to refuse the recognition and enforcement of the award under art V(1)(e) of the *New York Convention*.[51] In addition, under the *2002 Thai Arbitration Act*, the same standard of the public policy exception is applied to arbitral awards in both contexts. Also, it should be noted that this thesis does not cover the arbitrability ground.

Moreover, while reviewing literature about these problems in Thailand, the author noted that the Thai scholarly writing on this subject is very limited. There are only a handful of Thai journal articles discussing relevant issues arising from the public policy exception in the context of both domestic and international arbitration. Perhaps this is because the definition and the standard of the public policy is still vague, and the application of the public policy exception to refuse the recognition and enforcement of arbitral awards in cases concerning the State's interests trigger the protectionist viewpoints of the Thai authorities.

In addition, in Chapter IV, the comparative analysis of other jurisdictions is conducted. The selected countries are from both common law and civil law systems, and there are also some other countries mentioned because they have confronted the same issues as Thailand. Nevertheless, the official language of some of these countries is not English and the author does not understand those languages. Even though the issues arising from the public policy exception under the *New York Convention* are international in their nature, national courts' decisions are still involved as they are the ones that are required to exercise their supervisory power over arbitration matters. Since the literature and courts' decisions concerning the issues of these countries, ie, China, France, Germany, Indonesia, Japan, Russian Federation, Switzerland, and Taiwan, is predominantly the language of those countries, the gathered information might not be as detailed as that of the other countries that use English as their official language.

H *Structure of the Thesis*

This introductory Chapter provides an overview of the difficulties that the *2002 Thai Arbitration Act* causes in relation to the application of the public policy exception as a bar to

[51] Albert Jan van den Berg, *The New York Convention of 1958: An Overview* (4 June 2008) <http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> 4.

the recognition and enforcement of foreign arbitral awards. It emphasises the significance of this topic as a matter that has the potential to dramatically affect Thailand's economic status. Further, it outlines that this research is original and that its purpose is to identify issues relating to Thailand's arbitration process. It also identifies the core research questions that need to be answered and it sets out how this research will be conducted. The remainder of the thesis will be structured as follows:

Chapter II traces the history of international commercial arbitration law and the public policy exception in this area of law. Also, the necessity of the public policy exception under the *New York Convention* and its scope of application are discussed. This Chapter aims to provide the historical background of international commercial arbitration law, point out some ambiguity with respect to the public policy exception under the *New York Convention*, and to provide the internationally accepted standard of the public policy exception set forth in the *New York Convention* and the *Model Law*.

Chapter III explores the legislative historical development of Thailand's arbitration law framework and examines the current Thai arbitration law. This Chapter aims to identify the problematic issues concerning the public policy exception as a bar to the recognition and enforcement of foreign arbitral awards under the *2002 Thai Arbitration Act*.

Chapter IV examines arbitration laws and practice from other jurisdictions. These include the six selected countries which are the most popular places of arbitration and some other jurisdictions that are dealing with similar issues to those of Thailand. This Chapter aims to explore the particular issues as mentioned in Chapter III in other jurisdictions and how the issues are handled in these jurisdictions.

Chapter V analyses the significant problems identified in Chapter III. In addition, this Chapter proposes the amended provisions for Thai arbitration law reform based upon the discussions in Chapters II, III, and IV. The recommendations proposed in this Chapter aim to eliminate the problematic issues identified in Chapter III; however, some barriers that will potentially hinder any efforts to reform the law relating to arbitration in Thailand will also be discussed and suggestions made on how these might be addressed.

Chapter VI concludes by answering the core research questions set out in the Introduction, and in addition it summarises the recommendations for Thai arbitration law reform in order to eradicate the problems concerning the public policy exception as a bar to the recognition and

enforcement of foreign arbitral awards. Thus, with respect to the public policy exception, this thesis aims to make recommendations so that the practices in Thailand will align with its obligations under the *New York Convention*.

CHAPTER II THE APPLICATION OF THE PUBLIC POLICY EXCEPTION: THE INTERNATIONAL ENVIRONMENT

A *Introduction*

As trade increases between States, so does the potential for disputes. It is widely accepted that international commercial arbitration is the preferred method of dispute resolution over litigation, particularly in the context of international trade. This method is used because it is generally regarded as being fast, confidential, and flexible,[1] thus satisfying businesspeople who operate in a fast-moving business world, although in some cases, arbitration may not be necessarily faster than normal litigation.[2] Moreover, arbitral awards are final and binding. Therefore, if a party does not comply with an arbitral award, the other party can seek enforcement of the award anywhere through a competent national court.

According to the *New York Convention*, art V, there are only limited grounds which allow a national court to refuse the recognition and enforcement of foreign arbitral awards. One of the grounds is the public policy exception.

The private international law by which international commercial arbitration is governed functions in two particular ways with respect to the application of public policy: as a ground to refuse the effect of a foreign law application and as a ground to refuse the recognition and enforcement of foreign decisions.[3] The public policy exception under the *New York Convention* operates for the latter purpose. It has been widely accepted that the public policy ground is significant, but if it is successfully invoked as a public policy exception, it has the potential to lessen the efficiency of arbitration as a dispute resolution method.

This chapter will outline how the public policy exception is applied to international commercial arbitral awards in the international arena before considering its application domestically in Thailand, the topic for the following Chapter.

To understand the public policy exception in international commercial arbitration, this chapter will begin by describing its historical background followed by a discussion of the

[1] Gary B Born, 'Chapter 1: Introduction to International Arbitration' in *International Arbitration: Law and Practice* (Kluwer International, 2015) [24]-[26]; See also Aren Goldsmith, 'Arbitration and EU Antitrust Follow-on Damages Action' (2016) 34(1) *ASA Bulletin* 10, 11.
[2] Douglas Jarrett, *To Arbitrate or Not Arbitrate, That Is the Question* (29 June 2011) <http://www.beyondtelecomlawblog.com/the-question-of-whether-to/>.
[3] Joost Blom, 'Public Policy in Private International Law and Its Evolution in Time' (2003) 50(3) *Netherlands International Law Review* 373, 374.

purpose of the public policy exception. Then, the concept and scope of application of the public policy exception under the *New York Convention* will be discussed.

B *Historical Background*

Arbitration has been recognised in many jurisdictions around the world for generations. Its use can be seen in case law or in legislation. For example, in the Greek era, arbitration had already been used.[4] England recognised arbitration in case law for a long time before the codification of arbitration law known as *Arbitration Act of 1698*, and France, in the sixteenth century, enacted the *decree of the Moulins of 1566* making arbitration the only way to resolve commercial disputes.[5] At the time, there was no connection between arbitration systems in each State either with respect to the recognition of arbitration agreements or the enforcement of arbitral awards. Nonetheless, arbitration has been adopted as the prime dispute resolution mechanism, used by nations internationally and regionally.

1 *International Perspectives*

Even though the recognition of arbitration in many States began a long time ago, the global community only started to recognise arbitration in the nineteenth century. The first attempt to promote international arbitration was the *Protocol on Arbitration Clauses* (also known as the '*Geneva Protocol*').[6] The *Geneva Protocol*, according to (I), imposed an obligation on the Contracting States to recognise arbitration agreements of parties who were subject to the jurisdiction of different Contracting States to deal with either existing or future commercial or any arbitrable disputes regardless of the seat of arbitration. Nevertheless, there could be a reservation limiting a State's obligation by declaring its reservation to the, then, Secretary General of the League of Nations. For arbitral awards, each Contracting State promised that arbitral awards made in the State's territory would be enforced under its existing laws.[7]

The next attempt to make arbitration more favourable as a dispute resolution method for international commercial differences was the *Convention on the Execution of Foreign*

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[4] Richard A Cole, 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards' (1986) 1(2) *Ohio State Journal on Dispute Resolution* 365, 365.
[5] Kyriaki Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Springer, 2010) 14.
[6] *Protocol on Arbitration Clauses*, opened for signature 24 September 1923, 27 UNTS 157 (entered into force 28 July 1924) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-6.en.pdf>.
[7] Article (3) of the *Protocol on Arbitration Clauses* provides:

> Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

*Arbitral Awards (*also known as the *'Geneva Convention')*.[8] This Convention extended the enforceability of arbitral awards from the scope of that of the *Geneva Protocol* which applies only to the awards made in each State's territory to the awards made in the territories of any High Contracting Parties.[9] However, the Convention provided the necessary requirements that a foreign arbitral award needed to be satisfied in order that it would be recognised and enforced as listed in art 1.[10] In the *Geneva Convention*, the contradiction to public policy as a ground not to recognise or enforce a foreign arbitral award was introduced to international commercial arbitration for the first time. Article 1(e) of the said Convention states that it is compulsory for a foreign arbitral award, in order to gain recognition or enforcement, that it not be 'contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.'

After World War II, international trade grew exponentially. Accordingly, the provisions of the *Geneva Protocol of 1923* and the *Geneva Convention of 1927* (together the '*Geneva Treaties*') became outdated[11] and insufficient to serve world trade,[12] especially with respect

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[8] *Convention on the Execution of Foreign Arbitral Awards,* opened for signature 26 September 1927, 92 UNTS 301 (entered into force 25 July 1929) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf>.

[9] The *Geneva Convention* was opened for only the Contracting States of the *Geneva Protocol.*

[10] Article 1 of the *Convention on the Execution of the Foreign Arbitral Awards* provides:

> In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition and enforcement, it shall, further, be necessary:

> (a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
> (b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;
> (c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
> (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
> (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

[11] *Summary Record of the Third Meeting,* UN ESCOR, UN Doc E/CONF.26/SR.3 (12 September 1958) 3.

[12] *Summary Record of the First Meeting,* UN ESCOR, UN Doc E/CONF.26/SR.1 (12 September 1958) 3; See also International Chamber of Commerce, Enforcement of International Arbitral Awards, UN ESCOR, UN Doc E/C.2/373 (28 October 1953) [7].

to the enforcement of arbitral awards.[13] Therefore, in 1958, the *Geneva Treaties* were replaced by the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (hereinafter referred to as the *'New York Convention'*).[14] There are a number of principal improvements in the *New York Convention* such as:

1. The *New York Convention* imposes an obligation on the Contracting States to recognise and enforce arbitral awards made abroad regardless of whether the awards are made in the territory of any Contracting States. Unless the reciprocity reservation or commercial reservation is made, the Contracting States are obliged to recognise and enforce all arbitral awards made abroad according to the provisions in the Convention.[15] The intent of the drafters can also be seen in art 1 of the *New York Convention*.[16]

2. The *New York Convention* limits the grounds for refusal of the recognition and enforcement of foreign arbitral awards as stated in art V which is claimed to be the heart of the convention.[17]

3. The *New York Convention* abolishes 'double exequatur'.[18] Article 1(d) of the *Geneva Convention*[19] requires that a foreign arbitral award needs to be 'final in the

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[13] United Nations Commission on International Trade Law, *UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958): Excerpt, Guide on Article VII, UN GAOR, 63rd sess, Supp No 17, UN Doc A/CN.9/786 (29 May 2013) 19 [57].

[14] C*onvention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf>.

[15] *Report on the Committee on the Enforcement of International Arbitral Awards*, UN ESCOR, 19th sess, Agenda Item 14, UN Doc E/2704 (28 March 1955) [21]-[22].

[16] Article 1 of the New York Convention provides:

> 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
>
> …
>
> 3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

[17] Pieter Sanders, *New York Convention Day*, UN GAOR, 31st sess, 1st pt, UN Doc A/CN.9/1998/INF.1 (10 June 1998) 2.

[18] Ibid.

[19] Article 1(d) of the Geneva Convention provides:

> In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter

country in which it has been made' in order to be recognised or enforced somewhere else. Thus, the prevailing party needs to seek an exequatur at the place of arbitration before seeking recognition or enforcement in another country.[20] While the *Geneva Convention* requires the award to be final in the country of origin, the *New York Convention* only requires the award to be binding on the parties, according to art V(1)(e) of the convention.[21]

4. The *New York Convention* introduces an approach namely the 'pro-enforcement bias'. The Convention puts the burden of proof on the party resisting enforcement of a foreign arbitral award as mentioned in art V(1). Accordingly, the party needs to prove any ground for the refusal of recognition and enforcement of the award stated in art V(1)(a) to (e) to the competent authority.[22]

It is obvious that the enforceability of foreign arbitral awards is a priority of the world community. Therefore, the drafters of the *New York Convention* take a step forward by limiting the grounds for refusal of the recognition and enforcement of foreign arbitral awards. The said grounds can be categorised on the basis of the person who raises them into two types. The first one can be raised by the party against whom the award is invoked as stated in art V(1), and the other can be raised by the competent authority in the country where the recognition and enforcement is sought as stated in art V(2). It has been observed that how national courts exercise the role of supervising arbitration can cause difficulties to the

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called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition and enforcement, it shall, further, be necessary:

…

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.

[20] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011) 20, [61].

[21] Article V(1)(e) of the *New York Convention* provides:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

…

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

[22] *Report of the Working Group on Arbitration on the Work of its Thirty-eighth Session* (New York, 12-16 May 2003), UN GAOR, 36th sess, UN Doc A/CN. 9/524 (2 June 2003) 20, [60].

arbitration process and the development of international commercial arbitration.[23] In international commercial arbitration, the courts can exercise the supervision *ex officio* through art V(2) of the *New York Convention* which indicates the 'public policy exception' as a ground to refuse recognition and enforcement of a foreign arbitral award. Then, how the courts interpret public policy becomes a problem since each of the national courts defines public policy differently.

To further promote and facilitate international trade, the United Nations Commission on International Trade Law (UNCITRAL) was established in 1966.[24] The mandate of UNCITRAL is to promote the progressive harmonization and unification of the law of international trade.[25] At that time, commercial arbitration including the promotion of the *New York Convention* was one of the priorities proposed by delegations at the first session of UNCITRAL in 1968.[26] After that, with respect to the differences of legal, social, and economic systems between countries,[27] UNCITRAL produced two significant instruments to ameliorate the challenges relating to international commercial arbitration: the *UNCITRAL Arbitration Rules* ('*Arbitration Rules*')[28] and the *UNCITRAL Model Law on International Commercial Arbitration* ('*Model Law*').[29] The two instruments serve international commercial arbitration in different respects. The *Arbitration Rules* is a set of arbitration rules drafted as an option to be used by parties in *ad hoc* arbitration[30] concerning international trade;[31] however, the *Arbitration Rules* have sometimes been used in institutional arbitration[32]

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[23] Robert Briner, *New York Convention Day*, UN GAOR, 31st sess, 1st pt, UN Doc A/CN.9/1998/INF.1 (10 June 1998) 3.
[24] *Establishment of the United Nations Commission on International Trade Law*, GA Res 2205, UN GAOR, 6th Comm, 21st sess, Agenda Item 88, UN Doc A/RES/2205(XXI) (17 December 1966).
[25] Ibid.
[26] *Report of the United Nations Commission on International Trade Law on the Work of its First Session,* UN GAOR, 23rd sess, Supp No 16, UN Doc A/7216 (29 January-26 February 1968) 10, [34].
[27] Andrew Glenn Weiss, 'International Arbitration under the UNCITRAL Arbitration Rules: a Contractual Provision for Improvement' (1986) 13(2) *Syracuse Journal of International Law and Commerce* 367, 371.
[28] *Arbitration Rules of the United Nations Commission on International Trade Law*, GA Res 31/98, UN GAOR, 6th Comm, 31st sess, Agenda Item 108, UN Doc A/RES/31/98 (15 December 1976); as revised in 2010, *UNCITRAL Arbitration Rules as revised in 2010*, GA Res 65/22, UN GAOR, 6th Comm, 65th sess, 57th mtg, Agenda Item 77, UN Doc A/RES/65/22 (6 December 2010).
[29] *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, GA Res 40/72, UN GAOR, 6th Comm, 40th sess, 112th mtg, Agenda Item 135, UN Doc A/RES/40/72 (11 December 1985); as revised in 2006, *Revised Articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, paragraph 1, of the convention on the Recognition and Enforcement of Foreign Arbitral Awards, Done at New York*, 10 June 1958, GA Res 61/33, UN GAOR, 6th Comm, 61st sess, 64th mtg, Agenda Item 77, UN Doc A/RES/61/33 (4 December 2006).
[30] Ad hoc arbitration is an arbitration conducting without an administering body, but the arbitration is organized by the parties.
[31] *Official Records of the General Assembly*, UN GAOR, 28th sess, Supp No 17, UN Doc A/9017, para 85.

in practice.[33] Moreover, the *Arbitration Rules* are expected to be a tool for reducing difficulties which businesspeople confront in developing countries when seeking to resolve their disputes by arbitration.[34] On the other hand, the *Model Law* is designed to be a model law which would be adopted by States in order to harmonise domestic laws with the international commercial arbitration regime.[35] Before drafting the *Model Law*, studies were conducted to identify the problems on the application and interpretation of the *New York Convention*: the report of the Secretary-General: study on the application and interpretation of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[36] and the note by the Secretariat: further work in respect of international commercial arbitration.[37] Consequently, the *Model Law* is a means to reduce those problems.[38]

Notably, the scopes of application of the *New York Convention* and the *Model Law* is different in terms of arbitral awards. While the *New York Convention* governs foreign and non-domestic arbitral awards,[39] the *Model Law* governs international arbitral awards.[40] In other words, the *Model Law* seems to cover more arbitral awards than the *New York Convention* as will be shown in the following table. Table 2.1 details the scopes of application of the *New York Convention* and the *Model Law* by providing possible situations which, at the place of enforcement, would either fall into the category of foreign arbitral awards under the *New York Convention* or international arbitral awards under the *Model Law* or both. Notwithstanding, purely domestic arbitral awards fall into neither the scope of application of the *New York Convention* nor that of the *Model Law*.

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[32] Institutional arbitration or administered arbitration is an arbitration conducting under procedural rules of a particular institution which administers the arbitration.
[33] Gavan Griffith and Andrew D Mitchell, 'Contractual Dispute Resolution in International Trade: The UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980)' (2002) 3 *Melbourne Journal of International Law* 184, 187.
[34] Ibid 77.
[35] *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UN GAOR, 18th sess, UN Doc A/CN.9/264 (25 March 1985) 6.
[36] *Report of the Secretary-General: Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),* UN Doc A/CN.9/168 (20 April 1979).
[37] *Note by the Secretariat: Further Work in Respect of International Commercial Arbitration*, UN Doc A/CN.9/169 (11 May 1979).
[38] *Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration*, UN Doc A/CN.9/207 (14 May 1981) [1].
[39] Article I(1) of the *New York Convention*.
[40] Awards made in international arbitration as defined in art 1(3) of the *Model Law*.

Table 2.1: Scopes of Application of the *New York Convention* and the *Model Law*[41]

Number	Party 1	Party 2	Another International Elements*	POA	POE	Foreign Arbitral Award	International Arbitral Award
1	A	B	No			No	-
2	A	C	No			Maybe**	-
3	C	D	No			Maybe**	-
4	A	B	Yes			Maybe**	-
5	A	C	Yes			Maybe**	-
6	C	D	Yes			Maybe**	-
7	A	I	No			Maybe**	-
8	I	J	No			Maybe**	-
9	A	I	Yes			Maybe**	-
10	I	J	Yes			Maybe**	-
11	A	B	No			Yes	-
12	A	C	No			Yes	-
13	C	D	No			Yes	-
14	A	B	Yes			Yes	-
15	A	C	Yes			Yes	-
16	C	D	Yes			Yes	-
17	A	B	No			Yes	Yes
18	A	C	No			Yes	Yes
19	C	D	No			Yes	Yes
20	A	B	Yes			Yes	Yes
21	A	C	Yes			Yes	Yes
22	C	D	Yes			Yes	Yes
23	E	F	No			No	No
24	E	G	No			Maybe**	Yes
25	G	H	No			Maybe**	Yes
26	E	F	Yes			Maybe**	Yes
27	E	G	Yes			Maybe**	Yes
28	G	H	Yes			Maybe**	Yes
29	E	I	No			Maybe**	Yes
30	I	J	No			Maybe**	Yes
31	E	I	Yes			Maybe**	Yes
32	I	J	Yes			Maybe**	Yes
33	E	F	No			Yes	Yes
34	E	G	No			Yes	Yes
35	G	H	No			Yes	Yes
36	E	F	Yes			Yes	Yes
37	E	G	Yes			Yes	Yes
38	G	H	Yes			Yes	Yes
39	E	F	No			Yes	-

[41] It is noted that this table compares the scope of application of the *New York Convention* and the *Model Law* in terms of arbitral awards generally regardless of reservations which could be made by a State under art III of the *New York Convention* or the commercial characteristic of international arbitral awards under art 1(1) of the *Model Law*.

40	**E**	**G**	No			Yes	-
41	**G**	**H**	No			Yes	-
42	**E**	**F**	Yes			Yes	-
43	**E**	**G**	Yes			Yes	-
44	**G**	**H**	Yes			Yes	-

- The letters "A, B, C, D, E, F, G, H, I, and J" represent disputing parties in the process of international commercial arbitration, which can be natural persons or legal entities including corporations and companies.
- The Colours "Green, Red, Blue, Yellow, and Pink" represent States and also indicate the nationality or place of business of each person or company. Thus, **A** shows that Mr. **A** or the company **A** holds the Green State nationality or has the place of business in the Green State.
- The Green and Red States are the Contracting States of the *New York Convention*.
- The Blue and Yellow States are the Contracting States of the *New York Convention* and fully adopted the *Model Law*.
- The Pink State is NOT a Contracting State of the *New York Convention*.
- 'POA' stands for 'place of arbitration'.
- 'POE' stands for 'place of enforcement'.

* Another international element as indicated in art 1 (3) (b) of the *Model Law*:

1. The place of arbitration is outside the State in which the parties have their places of business; or
2. The place of performance is outside the State in which the parties have their places of business; or
3. The place with which the subject-matter of the dispute is most closely connected is outside the State in which the parties have their places of business; or
4. The parties expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

** The term 'Maybe' used in Table 2.1 indicates that 'maybe' the arbitral awards in these situations are considered as non-domestic arbitral awards which are covered by the *New York Convention*.[42] However, each Contracting State of the *New York Convention* may freely decide whether arbitral awards arising from any of these situations are domestic or not.[43]

According to Table 2.1, the situations can be sorted into two categories. First, the situations where the place of arbitration and the place of enforcement are the same: numbers one to ten and twenty-three to thirty-two. Numbers one to ten, the Green State is the place of arbitration and the State of enforcement. The Green State is a Contracting State of the *New York Convention* but has not adopted the *Model Law*.

[42] Article 1(1) of the *New York Convention*.
[43] International Council for Commercial Arbitration, above n 20, 21-22.

Numbers one to six: the company **A** and Mr. **B** hold the Green State nationality while the company **C** and the company **D** hold the Red State nationality. Both the Green and Red States are Contracting States of the *New York Convention*, but none of them adopts the *Model Law*. In number one, the parties hold the same nationality: the Green State, arbitrate their disputes in the Green State, and seek the enforcement of the arbitral award in the Green State without any other international element. The arbitral award in the situation number one is considered purely domestic, so it is neither a foreign arbitral award under the *New York Convention* nor an international arbitral award under the *Model Law*. Differently, in numbers two to six, at least one or more international elements are involved, eg, the parties hold different nationalities, at least one of the parties is an alien in the place of arbitration, or the place of performance is not the State that the parties hold their nationalities. Even though the place of arbitration and the place of enforcement in these situations is the Green State, the arbitral awards in these cases could be considered as foreign arbitral awards under the *New York Convention* only if any of these arbitral awards is considered a non-domestic arbitral award in the Green State. These arbitral awards are not international arbitral awards since the place of enforcement, the Green State, has not adopted the *Model Law*.

In numbers seven to ten, the company **A** holds the nationality of the Green State which is a Contracting State of the *New York Convention* but has not adopted the *Model Law*. The company **I** and Mr. **J** hold the nationality of the Pink State which is a non- Contracting State of the *New York Convention* and has not adopted the *Model Law*. In these situations, the parties arbitrate their disputes and seek the enforcement of the arbitral awards in the Green State, and at least one international element is involved in each of the situations. Therefore, these arbitral awards could be considered as foreign arbitral awards only if the awards are considered non-domestic arbitral awards in the State of enforcement: the Green State.

In numbers twenty-three to thirty-two, the Blue State is the place of arbitration and the State of enforcement. The Blue State is a Contracting State of the *New York Convention* and has fully adopted the *Model Law*. In number twenty-three, the parties hold the nationality of the Blue State, arbitrate their disputes in the Blue State, and seek the enforcement of the arbitral award in the Blue State without any other international element. Therefore, the arbitral award in this situation is purely domestic. Differently, numbers twenty-four to thirty-two involve at least one international element. As a result, the arbitral awards in these situations could be considered as foreign arbitral awards under the *New York Convention* only if these awards are

non-domestic arbitral awards in the Blue State. On the other hand, these arbitral awards are definitely international arbitral awards under the *Model Law*.

Second, where the place of arbitration is one State while the place of enforcement is another State relates to numbers eleven to twenty-two and thirty-three to forty-four. In numbers eleven to sixteen, the parties hold either the nationality of the Green State or the Red State, arbitrate their disputes in the Green State, and seek the enforcement of the arbitral awards in the Red State. Consequently, according to the territorial principle, all arbitral awards in these situations are considered foreign arbitral awards under the *New York Convention*, and as mentioned above, the Red State has not adopted the *Model Law*, so none of these arbitral awards is international.

In numbers seventeen to twenty-two, the parties hold either the nationality of the Green State or the Red State and arbitrate their disputes in the Green State. However, the prevailing parties seek the enforcement of the arbitral awards in the Blue State which is a Contracting State of the *New York Convention* and has fully adopted the *Model Law*. Therefore, all of these arbitral awards fall into both categories: foreign arbitral awards under the *New York Convention* and international arbitral awards under the *Model Law*. Similarly, in numbers thirty-three to thirty-eight, Ms. **E** and the company **F** hold the nationality of the Blue State while the Company **G** and Ms. **H** hold the nationality of the Yellow State. Both the Blue and Yellow States are Members of the *New York Convention* and have fully adopted the *Model Law*. Their disputes were arbitrated in the Blue State, but the arbitral awards are sought to be enforced in the Yellow State. All of the arbitral awards in these situations fall into both categories.

In numbers thirty-nine to forty-four, the parties hold the nationality of either the Blue State or the Yellow State, arbitrate their disputes in the Blue State. Notwithstanding, the place of enforcement is the Green State which is a Contracting State of the *New York Convention* but has not adopted the *Model Law*. Thus, the arbitral awards in these situations are foreign arbitral awards under the *New York Convention*, but none of them is international.

However, it needs to be emphasised that the *New York Convention* is a binding treaty, but the *Model Law* is not binding. Additionally, not every Contracting State of the *New York Convention* adopts the *Model Law*.[44]

As mentioned above, the aims of the *Model Law* are to enhance the use of the *New York Convention* and to provide a model national arbitration law which could be comfortably adopted by States. Thus, it provides the grounds for setting aside an arbitral award which is considered to be a States' issue.[45] Nonetheless, the *Model Law* carries on the intention of the *New York Convention* by limiting the grounds to set aside arbitral awards to those similar to the grounds to refuse the recognition and enforcement of foreign arbitral awards under the *New York Convention*. Notably, there are two public policy exceptions in the *Model Law*: one as a ground to set aside arbitral awards[46] and the other as a ground to refuse the recognition and enforcement of arbitral awards.[47] Both public policy exceptions influence the enforceability of arbitral awards because setting aside arbitral awards would make the awards unenforceable in the place of arbitration and may be refused in other States.[48]

Even though the public policy exception as a ground to set aside arbitral awards and the public policy exception as a ground to refuse the recognition and enforcement of arbitral awards under the *Model Law* use the exact same term, a difference in application in practice, which is supposed to only happen rarely, can be expected.[49] The reason behind such difference is that the Contracting State of the *New York Convention* is bound to apply the public policy exception narrowly in the enforcement of foreign arbitral awards matters.

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[44] United Nations Commission on International Trade Law, *Status UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006,* UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

[45] Jan Paulsson,'Awards Set Aside at the Place of Arbitration', *"Enforcing Arbitral Awards under the New York Convention: Experience and prospects" Colloquium to celebrate the 40th anniversary of the New York Convention* (United Nations, 1998) <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf> 23-24; See also Jared Hanson, 'Setting Aside Public Policy: the PEMEX Decision and the Case for Enforcing International Arbitral Awards Set Aside as Contrary to Public Policy' (2014) 45 *Georgetown Journal of International Law* 825, 830.

[46] Article 34.

[47] Article 36.

[48] Article V(1)(e) of the *New York Convention* and art 36(1)(a)(v) of the *Model Law*.

[49] *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UN GAOR, 18th sess, UN Doc A/CN.9/264 (25 March 1985) [12]; See also United Nations, *UNCITRAL Model Law on International Commercial Arbitration* (United Nations Commission on International Trade Law, 1994) 23-24 [44]. Besides the Swiss courts' decisions which will be mentioned in Chapter IV, the Indian courts' decisions, namely *ONGC Ltd v Saw Pipes Ltd* and Oil and *Natural Gas Corporation Limited v Western Geco International Limited*, stated that the standard of the public policy exception as a ground to annul arbitral awards is broader than the one applied to the refusal of the enforcement of arbitral awards. See *ONGC Ltd v Saw Pipes Ltd* [2003] 5 SCC 705, 727-8 (Supreme Court of India); *Oil and Natural Gas Corporation Limited v Western Geco International Limited* [2014] (10) SCALE 328 (Honourable Supreme Court of India).

Notwithstanding, they do not oblige States to do so for the public policy exception as a ground to set aside arbitral awards. Thus, a Contracting State of the *New York Convention* has no duty to apply the public policy exception as a ground to set aside arbitral awards narrowly; even though, it adopted the *Model Law* as its domestic law.

As mentioned earlier, arbitration has been recognised and adopted not only at the international level, but at the regional level as well. Thus, in some regions, regional communities have committed to the regional Conventions concerning arbitration.

2 *Regional Perspectives*

The three main regional arbitration Conventions are taken into account: the *1961 European Convention on International Commercial Arbitration* (the '*European Convention*'),[50] the *1975 Inter-American Convention on International Commercial Arbitration* (the '*Panama Convention*'),[51] and the *1987 Amman Arab Convention on Commercial Arbitration* (the '*Arab Convention*').[52] These three regional arbitration Conventions express the grounds for setting aside and the refusal of arbitral awards and their criteria differ depending on the intention of the Convention. In this section, both setting aside and enforcement of arbitral awards will be examined since setting aside and enforcement of arbitral awards is relevant to the public policy exception as a bar to the enforcement of arbitral awards.

(a) The 1961 European Convention

Article IX of the *European Convention* follows the concept of setting aside outlined in the *New York Convention* in terms of the territorial principle and the applicable law governing arbitral proceedings; therefore, setting aside an arbitral award may only take place in 'a State in which, or under the law of which, the award has been made.'[53] Moreover, art IX(2)[54] clearly limits the effect of setting aside arbitral awards to bar the enforcement of arbitral

[50] *European Convention on International Commercial Arbitration*, opened for signature 21 April 1961, 484 UNTS 349 (entered into force 7 January 1964).
[51] *Inter-American Convention on International Commercial Arbitration*, opened for signature 30 January 1975, 14 ILM 336 (entered into force 16 June 1976).
[52] *Arab Convention on Commercial Arbitration*, signed 14 April 1987, 7 Arab L.Q. 83 (entered into force 25 June 1992).
[53] Article IX(1).
[54] Article IX(2) of the *European Convention* provides:

> 2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph one above.

awards only on the grounds provided in art IX(1)[55] which are modelled on the grounds for the refusal of the recognition and enforcement of foreign arbitral awards under art V(1)(a) to (d) of the *New York Convention*.[56] Notwithstanding, art IX(1) does not contain the public policy and arbitrability grounds provided in art V(2) of the *New York Convention*, and according to art IX(2) of the *European Convention*, States that are the Contracting States of both the *New York Convention* and the *European Convention* may set aside arbitral awards on the grounds specified in art IX(1) of the *European Convention* only.[57] It has been observed that the public policy exception was omitted because imposing a duty to assure compliance of the public policy of the country of origin on the arbitrators in the setting aside proceedings without an enforcing request would harm the international character of the arbitral award.[58] It should also be noted that the *European Convention* is silent about the recognition and enforcement of arbitral awards, so these issues are to be governed by another international Convention or national law.

(b) The 1975 Panama Convention

The drafters of the *Panama Convention* sought the same goal as that aimed for in the *New York Convention*,[59] so the *Panama Convention* is generally compatible with the *New York*

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[55] Article IX(1) of the *European Convention* provides:

> 1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:
>
> (a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
>
> (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;
>
> (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.

[56] Article V(1)(e) of the *New York Convention*, which setting aside an arbitral award is a ground to refuse the enforcement of the arbitral award, was left out because art IX of the *European Convention* governing setting aside of the arbitral award respectively.

[57] Maria Beatrice Deli, 'The European Convention on International Commercial Arbitration (1961) (European ICA)' (2010) *World Arbitration Reporter (WAR)* 18.

[58] Dominique T Hascher, 'European Convention on International Commercial Arbitration of 1961: Commentary' (2011) XXXVI *Yearbook Commercial Arbitration* 504, 536.

[59] Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 104.

Convention[60] including the provision regarding setting aside and refusal of the recognition and enforcement of arbitral awards. Article 5 of the *Panama Convention*, which contains the grounds to refuse the recognition and execution of an arbitral decision, is similar to art V of the *New York Convention*. Hence, in both Conventions, setting aside an arbitral award may only be ordered by 'a competent authority of the country in which, or under the law of which, that award was made'[61] and be a ground to refuse the recognition and enforcement of the arbitral award. In addition, like the *New York Convention*, the *Panama Convention* does not provide any ground for setting aside arbitral awards, but the public policy exception is still a ground to refuse the recognition and execution of an arbitral decision.[62]

(c) The 1987 Arab Convention

Compared to the other regional Conventions, the provision regarding setting aside an arbitral award of the *Arab Convention* is different in terms of the competent authority. While the other regional Conventions identify 'a country in which, or under the law of which, the award has been made' as the competent authority, the *Arab Convention* specifies 'a Commission made up of a chairman and two members appointed by the Bureau of the Arab Centre for Commercial Arbitration' as the competent authority to hear setting aside cases.[63] Consequently, an arbitral award rendered by an arbitration tribunal under art 2[64] of the *Arab Convention* is subject to review by the commission upon request of a party. Moreover, the *Arab Convention* requires that an arbitral award falls under at least one of the three grounds set forth in art 34(1)[65] be set aside, and during the setting aside proceedings, the commission

[60] Albert Jan van den Berg, 'The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?' (1889) 5(3) *Arbitration International* 214, 229.
[61] Article V(1)(e) of the *New York Convention*. It is noted that the language of art 5(1)(e) of the *Panama Convention* is slightly different, but the meaning of these arts is the same.
[62] Article 5(2)(b).
[63] Article 34(3) of the *Arab Convention* provides:

> The Bureau appoints a Commission made up of a chairman and two members chosen upon the roster which studies the request and settles it quickly. However, this Commission cannot analyse grounds other than those mentioned in the request for setting aside.

[64] Article 2 of the *Arab Convention* provides:

> This Convention applies to commercial disputes between natural or juristic persons of any nationality, linked by commercial transactions with one of the contracting States or one of its nationals, or which have their main headquarters in one of these States.

[65] Article 34(1) of the *Arab Convention* provides:

> Each party may, by a request sent to the Chairman of the Centre, request that the award be set aside in one of the following cases:
>
> (a) if it is obvious that the arbitral tribunal exceeded the scope of its functions;
> (b) if a judgment established a new fact which could substantially influence the award, provided, however, that the ignorance of these facts was not due to the lack of diligence of the party which requests the setting aside;
> (c) if one of the arbitrators was under undue influence and if this had an effect on the award.

may suspend enforcement of the award.[66] Apparently, the *Arab Convention* provides the unified arbitration system within the Member States by establishing a permanent organisation, namely 'the Arab Centre for Commercial Arbitration', which is similar to an arbitration institution. Unlike setting aside arbitral awards, for the enforcing state, the Supreme Court of each Contracting State obtains the power to refuse the enforcement of an arbitral award under art 35[67] only if the arbitral award is contrary to public order.

Obviously, the three regional Conventions are quite different in terms of how they deal with setting aside arbitral awards, but they contain some common grounds upon which parties can challenge arbitral awards. Unlike the *New York Convention*, The *European Convention* and the *Arab Convention* seem to unify the regional arbitration system, especially for setting aside arbitral awards, to be under the same standard as provided by the Conventions and to limit the national intervention to arbitral awards. In this case, setting aside arbitral awards does not seem to be a States' issue anymore. However, the *Panama Convention*, which mostly follows the *New York Convention*, allows its Member States to enjoy the power of setting aside as they think appropriate. In terms of the recognition and enforcement of arbitral awards, the regional Conventions follow the principles set forth by the *New York Convention*.

At international, regional, or even national levels, the public policy exception has been discussed. At the present time, there are guidelines for the application and interpretation of the public policy exception, national laws indicating how the public policy exception should be interpreted, and court decisions setting up the criteria to apply and interpret the public policy exception. Still, how each national court interprets and applies the public policy exception is a significant difficulty for those who apply to enforce foreign arbitral awards since the definition of public policy is ambiguous. However, it is acknowledged that there is a need for the Conventions to include the public policy exception to achieve the intent of the Convention.

[66] Article 34(6).
[67] Article 35 of the *Arab Convention* provides:

> The Supreme Court of each contracting State must give leave to enforce awards of the arbitral tribunal. Leave may only be refused if this award is contrary to public order.

C *The Necessity of the Public Policy Exception under the New York Convention*

Since the *1923 Geneva Protocol* and the *1927 Geneva Convention* were not successful in terms of the number of Contracting States,[68] the *1958 New York Convention* is a significant evolution of international commercial arbitration. As at this date, the *New York Convention* has 156 Contracting States,[69] and that proves how significant it is. As mentioned earlier, the public policy exception was introduced to international arbitration Conventions for the first time through the *Geneva Convention*. At that time, the public policy exception was not controversial, perhaps because only 21 States ratified the *Geneva Convention*, and the Second World War started in 1939 and ended in 1945. Moreover, since the *Geneva Convention* put the burden of proof on the prevailing party, it was difficult for the party seeking enforcement to satisfy the requirements according to the laws of another country in which the enforcing court was located.[70]

The controversy regarding the public policy exception began during the drafting period of the *New York Convention*, and it was mostly about the terminology, which will be discussed later in this Chapter. Although there were arguments about the public policy exception, no delegate sought removal of it. Hence, there was the need of the public policy exception in the *New York Convention*. When a State determines to engage in an international commitment, the public policy exception is a means to express the ultimate power of the State and works like a shield to protect fundamental principles of the State.[71] Sometimes, it is called a 'catch-all' as a means to avoid the denigration of fundamental principles, values, and morality that a national court considers unacceptable. Regarding international commercial arbitration, the public policy exception is the necessary 'catch-all' which the Contracting States are secured

[68] It is to be noted that the *Protocol on Arbitration Clauses* had 28 Contracting States, and the *Convention on the Execution of Foreign Arbitral Awards* had only 21 Contracting States. See also *Protocol on Arbitration Clauses, opened for signature 24 September 1923*, 27 UNTS 157 (entered into force 28 July 1924) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-6.en.pdf>; *Convention on the Execution of Foreign Arbitral Awards*, opened for signature 26 September 1927, 92 UNTS 301 (entered into force 25 July 1929) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf>; *Consideration of Other Measures for Increasing the Effectiveness of Arbitration in the Settlement of Private Law Disputes* (Item 5 on the Agenda), UN ESCOR, UN Doc E/CONF. 26/6 (1 May 1957) [26].

[69] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf>.

[70] Charles L Evans and Robert W Ellis, 'International Commercial Arbitration: A Comparison of Legal Regimes' (1973) 8(1) *Texas International Law Journal* 17, 52.

[71] There are a lot of multilateral Conventions containing the public policy exception; for example, *Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Convention on Celebration and Recognition of the Validity of Marriages, and Convention on the Law Applicable to Agency*.

to retain in case situations other than those stated in art V(1) of the *New York Convention* occur.[72]

The object of the *New York Convention* is to promote the use of international commercial arbitration and facilitate the efficient international commercial arbitration framework, and that is the reason behind the 'pro-enforcement bias'. On the other hand, the public policy exception is a bar to the enforcement of arbitral awards when a national court finds that the enforcement of the awards is contrary to the public policy of the State. There is no question about the importance of these two aspects of public policy; therefore, it becomes necessary to determine how they can be balanced and deliver reasonable decisions for everyone. The balance between the pro-enforcement bias and the public policy exception needs to be scrutinised carefully. The more that national courts allow the public policy exception to bar the enforcement of foreign arbitral awards, the less the *New York Convention* and international commercial arbitration are effective.

Since art V(2)(b) of the *New York Convention* identifies 'the public policy of that country', it is based on each State's public policy which varies. Then, there appears to be an international issue about how the public policy exception should be applied and interpreted in international commercial arbitration matters. In order to comprehend the public policy exception under the *New York Convention*, the general concept of public policy needs to be examined. Afterward, the scope of application of the public policy exception in this particular area will be explored.

D *The Concept and the Scope of Application of the Public Policy Exception under the New York Convention*

The term 'public policy' is understood differently in different fields depending on the main interest of each field. For example, in political science, public policy, focusing on governmental policies or acts, is 'the description and explanation of the causes and consequences of government activities'[73] including social, economic, and political impacts.[74] Alternatively, in the area of law, public policy is fundamental rules of law, values, and morality, which can be changed depending on the matter of time and place. Thus, the general concept of public policy is broad and flexible. Thus, in some areas of law like international commercial arbitration law, there is an attempt to limit the scope of application of public

[72] Joel R Junker, 'The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards' (1977) 7(1) *California Western International Law Journal* 228, 245.
[73] Thomas R Dye, *Understanding Public Policy* (Pearson Education, 2002) 3.
[74] Michael Hill and Peter Hupe, *Implementing Public Policy* (SAGE Publications, 2014) 7.

policy to be as narrow as possible in order to increase the effectiveness of international commercial arbitration. Hence, the general concept of the public policy doctrine will be discussed followed by the narrow approach of the public policy exception under the *New York Convention*.

1 *The Concept of the Public Policy Doctrine*

'Public policy' was apparently discovered in English law in the early fifteenth century.[75] Public policy, as observed by W. S. M. Knight, is 'the modern equivalent for other and much older terms or phrases';[76] for example, '*encounter common ley*',[77] '*encounter de ley de Dieu*'[78], or 'against the benefit of the commonwealth'.[79] The term 'public policy' serves society as a mechanism to protect fundamental principles of law and morality of the State. The concept of public policy has been categorised as 'one of the most elusive and divergent notions in the world of juridical science.'[80] However, there have been attempts by many judges and scholars to define public policy. For example, Lord Macclesfield described the principle of public policy as 'a general mischief to the public'.[81] Lord Mansfield observed that public policy was '*ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'[82] Benjamin Cardozo, the former United States Supreme Court Justice and New York Court of Appeals Chief Judge, mentioned that public policy related to legal analogy, legal history, custom, the force of justice, morals, and social welfare.[83] Lord Truro, in *Egerton v. Brownlow*,[84] gave the definition of public policy as follows:

> Public policy … is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be

[75] W S M Knight, 'Public Policy in English Law' (1922) 38(2) *Law Quarterly Review* 207, 207; See also Kent Murphy, 'Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11(3) *Georgia Journal of International and Comparative Law* 591, 591.
[76] Knight, above n 75, 207.
[77] *Dyer's Case* [1413] 2 YB Hen V 26.
[78] *Prat v Phanner* [1586] 683 Moo.
[79] *Colgate v Bacheler* (1602) 78 ER 1097 (QB).
[80] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration' (1990) 21(3) *Law and Policy in International Business* 389, 401; See also M Ferrante, 'Enforcement of Foreign Arbitral Awards in Italy and Public Polucy' (1978) *Hommage a Frederic Eisemann* 86.
[81] *Mitchel v Reynolds* [1711] 1 P Wms 181.
[82] Knight, above n 75, 209; See also *Holman v Johnson* [1775] 1 Cowp 343.
[83] Percy H Winfield, 'Public Policy in the English Common Law' (1928) 42(1) *Harvard Law Review* 76, 76.
[84] *Egerton v Brownlow* [1853] 10 ER 359.

> termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.[85]

These explanations of public policy do not serve explicitly as precise definitions. They are mainly clarifications that provide the broad scope of public policy. As mentioned above, the general principle of public policy has been interpreted broadly. Nevertheless, public policy, according to Black's Law Dictionary,[86] has two meanings which are '[b]roadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the State and the whole of society.' and '[m]ore narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large.' In other words, public policy is fundamental principles regarding the public interests either broad or narrow meaning.

At the beginning, public policy existed as a national tool to fill the gap of domestic law[87] in order to protect fundamental standards and moral values of the State.[88] Thus, since public policy is valued by each individual State, the definition of public policy in each State varies. Javier Garcia de Enterria claimed that 'the concept of public policy is a function of place and time',[89] and that has been the reason why public policy cannot be defined precisely.

Obviously, public policy is a matter of place because each country has different social standards and legal frameworks. Therefore, what is acceptable in one country might not be considered decent in another country,[90] or it can even be contrary to significant principles of another country. If every country has the same values and standards, public policy would not be needed. The example showing that public policy is a matter of place is *Westacre Investments Inc. v Jugoimport-SDPR Holdings Co.Ltd. & Anor*.[91] The parties of this case agreed upon a consultancy contract for the sale of military equipment to the Kuwaiti Ministry of Defence in 1988. The contract was governed by Swiss law and contained an arbitration clause stating that the place of arbitration would be Geneva, Switzerland under the ICC rules. In 1989, Jugoimport terminated the contract claiming that the contract violated a Kuwaiti law

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[85] Ibid 437.
[86] *Black's Law Dictionary* (Thomson/West, 3rd Pocket ed, 2006) 581.
[87] Knight, above n 75, 208; See also Mark A Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26(3) *American Business Law Journal* 511, 513.
[88] Oscar Samour, 'Public Policy Exception to Recognition and Enforcement of Arbitral Awards under the New York Convention' (2009) 21, 23.
[89] Enterria, above n 80, 401.
[90] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 598.
[91] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Anor* [1999] 3 All ER 864.

or the public policy of Kuwait: bribing and exercising personal influence over government officials of Kuwait to procure Jugoimport's contracts. Then, in 1990, Westacre brought a claim before an arbitration tribunal seeking the payment of its consulting fee. The arbitration tribunal by a majority decision awarded in favour of Westacre holding that Jugoimport failed to prove the allegation of an illegal act under Swiss law.

Jugoimport challenged the arbitral award to the Swiss Federal Tribunal on the ground that the award was contrary to public policy. The Swiss Federal Tribunal rejected Jugoimport's challenge holding that the allegation had already been decided by the arbitration tribunal. Thus, the public policy invocation was dismissed by the Swiss Court. Later, Westacre sought the enforcement of the arbitral award in the United Kingdom. The High Court of Justice, Queen's Bench Division (Commercial Court) refused to permit fresh evidence at the stage of enforcement and enforced the arbitral award.[92] Jugoimport, then, challenged the enforcement order to the English Court of Appeal. The English Court of Appeal allowed the admission of new evidence to support Jugoimport's allegation on the basis of the public policy exception.

In addition, public policy is also a matter of time.[93] There is evidence in many jurisdictions indicating that public policy has changed over time. For instance, in *Wilko v. Swan* (1953),[94] a customer brought a law suit against partners in a securities brokerage firm alleging false representations which led to the sale of stock and a loss. Then, there was a motion to move the suit to arbitration under the *United States Arbitration Act* according to the terms in the agreement. The court held that an anti-trust claim could not be arbitrated because it was contrary to public policy, based on the *Securities Act*. Later, in *Scherk v Alberto-Culver Co.*[95] (1974), a United States company made an agreement for the transfer of the ownership of the enterprises along with all rights held by these enterprises to trademarks in cosmetic goods from a German citizen. The company filed a lawsuit against the German citizen after the discovery that the trademark rights under the contract were actually restricted. The German citizen made a motion to stay the trial until arbitration occurred in Paris pursuant to the arbitration clause in the contract. The court held that the arbitration agreement on the anti-trust claim was enforceable and did not violate public policy based on the *Securities Act*.

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[92] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Ors.* [1998] 4 All ER 570.
[93] Loukas A Mistelis, Julian D M Lew and Stefan Michael Kroll, 'Chapter 26 Recognition and Enforcement of Foreign Arbitral Awards' in Julian D M Lew, Loukas A Mistelis and Stefan Kroll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 687, 723.
[94] *Wilko v Swan et al., doing business as Hayden, Stone &Co., et al,* 346 US 427, (Sup Ct) (1953).
[95] *Scherk v Alberto-Culver Co*., 417 US 506, (Sup Ct) (1974).

Furthermore, Justice Burrough likened public policy to an 'unruly horse' – an expression that is well known. Accordingly, the Justice pointed out that 'when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.'[96] The unruly horse metaphor has been used to describe the uncertainty and unpredictability of courts' decisions. Percy H. Winfield described public policy based on the unruly horse metaphor delicately:

> That animal has proved to be a rather obstrusive, not to say blundering, steed in the law reports. … And, at times the horse has looked like even less accommodating animals. Some judges appear to have thought it more like a tiger, and have refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it like Balaam's ass which would carry its rider nowhere. But none, at any rate at the present day, has looked upon it as a Pegasus that might soar beyond the momentary needs of the community.[97]

These show the reluctance of the court to apply the public policy doctrine. According to Justice Burrough's metaphor, when public policy is taken into account, it could lead to an unpredictable destination. Although the public policy doctrine may be unsteady and threatening, it has been adhered to in courts' decisions until now. The application of public policy is problematic because of two factors which are the ambiguous definition and the unstable extent of its application. Public policy at the domestic level may be interpreted and applied broadly by national courts of each State since the doctrine serves as a shield to protect fundamental principles and morality within the territory of the State. On the other hand, at the international level, applying domestic public policy standards can cause conflict. The question becomes how broadly should public policy be defined and to what extent should domestic public policy standards be applied in international cases. To avoid the conflict, public policy has been categorised in order to differentiate the application of each type of public policy to suit different situations by two main criteria: the source of fundamental principles and the substance-procedure distinction.

(a) Public Policy Categorised by the Source of Fundamental Principles

The source of fundamental principles mentioned here depends on where the public policy is made, either from within the States or outside the States. Public policy is divided by the

[96] *Richardson v Mellish* [1824] 2 Bing 229, 252; 130 ER 294.
[97] Winfield, above n 83, 91.

source of fundamental principles into two principal types which are national public policy and supranational public policy.[98]

(i) National Public Policy

National public policy consists of 'domestic public policy' and 'international public policy'. Since public policy first exists at the national level, domestic public policy is the only type of public policy at the beginning period of the existence. Domestic public policy refers to fundamental principles and morality within the State in order to apply solely to internal matters.[99] When the use of public policy is expanded to the international level, international public policy will be applied in the international context. International public policy consists of standards of domestic public policy, but international public policy is more flexible, less strict, and narrower than domestic public policy.[100]

(ii) Supranational Public Policy

Supranational public policy consists of 'transnational public policy', 'regional public policy', and 'truly international public policy'.[101] First, transnational public policy is customary laws[102] such as *lex mercatoris*, *lex sportive*, or *lex electronica*. Because transnational public policy belongs to neither the national legal system nor the international legal system, the duty which is subject to fundamental principles are questioned.[103] And, that is the controversial discussion about an important character of public policy. Second, regional public policy is the shared public policy considerations within a region. Therefore, it is possible that the public policy of the individual States in the region is different from the common regional public policy.[104] Last, truly international public policy derives from the fundamental rules of natural law, the principles of universal justice, *ius cogens* in public international law, the general principles of morality, and public policy accepted by civilised countries.[105] The idea of truly

[98] James D Fry, 'Desordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8(1) *Chinese Journal of International Law* 81, 85
[99] Samour, above n 88, 23.
[100] Marie Louise Seelig, 'The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility' (2009) 116(3) *Belgrade Law Review* 116, 121.
[101] Pierre Mayer, 'Effect of International Public Policy in International Arbitration' in Loukas A Mistelis and Julian D M Lew (ed), *Pervasive Problems in International Arbitration* (Kluwer Law International, 1st ed, 2006) vol 15, 61.
[102] The example of the customary laws are lex mercatoria, lex sportive, and lex electronica.
[103] Mayer, above n 101, 64.
[104] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) IBA *Journal of Dispute Resolution* 123, 124.
[105] Julian D M Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications, Inc., 1978) 535.

international public policy is international in nature which an enforcing State is to carry out in practice without changing it.[106]

The distinction between national public policy and supranational public policy is the source of the fundamental principles. While national public policy comes from a national source, supranational public policy comes from more than one national source.[107] Besides the source of fundamental principles criteria, substance-procedure distinction is the other criterion to be examined in the following part.

(b) Public Policy Categorised by the Substance-Procedure Distinction

Public policy as categorised by the substance-procedure distinction is divided into two types: substantive public policy and procedural public policy. Basically, these two types of public policy are the result of distinguishing the differences between substantive and procedural law.[108]

(i) Substantive Public Policy

Substantive public policy governs the rights and duties of parties as regards the subject matter. Mandatory law, fundamental principles of law, public order or good morals, and national interests/foreign relations are the examples that fall into the category of substantive public policy.[109]

(ii) Procedural Public Policy

Procedural public policy governs the procedural facets of a matter. Fraud, breach of natural justice / breach of due process, lack of impartiality, lack of reasons, manifest disregard of the law, manifest disregard of the facts, *res judicata*, and annulment of judgment are the examples in the procedural public policy category.[110]

As mentioned, public policy is categorised to make it possible to identify which type of public policy suits different situations. So does international arbitration law. There are efforts

[106] Fry, above n 98, 89.
[107] Ibid 86.
[108] Mauro Rubino-Sammartano, *International Arbitration: Law and Practice* (Kluwer Law International, 2nd ed, 2001) 507.
[109] Luke Villiers, 'Breaking in the 'Unruly Horse': the Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards' (2011) 18 *Australian International Law Journal* 155, 162; See also Loukas Mistelis, '"Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards' (2000) 2 *International Law Forum Du Droit International* 248, 251.
[110] Mistelis, above n 109.

to indicate the types of public policy as regards the public policy exception in art V (2) (b) of the *New York Convention*.

2 *The Scope of Application of the Public Policy Exception under the New York Convention*

International commercial arbitration law is an area of law which has struggled to determine public policy as a ground to set aside arbitral awards or to refuse to enforce foreign arbitral awards. International Conventions dealing with international commercial arbitration do not specify what type of public policy shall be applied. However, there were discussions about the terms to be used during the drafting period of the current international commercial arbitration Convention, the *New York Convention*. In 1953, the preliminary draft of the *New York Convention* was introduced by the International Chamber of Commerce (ICC). The ICC preliminary draft[111] contained a public policy exception as a ground to refuse the recognition and enforcement of international arbitral awards in art IV[112] by using the terms 'that recognition or enforcement of the award would be contrary to public policy in the country in which it is sought to be relied upon'.[113]

After that, the committee on the enforcement of international arbitral awards suggested that the terms should be changed to 'that the recognition or enforcement of the award, or the subject matter thereof, would be clearly incompatible with public policy or with fundamental principles of the law ("ordre public") of the country in which the award is sought to be relied upon'.[114] Then, this phrase became controversial. There were comments stating that the terms 'fundamental principles of the law' would cause interpretation difficulties, supported by the representatives of Austria, Japan, Sweden, Union of Soviet Socialist Republics (USSR), United Kingdom, International Chamber of Commerce, International Law Association, and Society for Comparative Legislation.[115] Then, the result appeared in the Final text of the *New York Convention* that only the term 'public policy' was maintained.

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[111] *International Chamber of Commerce, Enforcement of International Arbitral Awards*, UN ESCOR, UN Doc E/C.2/373 (28 October 1953).
[112] Article IV of the ICC preliminary draft later became art V of the *New York Convention.*
[113] *International Chamber of Commerce, Enforcement of International Arbitral Awards*, UN ESCOR, UN Doc E/C.2/373 (28 October 1953) [13].
[114] *Committee on the Enforcement of International Arbitral Awards, Report of the Committee on the Enforcement of International Arbitral Awards*, UN ESCOR, 19th sess, Agenda Item 2, UN Doc E/AC.42/4/Rev.1 (28 March 1955) [49].
[115] *Recognition and Enforcement of Foreign Arbitral Awards,* UN ESCOR, 21st sess, Agenda Item 8, UN Doc E/2822 (31 January 1956); See also *Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* UN ESCOR, UN Doc E/CONF.26/2 (6 March 1958) [7].

Also, there were some comments suggesting the deletion of the terms 'or the subject matter thereof' because these terms would cause interpretation difficulties, a view supported by the representatives of Japan, Sweden, USSR, and International Law Association.[116] The terms were later deleted.

Furthermore, there was also an argument about the two terms under the same objective which are 'public policy' and '*ordre public*'. In the meeting of the committee on the enforcement of international arbitral awards concerning the draft of the *New York Convention*, the representative of the United Kingdom (Mr Wortley), pointed out that public policy and *ordre public* were not exactly the same. He stated that 'public policy was a much more rigid and more narrowly circumscribed concept than *ordre public*'[117] Nevertheless, in the final text of the *New York Convention*, art V(2)(b) indicates that the competent authority of the country where a foreign arbitral award is sought may refuse to recognise or enforce the award if it finds that 'the recognition or enforcement of the award would be contrary to the public policy of that country.' Additionally, art V(2)(b) of the *New York Convention* in French uses the term '*ordre public*' as the translation of the term 'public policy', and that has been the reason for a number of scholars to assert that the terms 'public policy' and '*ordre public*' are interchangeable.

The discussion concerning the terms 'public policy' and '*ordre public*' was continued to the drafting period of the *Model Law*. Accordingly, in the 318th meeting on the UNCITRAL model law on international commercial arbitration, the chairman from Austria (Mr Loewe) claimed that 'public policy was a translation of the French term *ordre public* and meant the fundamental principles of law'.[118] However, in the 330th meeting on the UNCITRAL model law on international commercial arbitration, the observer for Canada (Mr Graham), says that 'his delegation had understood the term "public policy" in the sense of the French "*ordre*

[116] *Recognition and Enforcement of Foreign Arbitral Awards*, UN ESCOR, 21st sess, Agenda Item 8, UN Doc E/2822 (31 January 1956); See also *Recognition and Enforcement of Foreign Arbitral Awards*, UN ESCOR, 21st sess, Agenda Item 8, UN Doc E/2822/Add.1 (21 February 1956).
[117] *Committee on the Enforcement of International Arbitral Awards*, UN ESCOR, 1st sess, 2nd mtg, UN Doc E/AC.42/SR.2 (23 March 1955) [7].
[118] *Summary Records of the United Nations Commission on International Trade Law for Meetings Devoted to the Preparation of the UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 318th mtg, UN Doc A/CN.9/SR.318 (11 June 1985) [38].

public", rather than in the restricted common law sense' which is supported by the representative of the United Kingdom (Mr Rickford).[119]

Nevertheless, it has been accepted that both terms aim to reserve a State's sovereign right to protect fundamental principles and moral values within the territory. It has been observed that the term 'public policy' is used in common law countries while the term '*ordre public*' is commonly used in civil law countries.[120] Even if the objective of these two terms is the same, there are indications that they include different principles and may therefore attract different decisions. Thus, the differences may cause problems in applying the public policy exception under the *New York Convention*. In the 330th meeting on the UNCITRAL model law on international commercial arbitration,[121] the representative of India (Mr Sekhon) mentioned that the term 'public policy' actually exists in the civil law system but essentially referred to the law of contracts and that his delegation suggested that the term 'public policy' be deleted from the ground to refuse the recognition and enforcement of international arbitral awards. In response to the suggestion of the representative of India, Mr. Herrmann from International Trade Law Branch insisted that the term 'public policy' would be retained according to the decision of the Commission along with the report to indicate how the term could be interpreted.

It seems that the argument about the dissimilarity between the terms public policy and *ordre public* has been carried on for decades. Although the dissimilarity between both terms was pointed out once at the process of considering the text of the *New York Convention*, the exact same terms were maintained in the text of the *Model Law*. Ironically, the two terms have been accepted as the translation of each other in English and French which would allow everyone to perceive them as the exact same meaning. However, the clarification on the different coverage of both terms concerning procedural public policy was noted in the commission's report as will be discussed later in this Chapter.

Besides the terminology issue, debate has been ongoing regarding the application and interpretation of the public policy exception. There are two aspects of public policy to be

[119] *Summary Records of the United Nations Commission on International Trade Law for Meetings Devoted to the Preparation of the UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 330th mtg, UN Doc A/CN.9/SR.330 (19 June 1985) [9].
[120] Garhart Husserl, 'Public Policy and Ordre Public' (1938) 25(1) *Virginia Law Review* 37, 37; See also Murphy, above n 75, 591.
[121] *Summary Records of the United Nations Commission on International Trade Law for Meetings Devoted to the Preparation of the UNCITRAL Model Law on International Commercial Arbitration,* UN GAOR, 330th mtg, UN Doc A/CN.9/SR.330 (19 June 1985) [7].

considered: domestic public policy versus international public policy and substantive public policy and procedural public policy.

(a) Domestic Public Policy versus International Public Policy

If the text of art V(2)(b) of the *New York Convention* is read literally, it would be possible to interpret the public policy exception as domestic public policy. However, there are a number of attempts to indicate that 'international public policy' shall be applied according to the intention of the *New York Convention*. Still, there are difficulties when each State's competent authorities interpret public policy under the *New York Convention*.

During the drafting period of the *New York Convention*, there was some guidance indicating the narrow application of the public policy exception. For example, the intention of the committee on the enforcement of international arbitral awards to limit the application of the public policy exception to the basic principles of the legal system of the enforcing State[122] and the comment from the government of the Netherlands advising that the concept of *ordre public* (public policy) should be restricted as much as possible.[123] Notwithstanding this, it has been observed that the majority of the Contracting States were not ready to accept 'international public policy' to apply to arbitration matters.[124]

However, during the drafting period of the *Model Law*, there was a proposal to further restrict the public policy exception as 'international public policy', but the proposed idea did not succeed. It was argued that, in many countries, the case law and doctrine showed that a different standard was applied to international and domestic arbitration matters. Also, adopting the term 'international public policy' would cause a conflict between the public policy exceptions: for setting aside awards under the *Model Law* and for refusing the enforcement of foreign arbitral awards under the *New York Convention*[125], and 'the term lacked precision'.[126] Moreover, the observer for the ICC raised the issue concerning the

[122] *Committee on the Enforcement of International Arbitral Awards, Report of the Committee on the Enforcement of International Arbitral Awards*, UN ESCOR, 19th sess, Agenda Item 2, UN Doc E/AC.42/4/Rev.1 (28 March 1955) [49].
[123] *Recognition and Enforcement of Foreign Arbitral Awards,* UN ESCOR, 21st sess, Agenda Item 8, UN Doc E/2822/Add.4 (3 April 1956) [2].
[124] William Graham et al, 'International Commercial Arbitration and International Public Policy' (1987) 81 *American Society of International Law* 372, 376.
[125] *United Nations Commission on International Trade Law, Report of the Working Group on International Contract Practices on the Work of Its Fourth Session,* 16th sess, UN Doc A/CN.9/232 (10 November 1982) [16]-[17].
[126] *United Nations Commission on International Trade Law, Report of the Working Group on International Contract Practices on the Work of Its Fifth Session,* 16th sess, UN Doc A/CN.9/233 (28 March 1983) [154].

ambiguity of public policy and suggested that the development of the concept and the distinction between national and international public policy should be made.[127] Notwithstanding, the wording of the public policy exception under the *Model Law* is the same as that of the *New York Convention*.

Even though the term 'international public policy' has not appeared in either the *New York Convention* or the *Model Law*, efforts have been made to specify the 'international public policy' standard to be applied to international arbitration matters. Regarding international organisations, the International Law Association (ILA) and the International Council for Commercial Arbitration (ICCA) indicate clearly that the narrow standard of international public policy is to be applied according to the *New York Convention* and the *Model Law*.[128] In the ILA Final Report, it stated that the intention of the *New York Convention* and the *Model Law* was to limit the refusal of arbitral awards enforcement. Consequently, interpreting the public policy exception according to the narrow standard of international public policy would align to the intention of the *New York Convention* and the general rule of interpretation under the *Vienna Convention on the Law of Treaties*.[129] Nonetheless, there was a disagreement on the extent to which a national court is entitled to review international arbitral awards: limited in favour of the pro-enforcement bias or boundless to protect the State. It is to be noted that the protectionist notion was supported by members of the committee on international commercial arbitration, mainly from developing countries.[130]

Regarding the national legislation, the term 'international public policy' is contained in some jurisdictions' arbitration laws; for example, the *French Code de procedure civile*,[131] the *Portuguese Código de Processo Civil*,[132] the *Lebanese Code of Civil Procedure*,[133] the *Algerian Code of Civil and Administrative Procedure*,[134] and the *Tunisian Arbitration*

[127] *Summary Records of the United Nations Commission on International Trade Law for Meetings Devoted to the Preparation of the UNCITRAL Model Law on International Commercial Arbitration,* UN GAOR, 318th mtg, UN Doc A/CN.9/SR.318 (11 June 1985) [40].
[128] Committee on International Commercial Arbitration, International Law Association, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (New Delhi, 2-6 April 2002); See also International Council for Commercial Arbitration, above n 20.
[129] *Vienna Convention of the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31.
[130] Committee on International Commercial Arbitration, above n 128.
[131] *Code de procedure civile* [Code of Civil Procedure] (France) arts 1514 and 1520.
[132] *Codigo de Processo Civil* (Portugal) [Code of Civil Procedure], arts 46, 54, and 56.
[133] *Code of Civil Procedure* (Lebanon) Decree Law 90/83, art 817.
[134] *Code of Civil and Administrative Procedure* (Algeria) Law No 08-09 of 25 February 2008, arts 1051, 1052, 1055, and 1056.

Code.[135] Concerning the national courts' decisions, there are some cases where national courts indicate that the narrow standard of international public policy shall be applied to foreign arbitral awards.[136] In terms of scholars' opinions, there are a number of scholars who support the concept of international public policy as that that should be applied in international commercial arbitration matters.[137]

Obviously, the application of the narrow standard of international public policy has been widely accepted as the standard of the public policy exception under the *New York Convention*. Unfortunately, some States do not follow the narrow application and interpretation of public policy as recommended by various sources. According to the history of the *New York Convention* and the *Model Law*, the question whether the public policy exception covers both substantive and procedural public policy has also been discussed.

(b) Substantive Public Policy versus Procedural Public Policy

There has been another argument concerning the public policy exception. The argument is whether the discretion of national courts to exercise their supervision by applying the public policy exception when refusing the recognition and enforcement of foreign arbitral awards under the *New York Convention* covers either substantive issues or procedural issues or both. The opinion on this issue is split.

First, it has been accepted that the public policy exception involves the substantive review of arbitral awards, but it is uncertain that it involves the procedural review. Article V(1)(b)[138], a

[135] *Arbitration Code* (Tunisia) Law 93-42 of 26 April 1993, arts 78(2)(II) and 81(II).
[136] See, eg, *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA),* 508 F 2d 969, (2nd Cir, 1974); *Smita Conductors Ltd. v Euro Alloys Ltd.* [2001] 7 SCC 728 (31 August 2001) (Babu and Phukan JJ) (Supreme Court of India); *Mir Kazem, et al. v Tsann Kuen China Enterprise Co., Ltd., et al.,* 118 Cal. App. 4th 531 (2004); *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 (Court of Appeal); *Karaha Bodas Company LLC v Persusahaan Pertambangan Minydak Dan Gas Bumi Negara (Pertamina)* [2007] 4 HKLRD 1002; *Open Type Joint Stock Company Efirnoye (EFKO) v Alfa Trading Ltd.* [2011] 1 CLJ 323 (Pathmanathan J) (High Court of Malaya).
[137] See, eg, Heinz Strohbach, 'International Arbitration and Public Policy: Comment on the Legal Practice in the German Democratic Republic' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series* (Kluwer Law International, 1987) vol 3, 360; Mayer, above n 101, 60; Alan Redfern and Martin Hunter, 'Recognition and Enforcement of Arbitral Awards' in Nigel Blackaby et al. (eds) *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed, 2009); Emmanuel Gaillard, 'The Urgency of Not Revising the New York Convention' in Albert Jan van den Berg (ed), 5*0 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series* (Kluwer Law International, 2009) vol 14, 694; Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' (2014) 11(41) *Revista Brasileira de Arbitragem* 174-183; Michael Dunmore, 'What to Expect from the Review of Arbitral Awards by Courts at the Seat' (2015) 33(2) *ASA Bulletin* 293.
[138] Article V of the *New York Convention* provides:

violation of due process, is obviously procedural injustice, and it also relates to public policy. Albert Jan van den Berg stated that the fact that a violation of due process can be raised by the losing party does not prevent a court from refusing the recognition and enforcement of an award by the public policy exception under art V(2)(b).[139] It has been observed that the chance of success by challenging the enforcement of an arbitral award by the public policy exception under art V(2)(b) is greater than the due process defence under art V(1)(b).[140]

However, there was a discussion on this issue relating to the difference between the terms 'public policy' and '*ordre public*'. In the 324th meeting on the UNCITRAL model law on international commercial arbitration, the representative of the United Kingdom (Sir Michael Mustill) said that 'the words "public policy" were an inaccurate rendering of the term "*ordre public*", which conveyed a wider notion of procedural injustice'.[141] Consequently, the commission decided to maintain the public policy exception, as it appeared in the *New York Convention*, in the *Model Law* and provided the clarification that the public policy exception under the *New York Convention* covered both substantive and procedural public policy in its report.[142]

Moreover, the ILA gathered a number of rules and norms which fell into two categories of public policy: substantive and procedural public policy as in the following table:[143]

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> > (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

[139] Albert Jan van den Berg, *The New York Convention of 1958: An Overview* (4 June 2008) <http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> 15.
[140] Joseph T McLaughlin and Laurie Genevro, 'Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts' (1986) 3(2) *Berkeley Journal of International Law* 249, 266.
[141] *Summary Records of the United Nations Commission on International Trade Law for Meetings Devoted to the Preparation of the UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 324th mtg, UN Doc A/CN.9/SR.324 (14 June 1985) [21].
[142] *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session,* UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (21 August 1985) [295]-[297].
[143] Committee on International Commercial Arbitration, *Interim Report on Public Policy as a bar to Enforcement of International Arbitral Awards* (International Law Association, 2000) <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=15&ved=0CEMQFjAEOAo&url=http%3A%2F%2Fwww.ila-hq.org%2Fdownload.cfm%2Fdocid%2FE723662E-053C-415A-A4C7822577AE6B4F&ei=IIPTUaXeLIGCkwWS04CABQ&usg=AFQjCNFHXadopA03NVuxeHqmmHH1eRNOzw&bvm=bv.48705608,d.dGI&cad=rja> 17-30.

Table 2.2: Summary of Rules and Norms Falling into Substantive and Procedural Public Policy

Substantive Public Policy	**Procedural Public Policy**
Mandatory laws/*lois de police*	Fraud/corrupt arbitrator
Fundamental principles of law	Breach of national justice/due process
Contrary to good morals/public order	Lack of impartiality
National interests/foreign relations	Lack of reasons
	Manifest disregard of the law
	Manifest disregard of the facts
	Res judicata
	Annulment at the place of arbitration
	Other categories, ie, the claimant must prove its allegations of fact and no one shall plead by proxy.

Source: The Interim Report on Public Policy as a bar to Enforcement of International Arbitral Awards[144]

Second, the national courts' discretion to review arbitral awards under the public policy exception covers solely procedural public policy. Redfern and Hunter said:

> There is a belief that, so far as international arbitrations are concerned, the parties should be prepared to accept the decision of the arbitral tribunal even if they consider it to be wrong, so long as the correct procedures are observed. If a court is allowed to review this decision on the law or on the merits, the speed and, above all, the finality of the arbitral process is lost. Indeed, arbitration then becomes merely the first stage in a process that may lead, by the way of successive appeals, to the highest appellate court at the place of arbitration.[145]

It can be concluded that the standard of public policy application under the *New York Convention* and the *Model Law* is as narrow as 'international public policy' and covers both substantive and procedural issues.

[144] Ibid.
[145] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th ed, 2004), 421.

However, there is another question relating to the extent of a national court's reviewing power. The question appears to be how extensive is a national court's discretion concerning a merits review. There are two opinions on this issue. First, national courts inevitably review the merits of the awards with respect to the public policy exception because the courts shall be entitled to protect the State from enforcing improper or prejudiced arbitral awards without any restriction.[146] In contrast, the other opinion favours the '*prima facie* review approach referring to no merits review principles' except when an award is obviously contrary to public policy.[147]

There are a number of suggestions stating that the competent authority may not exercise its reviewing power over the merits of an arbitral award.[148] One of which was raised in the study of the comments and suggestions regarding the concern with problems relating to the drafting of the *New York Convention* saying that a review of an arbitral award as to its substance was excessive.[149] The ILA final report also concludes that a national court should be authorised to review the underlying evidence of the awards 'only when there is a strong *prima facie* argument of violation of international public policy'[150] as an exceptional circumstance. Furthermore, it has been accepted that mistakes in facts or in law by the arbitration tribunal are not sufficient to bar the enforcement of the arbitral awards according to the public policy exception.[151]

This is a matter of balancing the two significant policies in the international commercial arbitration area: the pro-enforcement bias and the public policy of the State of the place of arbitration or the enforcing State. If national courts are authorised to have limitless power to review arbitral awards, it is impossible that arbitration will be an effective dispute resolution

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[146] Committee on International Commercial Arbitration, above n 128, 4-5. It is noted that this opinion came from some members of the Committee, mostly from developing countries, while the majority of the Committee believed that the discretion of national courts is limited.

[147] Fifi Junita, 'Public Policy Exception in International Commercial Arbitration -- Promoting Uniform Model Norms' (2012) 5(1) (31 May 2012) *Contemporary Asia Arbitration Journal* 45, 50; See also Donald Francis Dono, 'International Commercial Arbitration and Public Policy' (1995) 27(3) *New York University Journal of International Law and Politics* 645, 649.

[148] van Den Berg, above n 139, 13; See also Margaret Moses, 'Can Parties Tell Courts What to Do - Expanded Judicial Review of Arbitral Awards' (2004) 52(2) *University of Kansas Law Review* 429, 457; International Council for Commercial Arbitration, above n 20, 78.

[149] *Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UN ESCOR, UN Doc E/CONF.26/2 (6 March 1958) [12].

[150] Committee on International Commercial Arbitration, above n 128, 11.

[151] Gary B Born, 'Recognition and Enforcement of International Arbitral Awards' in *International Arbitration: Cases and Materials* (Kluwer Law International, 2nd ed, 2015) 1189, 1197; See also Bockstiegel, above n 104, 130.

method. On the other hand, unless national courts acquire the reviewing power, unlawful or unjust awards may be recognised and ultimately harm the States.

E *Conclusion*

As the intention of the *New York Convention* is to promote and facilitate international commercial arbitration, especially the enforceability of foreign arbitral awards, the pro-enforcement bias for arbitral awards was introduced. Article V of the Convention becomes the only grounds for national courts to refuse the recognition and enforcement of foreign arbitral awards. Therefore, it is impossible that the public policy exception be applied unlimitedly by national courts.

Internationally, the public policy exception under the *New York Convention* and the *Model Law* is construed as 'international public policy', the narrow standard of public policy. However, the application of the broad standard of domestic public policy is evidenced as the bar to the enforcement of foreign or international arbitral awards in some jurisdictions' court decisions. Consequently, the said application of the public policy exception by Thai courts is incompatible with the standard under the *New York Convention*. In the last thirteen years, Thailand has struggled with the application of the public policy exception both as a ground to set aside arbitral awards or to refuse the enforcement of arbitral awards. Some issues should be taken into consideration as factors influencing Thai Courts' broad application and interpretation, and these issues will be discussed in the next Chapter.

CHAPTER III THE APPLICATION OF THE PUBLIC POLICY EXCEPTION: THE THAI ENVIRONMENT

A *Introduction*

As discussed in the previous Chapter, the international community has promoted international commercial arbitration[1] since the 1920s. This is evidenced by the introduction of the *1923 Geneva Protocol*,[2] the *1927 Geneva Convention*,[3] and the *1958 New York Convention*.[4] Both the *Geneva Convention* and the *New York Convention* include references to the public policy goals, ie, they promote the enforcement of arbitration awards and the application of the public policy exception in certain circumstances – goals which appear to conflict. This latter limb of the policy has often been referred to as an obstacle to the system of international arbitration. However, both of the limbs of the policy seek to achieve the same goals. Both the pro-enforcement bias and the public policy exception refuse to enforce unjust awards. While both are important, economic reasons demand that public policy be applied narrowly and reserved for exceptional circumstances only. Yet there is a great deal of ambiguity around the application of public policy, particularly the public policy exception, in arbitration practices internationally.

In response to the problems of application and interpretation of the *New York Convention*,[5] the United Nations Commission on International Trade Law (UNCITRAL) produced the *Model Law*[6] as a non-binding supplement to provide guidance with a view to eliminate the

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[1] International Commercial Arbitration refers to contractual or out-of-court arbitration only.

[2] *Protocol on Arbitration Clauses*, opened for signature 24 September 1923, 27 UNTS 157 (entered into force 28 July 1924) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-6.en.pdf>.

[3] *Convention on the Execution of Foreign Arbitral Awards*, opened for signature 26 September 1927, 92 UNTS 301 (entered into force 25 July 1929) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf>.

[4] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf>. The *New York Convention* repealed the *Geneva Treaties* (the *Geneva Protoco*l together with the *Geneva Convention*).

[5] *Report of the Secretary-General: Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), UN Doc A/CN.9/168 (20 April 1979); See also *Note by the Secretariat: Further Work in Respect of International Commercial Arbitration,* UN Doc A/CN.9/169 (11 May 1979).

[6] *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, GA Res 40/72, UN GAOR, 6th Comm, 40th sess, 112th mtg, Agenda Item 135, UN Doc A/RES/40/72 (11 December 1985); as revised in 2006, *Revised Articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, paragraph 1, of the convention on the Recognition and Enforcement of Foreign Arbitral Awards, Done at New York*, 10 June 1958,

problems.[7] The *Model Law* was created as a model arbitration law which a State could adopt either in part or as a whole as its domestic arbitration law, but in fact it has not been adopted by all States.[8] Regarding the public policy exception, the *Model Law* does not provide any further clarification on the public policy exception.[9]

Thailand recognises and continually promotes international commercial arbitration as a dispute resolution mechanism. This is demonstrated by the fact that Thailand signed and ratified all three international commitments including the *New York Convention*, and later Thailand also largely adopted the *Model Law* as the *Thai Arbitration Act B.E.2545* (2002),[10] the current Thai arbitration Law. Most of the provisions in the *2002 Thai Arbitration Act* evince the content of the *Model Law* including the public policy exception. In fact, the *2002 Thai Arbitration Act* follows the *Model Law* and therefore contains two provisions concerning the public policy exception. One provision relates to a ground to set aside arbitral awards,[11] and the other is a ground to refuse the recognition and enforcement of arbitral awards.[12] However, a number of problematic issues have arisen in relation to the application and interpretation of the public policy exception in Thailand. For instance, there is a certain amount of ambiguity concerning the application of the public policy exception of the Thai arbitration law; the broad interpretation of the public policy exception by Thai courts; and the inconsistent application and interpretation of the public policy exception in arbitration matters generally over time. Obviously, these problems affect the development of arbitration in Thailand. Additionally, because Thailand is a Contracting State of the *New York Convention*, the law and judicial practice in Thailand are expected to be compatible with the provisions therein including the public policy exception. However, it could be argued that this is not happening. The empirical evidence from critical analysis of Thai cases on the public policy exception as discussed in detail below in this Chapter suggests that the Thai courts' recent application and interpretation of the public policy exception in dealing with

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GA Res 61/33, UN GAOR, 6th Comm, 61st sess, 64th mtg, Agenda Item 77, UN Doc A/RES/61/33 (4 December 2006).

[7] *Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration*, UN Doc A/CN.9/207 (14 May 1981) [1].

[8] United Nations Commission on International Trade Law, *Status UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006, UNCITRAL* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

[9] *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UN GAOR, 18th sess, UN Doc A/CN.9/264 (25 March 1985) [10].

[10] *Arbitration Act, B.E. 2545* (Thailand) 23 April 2002, Government Gazette Vol. 119, Part 39 Kor.

[11] Section 40(2)(b).

[12] Section 44.

arbitral awards is, in my view, actually incompatible with the pro-enforcement bias of the *New York Convention*.

This is ultimately particularly problematic as this divergent practice may very well affect Thailand's economic growth and the development of Thailand as an international trading State. It is also the case that since foreign investment is still needed in driving economic growth and for building infrastructure, arbitration is a preferable dispute resolution method for foreign investors when they are engaged in doing business in Thailand. If there is a difficulty in enforcing arbitral awards due to the public policy exception, it may dissuade investors from pursuing business interests in Thailand with Thai businesspeople or Thai government entities.

This Chapter will reveal and discuss the problematic issues relating to the application of the public policy exception in Thailand. Initially, it will discuss the legislative history of arbitration in Thailand leading to the enacting of the current Act regulating arbitral awards (the *2002 Arbitration Act*) and provide the background of how the current problems have developed. Next, the actual problematic issues relating to the application of the public policy exception in Thai arbitration law will be discussed. This part consists of four principal issues which are:

1 The ambiguity of the *2002 Thai Arbitration Act* in relation to the court's power to review arbitral awards;

2 The failure of the legislation to distinguish between domestic and foreign arbitral awards;

3 The broad interpretation adopted by Thai courts in deciding arbitration cases where the public policy exception may apply; and

4 Cultural impediments influencing the application and interpretation of the public policy exception.

The Chapter's conclusion will suggest that the issues mentioned above significantly affect the application and interpretation of the public policy exception and obstruct the economic growth and development of Thailand generally as a State in international affairs.

B *Legislative Historical Development of Arbitration Background*

Thailand has recognised arbitration since the Ayudhya period (1350-1767). This was evidenced by the revision of the laws in the Rattanakosin period in 1804.[13] Accordingly, the first written Thai arbitration legislation was enacted as part of the *1804 Three Emblems Law*.[14] Subsequently, the *1898 Civil Procedure Act*[15] determined that the judges played an important role over arbitrators in order to restrict arbitration.[16] In 1930, the *Act on Arbitration Agreement B.E. 2473* (1930)[17] was enacted in response to Thailand's ratification of the *Geneva Protocol*.[18] At this point in time, there was no solid evidence of the pro-arbitration policy in Thailand. Nonetheless, there was an arbitration case decided by the Thai Supreme Court in 1935 in which the court recognised the arbitration agreement and enforced the arbitral award made in the United Kingdom.[19]

In 1934, the *Thai Civil Procedure Code* (1934),[20] which repealed the *1898 Civil Procedure Act*, included two types of arbitration which are the out-of-court arbitration [21] and the court-annexed arbitration.[22] As stated above, Thailand ratified the *New York Convention*, and so Thailand is bound by the provisions in the *New York Convention*. However, in practical terms, even though Thailand was the sixth State to ratify the *New York Convention*,[23] there does not appear to be any evidence to show that there was a specific goal or course of action that supports the assumed intention for Thailand to incorporate the *New York Convention* into

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[13] Office of Judiciary Thai Arbitration Institute, *Arbitration* (Thai Arbitration Institute) 3; See also Athueck Asvanund, 'The King Rama V and the Use of Arbitration' (2009) 111 *New Law* 57, 57; Phairush Burapachaisri, *The Mediation and Arbitration Procedure,* Court of Justice Thailand <http://elib.coj.go.th/managecourt/data/f14_30.pdf> 1.

[14] *Three Emblems Law* (Thailand) 1804.

[15] *Civil Procedure Act* (Thailand) 21 October 1897. It was repealed by the *Civil Procedure Code* (Thailand) in 1934.

[16] Anan Chantara-opakorn, *The Law of Dispute Resolution by Arbitration* (Thammasat University Press, 1994), 6-7.

[17] *Act on Arbitration Agreement B.E. 2473* (Thailand) 13 Febuary 1930, Government Gazette Vol. 47.

[18] The *Geneva Protocol* was repealed by the *New York Convention*.

[19] *Raisond Export Gesellschaft mbH (by Mr. Har D. Alkinson) v Berli Jucker Anglo Partnership* [1935] 465/2478 (Supreme Court of Thailand). The dispute is this case was arisen between a German company and a Thai partnership established by two Swiss businessmen.

[20] *Civil Procedure Code* (Thailand) 1934.

[21] Out-of-court or contractual arbitration is the arbitration that the parties agree to arbitrate the future or existed dispute to one or more arbitrators.

[22] Court-annexed arbitration is the arbitration that the parties agree to arbitrate the dispute of the case during the trial court proceedings. In terms of the enforcement of the court-annexed arbitral awards, the court may refuse the enforcement of the arbitral award if the award is contrary to the law.

[23] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf>. The *New York Convention* has been ratified by 156 Contracting States as of June 2016.

domestic law for twenty-eight years. In 1987, the *Arbitration Act B.E. 2530*[24] was enacted by the Thai parliament as the law governing the out-of-court or contractual arbitration.[25] According to the note at the end of the *1987 Thai Arbitration Act*, the Act was enacted in response to the growth of arbitration and the ratification of international Conventions concerning international arbitration. Moreover, at this time, the provisions of the *Civil Procedure Code* governed both the out-of-court and the court-annexed arbitration, and the said provisions did not systematically align with the international Conventions ratified by Thailand. Consequently, the provision in the *Thai Civil Procedure Code* concerning the out-of-court arbitration was repealed by the *1987 Arbitration Act*, but the provisions on the court-annexed arbitration are still binding.

The *1987 Thai Arbitration Act* mainly followed the framework of the English arbitration laws;[26] even though, the *Model Law* was published in 1985. It became immediately obvious that the Act was affected by some critical problems; for instance, it contained a narrower definition of foreign arbitration than that included in the *New York Convention*. The *New York Convention* relies only upon the territorial principle, so foreign arbitration is an arbitration conducted outside the State. However, according to s 28 of the *1987 Thai Arbitration Act*,[27] only those arbitrations that were conducted mainly or wholly outside Thailand and did not involve Thai Nationals would be categorised as foreign arbitrations. This indicated that the *1987 Thai Arbitration Act* took both the territorial principle and the nationality principle into account. Thus, there were not many cases that dealt with foreign arbitral awards under the *1987 Thai Arbitration Act*.

Further, in terms of the enforcement of arbitral awards under the *1987 Arbitration Act*, the Act provided for one rule to deal with the enforcement of domestic arbitral awards and the other rule to deal with foreign arbitral awards. The Act had only one public policy exception provision as a ground for the court to refuse the recognition and enforcement of foreign

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[24] *Arbitration Act B.E. 2530* (Thailand) 19 July 1987, Government Gazette Vol. 104 Part 156 Kor, Special Edition.

[25] After the enactment of the *Arbitration Act* (1987) (Thailand), the *Civil Procedure Code* (Thailand) 1934 provides for court-annexed arbitration only in ss 210-222.

[26] Thawatchai Suvanpanich, *Explanation of the Thai Arbitration Act B.E. 2545, Specific Law Series* (Nititham, 2014) 40; See also Vichai Ariyanuntaka, J*urisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards: a Thai Perspective,* Court of Justice Thailand <http://www.coj.go.th/en/pdf/AlternativeDisputeResolution04.pdf> 20; Anan Chantara-opakorn, 'What Is Foreign Arbitration?: Analysis on Section 28 of the Thai Arbitration Act B.E. 2530 (1987)' (1989) 17(3) *Nitisat Journal* 154, 163.

[27] Section 28 of the *Arbitration Act B.E. 2530* (1987) Thailand provides:
Foreign arbitration means an arbitration conducted wholly or mainly outside the Kingdom of Thailand and any party thereto is not of Thai national.

arbitral awards, and this was set out in s 35.[28] During the enforcing period of the *1987 Thai Arbitration Act*, the courts did make reference to the *New York Convention*, and also considered and indicated the scope of the public policy exception in accordance with the intention of the *New York Convention*, ie, the narrow approach of public policy: internationally known as 'international public policy'.

An example of this is the case of *Coat Import SA Co., Ltd.* ('Coat Import') *v Teparak Textile Co., Ltd.* ('Teparak')[29] In this case, Coat Import, a foreign company, entered into a sale contract of two hundred tons of African cotton with Teparak, a Thai company, with the price of 76.50 US cents per pound. The parties agreed upon four deliveries in February, March, April, and May 1992, and Teparak agreed to open the letter of credit for the total amount before the first delivery. In the contract, there was an arbitration clause under the rules of the Liverpool Cotton Association.[30] The facts show that Teparak did not open the letter of credit as agreed by the parties. Consequently, Coat Import brought the dispute to arbitration in the United Kingdom. Teparak failed to appoint an arbitrator. Thus, the president of the Liverpool Cotton Association appointed an arbitrator on behalf of Teparak. The arbitration tribunal rendered the award in favour of Coat Import on the ground of a breach of contract by Teparak, but Teparak defaulted on a payment as stated in the award. Thus, Coat Import filed a lawsuit with the Thai local court requesting the enforcement of the arbitral award. Teparak argued that the contract between Coat Import and Teparak did not exist, so the president of the Liverpool Cotton Association had no right to appoint an arbitrator on behalf of Teparak. Also, Teparak did not have any representative in the case. The Trial judge dismissed Coat Import's action. Coat Import appealed the decision of the court of first instance. The Thai Appeal Court ruled in favour of Teparak by refusing to enforce the award because the enforcement of the award would be contrary to the public order or good morals of Thailand. The Appeal Court mentioned that the arbitration tribunal miscalculated the amount of compensation, and the court therefore had no power to correct the arbitral award. Coat Import appealed the decision of the Appeal Court to the Thai Supreme Court. Finally, the Thai

[28] Section 35 of the *Arbitration Act B.E.2530* (Thailand) provides:

> The court may refuse recognition and enforcement of the award under Section 34 (foreign award) if it appears before the court that the subject matter of the dispute is not capable of settlement by arbitration under Thai law, or that the recognition or enforcement of the award would be contrary to the public policy or good morals or the principle of international reciprocity.

[29] *Coat Import SA Co., Ltd. v Teparak Textile Co., Ltd.* [1997] 5513/2540 (Supreme Court of Thailand).

[30] According to the rules of the Liverpool Cotton Association, arbitration under the rule is to be decided by two arbitrators of the Liverpool Cotton Association chosen by each party. If a party fails to appoint the arbitrator, the president of the Liverpool Cotton Association has the power to appoint the arbitrator on behalf of the party.

Supreme Court reversed the decisions of the lower courts. The Supreme Court found that Teparak did not establish a ground that would convince the Court to refuse the enforcement of the award. The Supreme Court went on to rule that the enforcement of the award would not be contrary to the public order and good morals since the arbitrators interpreted and rendered the award in accordance with the rules of the Liverpool Cotton Association. Furthermore, the Supreme Court held that, according to the *New York Convention*, the court may exercise its power to refuse the enforcement of a foreign arbitral award only when Teparak had proved the grounds under sub-ss 34(1) to (6)[31] or when the court found the grounds under s 35[32] of the *1987 Thai Arbitration Act*. In response to the argument of Teparak, the arbitrators found that the contract existed, so the court refused to go through the issue on the existence of the underlying contract.

It is obvious that, in this case, the Thai Supreme Court exercised only a very limited reviewing power by respecting the arbitration agreement between the parties accepting that differences between the parties were to be arbitrated under the rules of the Liverpool Cotton Association which is in accordance with the principle of freedom of contract. Moreover, the court denied reviewing the merits of the case decided by the arbitration tribunal on the issue

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[31] Section 34 of the *Arbitration Act B.E.2530 1987* (Thailand) provides:

> An application for the execution of a foreign arbitral award under the auspices of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10th June 1958, may be denied by the court, if the party against whom the execution of the award is sought can prove that:
>
> (1) any party to the arbitration agreement was, under the law applicable to him, under some incapacity;
>
> (2) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
>
> (3) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
>
> (4) the award contains decisions on matters beyond the scope of the submission to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
>
> (5) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (6) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. If merely an application for the setting aside or suspension of the award has been made to a competent authority, the court where the enforcement of the award is sought may, if it deems appropriate, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

[32] Section 35 of the *Arbitration Act B.E.2530* 1987 (Thailand) provides:

> The court may refuse recognition and enforcement of the award under Section 34 if it appears before the court that the subject matter of the dispute is not capable of settlement by arbitration under Thai law, or that the recognition or enforcement of the award would be contrary to the public policy or good morals or the principle of international reciprocity.

of the existence of the underlying contract. The decision in this case shows the narrow application and interpretation of the Thai Supreme Court in reviewing the arbitral award, and the court clearly does not extend the application of the public policy exception to bar the enforcement of the arbitral award.

Another case where the court referred to the *New York Convention* and applied the narrow standard of the public policy exception is *Amalgamated Metal Corporation PLC Co., Ltd.* ('Amalgamated') *v Preeya Mining Limited Partnership* ('Preeya Mining').[33] On 7 June 1991, Amalgamated, an English company, agreed to purchase wolframite from Preeya Mining, a Thai partnership, and the cost of the wolframite was paid in advance. Preeya Mining breached the contract by delivering unqualified wolframite to Amalgamated. The dispute was brought to arbitration in London, the United Kingdom as agreed upon by the parties in the contract. The arbitration tribunal rendered the award in favour of Amalgamated on the ground of breach of contract. According to the arbitral award, Preeya Mining was obliged to pay compensation in the amount of USD 213 392.41 and the arbitration fee of GBP 3 393 plus interest. The losing party did not make the payment. Hence, Amalgamated filed a petition to the Thai Civil Court requesting the enforcement of the arbitral award. The Civil Court and the Thai Appeal Court enforced the arbitral award. Preeya Mining appealed the Appeal Court's decision to the Thai Supreme Court arguing that the arbitral award was incorrect because no reason for the decision were provided.[34] In addition, Preeya Mining argued that the interest rate of 7.5 percent per year charged for the arbitration fee was unlawful, and that the legal proceedings were not filed within the prescribed time limitation. The Thai Supreme Court, however, held that the arbitral award was enforceable by referring to the *New York Convention* and ss 34 and 35 of the *1987 Thai Arbitration Act* that Preeya Mining did not prove the grounds for the refusal of foreign arbitral awards, and the enforcement of the arbitral award would not be contrary to the public order or good morals of Thailand.

[33] *Amalgamated Metal Corporation PLC Co., Ltd. v Preeya Mining Limited Partnership* [1997] 7128/2540 (Supreme Court of Thailand).

[34] Section 20 of the *Arbitration Act B.E.2530* 1987 (Thailand) provides:

> An award shall be made in writing, signed by the arbitrator or the umpire, as the case may be, and shall clearly state the reasons for all decisions. However, it shall not prescribe or decide on any matters falling beyond the scope of the arbitration agreement or the relief sought by the party, except in fixing the fees, expenses or remuneration of the arbitrator or umpire under Section 27, or in case where the award is rendered in accordance with the agreement or the compromise between the parties. It should be noted that Section 20 of the 1987 Arbitration Act governing domestic arbitral award required arbitration tribunal to clearly state the reasons for all decision while this case concerned the recognition and enforcement of foreign arbitral award governed by Chapter 6 of the Act (ss 28-35).

In these cases, the courts applied the public policy exception narrowly. The courts refused to review the merits of the case in these cases in favour of the principle of finality of arbitral awards. Moreover, the Thai Supreme Court also determined that the burden of proof should be placed on the party defending against enforcement. This demonstrates that the Thai Supreme Court applied the same standard of the public policy exception as that laid down under the *New York Convention* – a pro-enforcement bias.

During the enforcing period of the *1987 Thai Arbitration Act*, it had been observed that most of the foreign arbitral awards were steadily enforced by Thai courts without any undue hardship[35] including some cases concerning contracts between government agencies and private sectors.[36] Furthermore, it should be noted that the *1987 Arbitration Act* did not have any section to deal with setting aside an arbitral award – it only provided the courts with the ability to reject the enforcement of awards.

After fifteen years of operation of the *1987 Thai Arbitration Act*, the Thai Arbitration Institute (TAI)[37] conducted an extensive study in order to implement reforms to meet the international expectation, and consequently persuaded foreign investors and jurists that Thailand is an efficient place of arbitration within the region, and to promote trade and investment in Thailand to both domestic and foreign investors.[38] As a result, the *Thai Arbitration Act B.E. 2545* (2002) was passed. This Act is largely based on the *Model Law* – which deliberately required a consideration of the territorial principles, nationality principles, and other international elements whereas the *New York Convention* only referred to the territorial principle.[39]

[35] Sorawit Limparangsri, 'Alternative Dispute Resolution in ASEAN: A Comtemporary Thai Perspective' (2007) 2 *TAI Journal of Arbitration* (English Version) 13, 23.
[36] Ibid 28.
[37] Two main domestic arbitration institutes in Thailand at the time are: (1) the Thai Arbitration Institute of the Alternative Dispute Resolution Office (TAI), within the Office of the Judiciary, which is responsible for the facilitation of the arbitration process through providing resources required to conduct arbitration; and (2) the Thai Commercial Arbitration Institute of the Board of Trade, which sets the rules that govern arbitration conducted through it.
[38] Thai Arbitration Institute, Office of the Judiciary and Office of Alternative Dispute Resolution, *The New Arbitration Era in Thailand*, E-Library of the Judiciary <http://www.coj.go.th/en/pdf/AlternativeDisputeResolution02.pdf> 1.
[39] It is noted that Thailand is bound to the provisions in the *New York Convention*. The *Model Law* is only a non-binding document produced by UNCITRAL in order to be adopted by a State as domestic arbitration law. The aim of the *Model Law* is to reduce the problems concerning the application and interpretation of the *New York Convention.*

The *Model Law* is designed to be applied to only international commercial arbitration as defined in art 1(3)[40] with no distinction between domestic and foreign arbitral awards. Thus, the *2002 Thai Arbitration Act*, mostly based on the *Model Law*, does not distinguish between domestic and foreign arbitral awards. However, art 1of the *Model Law* was not included in the *2002 Thai Arbitration Act*.[41] The fact that art 1 of the *Model Law* was left out has caused some confusion and ambiguity with regard to the application of the *2002 Thai Arbitration Act* generally and in particular the application and interpretation of the public policy exception. Because the Act fails to clearly define the scope of application of the Thai arbitration law, all arbitration cases are treated similarly including the standard of the public policy exception. Adding to the confusion, it should be noted that, according to the intention of the drafters of the *2002 Thai Arbitration Act*, the international standard under the *New York Convention* and the *Model Law* should be applied to all arbitration cases. It is suggested that this does not seem to be practical because the courts have not applied the *2002 Thai Arbitration Act* in accordance with both the intention of the Act's drafters and the intention of the *New York Convention* and the *Model Law*, especially for the application and interpretation of the public policy exception.

In comparison to the *1987 Thai Arbitration Act*, the current Thai arbitration law, the *2002 Thai Arbitration Act*, has two public policy exceptions: one as a ground for setting aside arbitral awards in s 40(2)(b) and the other as a ground to refuse the recognition and enforcement of arbitral awards in s 44. Also, for the enforcement of arbitral awards, the *2002 Thai Arbitration Act* does not have separate sections dealing with domestic and foreign arbitral awards. According to the intention of the drafters of the Act accompanied with the

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[40] Article 1(3) of the *Model Law* provides:

> An arbitration is international if:
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
> (b) one of the following places is situated outside the State in which the parties have their places of business:
> > (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
> > (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
> (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

[41] The articles from the *Model Law* that was left out are art 1 concerning the scope of application, art 2(a) the definition of 'arbitration', art 3(1)(b) regarding the time of the receipt of written communications, art 5 the extent of court intervention, art 13(1) concerning the challenge procedure that the parties may agree upon a procedure for challenging an arbitrator freely, and art 17 regarding the power of an arbitral tribunal to order interim measures.

language used in the Act, the *2002 Arbitration Act* is meant to serve as an efficient tool in order to ensure that the arbitration system in Thailand would be accepted internationally.

However, as will be shown below, it would seem that, in practice, the courts have not followed the intent of the drafters concerning the application and interpretation of the public policy exception. There are a number of cases dealt with by the courts after the enactment of the *2002 Thai Arbitration Act*, where the courts interpreted the public policy exception broadly by reviewing the merits of the case in order to reach the judgement that the awards or the enforcement of the awards would be 'contrary to the public order or good morals of Thailand'.[42] Some of these cases will be discussed later in this Chapter such as *The Expressway and Rapid Transit Authority of Thailand (ETA) v BBCD Joint Venture (BBCD)*,[43] *The Office of the Permanent Secretary, the Prime Minister's Office v ITV Public Company Limited*,[44] and *TOT Public Company Limited v True Corporation Company Limited*.[45]

Theoretically, Thai foreign arbitral awards are to be treated according to the international public policy standard as set out in the *New York Convention* as Thailand is a Contracting State. However, practically, this may not be the case. This result appears to derive from the fact that the current Thai arbitration law concerning the reviewing power of the competent courts is vague; that the law has no separate provision to deal with domestic and foreign arbitral awards; that Thai courts apply and interpret the public policy exception broadly; and that Thai legal culture influences the broad application and interpretation of the public policy exception. It is suggested that these factors, which will now be discussed in detail, are causing issues for the enforcement of foreign arbitral awards in Thailand.

C *Problematic Issues of the Public Policy Exception in Thailand*

Modern Thai arbitration law has been developed over time in accordance with the international Conventions and instruments. To emphasise, Thailand is currently bound by the *New York Convention* and largely adopted the *Model Law*, a non-binding document supporting the use of the *New York Convention*, as Thai arbitration law. However, there seems to be some confusions arising from a certain ambiguity relating to Thai legislation and

[42] *Arbitration Act* 2002 (Thailand) ss 40(2)(b) and 44
[43] *The Expressway and Rapid Transit Authority of Thailand (ETA) v BBCD Joint Venture (BBCD)* [2006] 7277/2549 (Supreme Court of Thailand).
[44] *The Office of the Permanent Secretary, the Prime Minister's Office v ITV Public Company Limited* [2006] 349/2549 (Supreme Administrative Court of Thailand).
[45] *TOT Public Company Limited v True Corporation Company Limited* [2012] 1660/2555 (Central Administrative Court of Thailand).

consequently its application and interpretation resulting in judicial decisions that question to what extent the international principles under the *New York Convention* and the *Model Law* should be applied in determining matters under Thai arbitration law. This confusion particularly relates to the application of the public policy exception under the *2002 Thai Arbitration Act*. The key problematic issues in relation to the application of the public policy exception discussed in this Chapter are:

1 The ambiguity of the *2002 Thai Arbitration Act* in relation to the court's power to review arbitral awards;

2 The failure of the legislation to distinguish between domestic and foreign arbitral awards;

3 The broad interpretation adopted by Thai courts in deciding arbitration cases where the public policy exception may apply; and

4 Cultural impediments influencing the application and interpretation of the public policy exception.

1 *The Ambiguity of the Thai Arbitration Act B.E. 2545 (2002) in Relation to the Court's Power to Review Arbitral Awards*

An arbitration tribunal is established by an agreement between the parties concerning the appointment of arbitrator(s). Consequently, unlike a court, an arbitration tribunal has no power to give an order to any individual, ie, an arbitration tribunal may only order the parties to testify at a hearing. The national courts then have the supervisory power – the supporting power and the reviewing power. In terms of the supporting power, an arbitration tribunal needs to request an order from a competent court so that the order can be enforced in the jurisdiction. After the arbitration tribunal renders the arbitral award, the competent court may exercise its reviewing power through two mechanisms: setting aside arbitral awards and refusal of the enforcement of arbitral awards.

Article V of the *New York Convention* provides the grounds upon which a court in which the prevailing party seeks enforcement may refuse the recognition and enforcement of a foreign arbitral award. These grounds are also those set out in the *Model Law*. Because the *New York Convention* governs how the Contracting States respond to foreign arbitral awards, setting aside arbitral awards is not in the scope of the *New York Convention*. The only reason why

the setting aside of arbitral awards is mentioned in the *New York Convention* is that it is a ground for a competent authority to refuse the recognition and enforcement of foreign arbitral awards under art V(1)(e). According to art V(1)(e) of the *New York Convention*, an arbitral award can only be set aside by the court at the place of arbitration or the State of applicable law. Therefore, if an arbitral award is set aside by the competent court at the place of arbitration or the State of applicable law, the arbitral award may then be refused by any national court.46 Unlike the *New York Convention*, the *Model Law* provides the grounds for setting aside arbitral awards47 because it was created for the purpose of adoption as domestic law. According to the *Model Law*, the grounds for setting aside arbitral awards are similar to the grounds for refusing to enforce arbitral awards,48 and they mirror the grounds to refuse the recognition and enforcement of foreign arbitral awards under art V of the *New York Convention*. Therefore, the public policy exception is a ground for national courts to set aside arbitral awards and to refuse the recognition and enforcement of arbitration awards under the *Model Law*. Notwithstanding, a factor related to the courts' reviewing power is the public policy exception: either the application or the interpretation or both.

The public policy exception is referenced in the *2002 Thai Arbitration Act* on two grounds: one as a ground to set aside arbitral awards and the other as a ground to refuse the recognition and enforcement of arbitral awards. In particular, the public policy exception found in ss 40(2)(b) and 44 of the *2002 Thai Arbitration Act* are modelled on arts 34(b)(ii)[49] and 36 (1)(b)(ii)[50] of the *Model Law* respectively. It is remarkable that the *2002 Thai Arbitration Act*, s 40, is the first Thai arbitration law containing a provision regarding setting aside arbitral awards. Section 40 of the *2002 Thai Arbitration Act* states that the competent courts under the Act, the courts in Thailand,[51] have the power to set aside arbitral awards. Also, the fact that

[46] The content can be found in art V(1)(e) of the *New York Convention* and art 34 accompanied with art 1(2) of the *Model Law*.
[47] Article 34.
[48] Article 36.
[49] Article 34 of the *Model Law*: Application for setting aside as exclusive recourse against arbitral award provides:

> (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.

[50] Article 36 of the *Model Law*: Grounds for refusing recognition or enforcement provides:

> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> (b) the court finds that:
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

[51] Section 9 of the *Arbitration Act B.E. 2002* (Thailand) provides:

the drafters of the *2002 Thai Arbitration Act* did not retain art 1(2) of the *Model Law* which states clearly that '[t]he provisions of this Law, except arts 8, 9, 35, 36, apply only if the place of arbitration is in the territory of this State', has created a peculiar circumstance. Such unusual circumstance, caused by the ambiguous scope of application of the 2002 Act, is that the language of s 40 allows an interpretation that the competent courts in Thailand can set aside all arbitral awards regardless of where they were made. Accordingly, in Thailand, all arbitration cases may be reviewed twice by the same competent courts because a party has the right to file a petition seeking the setting aside of the arbitral award, and the prevailing party may also seek the enforcement of the arbitral award. Consequently, the competent court has two opportunities to review the same arbitral award on the same grounds, and that is a practice quite different to that proposed by the *New York Convention* – only the courts in the place of arbitration may have two opportunities to review arbitral awards via the two mechanisms which are setting aside and refusing to enforce arbitral awards.[52]

The following case exemplifies the point being made:

In *Krungthai Feedmill Public Co., Ltd. v Cargill Siam Co., Ltd.*,[53] there was an argument whether the court had jurisdiction to set aside the arbitral award made in London. Both parties were Thai corporations which agreed to arbitrate the disputes relating to the sale contract of soybean hulls under the rules of the Grain and Feed Trade Association (GAFTA) in London, United Kingdom. The Thai Supreme Court affirmed the decision of the Central Intellectual Property and International Trade Court by setting aside the arbitral awards and refusing to enforce the arbitral award on the ground that the main contract is not binding. Also, the Supreme Court mentioned that 'even though London, the United Kingdom is the place of arbitration, the competent Thai court may refuse the enforcement of the arbitral award or set aside the arbitral award.'[54]

Basically, the prevailing party in arbitration may still seek the enforcement of the arbitral award elsewhere since the Thai court's decision on setting aside the arbitral award would not

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> The Central Intellectual Property and International Trade Court, or the Region Intellectual Property and International Trade Court, the Court having jurisdiction over the place where the arbitration proceedings are being conducted, the Court having jurisdiction over the domicile of the parties, or the Court having jurisdiction to adjudicate the dispute raised to the arbitrator, shall be the competent Court under this Act.

[52] Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?' (2014) 29(2) *ICSID Review* 263, 266.

[53] *Krungthai Feedmill Public Co., Ltd. v Cargill Siam Co., Ltd.* [2009] 5511-5512/2552 (Supreme Court of Thailand).

[54] Ibid 25.

be effective in other jurisdictions. Notwithstanding, it depends on where the properties of the losing party are situated. If the losing party only holds properties in the territory of Thailand, it is possible that the prevailing party may go home empty-handed. Consequently, this would raise questions for both domestic and foreign investors with respect to whether or not they should invest and conduct business in Thailand.

However, recently the Thai Supreme Court, in two of its decisions,[55] overruled its decision in the case of *Krungthai Feedmill Public Co., Ltd. v Cargill Siam Co., Ltd*. The two court decisions referred to the principle of the *New York Convention* to determine that only the competent authority at the place of arbitration should have the power to set aside arbitral awards. Thus, Thai courts do not have the power to set aside arbitral awards made in another State. Even though it may seem that Thai courts' decisions now align with the *New York Convention* on this point, the ambiguity of the current Thai legislation is still problematic. It is difficult to know if or when Thai courts will, in the future, interpret the legislative provision as meaning that they can apply their reviewing power as they did in *Krungthai Feedmill Public Co., Ltd. v Cargill Siam Co., Ltd*.

This issue is relevant to the public policy exception as a bar to the enforcement of foreign arbitral awards because a set aside arbitral award is likely to be unenforceable in another State in accordance with art V(1)(e) of the *New York Convention*. In addition, the current Thai arbitration law provides that the one standard should be applied to all arbitral awards; therefore, there is only one standard of the public policy exception that can be applied to all arbitral awards in all cases: setting aside or refusing the enforcement.

Section 40[56] of the *2002 Thai Arbitration Act*, setting out the grounds upon which an arbitral award will be set aside, is divided into two subsections which are sub-s 40(1) the grounds that

[55] *I. Schneider K.G. (GmbH and Co.) v Khao Yai Canned Fruit Co., Ltd.* [2013] 13534/2556 (Supreme Court of Thailand); See also *TPI Polene Public Company Limited v HC Trading International Inc.* [2013] 13535-13536/2556 (Supreme Court of Thailand) affirming TPI Polene Public Company Limited v HC Trading International Inc. [2010] Gor Khor 80/2553 (Central Intellectual Property and International Trade Court).

[56] Section 40 of the *Arbitration Act B.E. 2545* 2002 (Thailand) provides:

> Recourse against an arbitral award may be made only by an application to the competent Court for setting aside in accordance with this Section.
> A party may apply to the competent Court to set aside the award within ninety days as from the date of receiving a copy of award or, in the case where a party requests the arbitral tribunal to correct or interpret the award or to make an additional award, within ninety days as from the date of correction, interpretation or making of the additional award.
> The Court shall set aside the arbitral award if:
> (1) a party who make the application is able to prove that:
> (a) a party to the arbitration agreement is incapacity under the law applicable to that party;

a party must raise and prove one of the grounds from sub-ss 40(1)(a) to 40(1)(e) in order that the court shall set aside an arbitral award and secondly the grounds for setting aside arbitral awards that the court may raise on its own motion including the public policy exception in sub-s 40(2).

For the recognition and enforcement of arbitral awards, ss 43 and 44 of the *2002 Thai Arbitration Act* provides the grounds for the refusal of the enforcement of an arbitral award 'irrespective of the country in which it was made'. Section 43[57] contains six grounds for the refusal of the enforcement of arbitral awards that must be raised by the party on whom the

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(b) the arbitration agreement is not legally binding under the law to which the parties have agreed upon or, in the case where there is no such agreement, the law of the Kingdom of Thailand;

(c) a party who make the application was not delivered advance notice of the appointment of the arbitral tribunal or the hearings of the arbitral tribunal, or was otherwise unable to present his or her case;

(d) the awards deals with a dispute not falling within the scope of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration could be separated from those not so submitted, only the part of award which contains decisions on matters not submitted to arbitration may be set aside by the Court; or

(e) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties, in the case where there is no such agreement, was not in accordance with this Act;

(2) It appears to the Court that:

(a) the award deals with the dispute which shall not be settled by arbitration under the law; or

(b) the recognition or enforcement of the award is contrary to public order or good morals.

In considering a request for setting aside an award, if the parties so requested and the Court thinks fit, the Court may suspend the setting aside proceedings for a period of time as it deems appropriate in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take other actions which, in the opinion of the arbitral tribunal, would eliminate the grounds for setting aside.

[57] Section 43 of the *Arbitration Act B.E.2545* 2002 (Thailand) provides:

The Court may refuse to enforce the arbitral award, irrespective of the country in which it was made, if the party against whom the enforcement is invoked can prove that:

(1) a party to the arbitration agreement is incapacity under the law applicable to that party;

(2) the arbitration agreement is not legally binding under the law to which the parties have agreed upon or, in the case where there is no such agreement, under the law of the country where the award was made;

(3) the enforced party was not given advance notice of the appointment of the arbitral tribunal or of the hearings of the arbitral tribunal or was otherwise unable to present his or her case;

(4) the award deals with a dispute not falling within the scope of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be enforced by the Court;

(5) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement made by the parties or, in the case where there is no such agreement, was not in accordance with the law of the country where the award was made; or

(6) the award has not yet become binding upon the parties, or it has been set aside or suspended by a competent Court or by the law of the country where it was made, except where the application for setting aside or suspension of the award has been made to the competent Court and the trial is pending, the Court may suspend the proceedings to enforce the award as it thinks fit. If so requested by the party who apply for enforcement of award, the Court may order the enforced party to give security in an amount as it thinks fit.

enforcement is invoked. Section 44[58] contains the grounds upon which the competent court has the power to raise on its own volition in order to refuse the enforcement of arbitral awards, and these grounds relate to arbitrability and the public policy exception. Sections 43 and 44 are modelled on art 36 of the *Model Law* which was intended by the drafters of the *Model Law* to be applied to all international arbitral awards. As mentioned before, leaving out art 1 of the *Model Law* concerning the scope of application creates what might be considered the crucial confusion to the application of the *2002 Thai Arbitration Act*. The language of ss 40, 43, and 44 of the *2002 Thai Arbitration Act* appears to be applied to all arbitral awards, and it is implied to be the international standard under the *New York Convention* and the *Model Law* according to the intent of the drafters of the Act and the *New York Convention* of which Thailand is a Contracting State. However, the application and interpretation of the public policy exception in Thailand, both as a ground to set aside arbitral awards and to refuse the enforcement of arbitral awards, varies from the intent of the *New York Convention*.

Obviously, a failure on the part of the *2002 Thai Arbitration Act* to specify its clear scope of application has created enormous ambiguity in relation to the competent courts' reviewing power. This is amplified by the fact that the Act impliedly allows the parties to apply to the competent courts for setting aside of both arbitral awards made within the territory of Thailand and arbitral awards made elsewhere. Therefore, the competent courts under the *2002 Thai Arbitration Act* may set aside and refuse to enforce any arbitral award that they review. Accordingly, since the public policy exception both as a ground to set aside arbitral awards and as a ground to refuse the enforcement of arbitral awards may be applied to all arbitral awards, the public policy exceptions in ss 40 and 44 are to be applied by reference to the same standard which is expressed broadly. This clearly opposes the territorial principle and the narrow standard of the public policy exception, and that makes it incompatible with the *New York Convention*.

With respect to the unclear scope of application of the *2002 Thai Arbitration Act*, the failure to distinguish between the types of arbitral awards is another significant cause of the sole standard of the public policy exception: the broad standard. This issue will now be discussed.

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[58] Section 44 of the *Arbitration Act B.E. 2545* 2002 (Thailand) provides:

> The Court shall have the power to refuse the application to enforce the award under Section 43 (irrespective of the country in which it was made) if it appears that the award deals with the dispute which shall not be settled by arbitration under the law or the enforcement of award is contrary to public order or good morals.

2 *The Failure of the Legislation to Distinguish between Domestic and Foreign Arbitral Awards*

The *2002 Thai Arbitration Act* is the product of the 2002 Thai arbitration law reform which had as its aim to promote Thailand's arbitration system as the premier system in the region and to be accepted internationally. Sorawit Limparungsri, judge of the Office of the President of the Supreme Court of Thailand, stated:

> The main reason causing Thailand to adopt a single framework for both types of arbitration is the increasingly intermingled nature of trade and investment transactions in today[']s business community renders it practically complicated to differentiate between domestic disputes and those with international character. Having different laws for different kinds of arbitration will trigger more arguments and controversies as to the applicable law.[59]

Since both domestic and foreign arbitral awards are intended to be treated using the same standard, that is the international standard, the unification of the provisions to deal with the enforcement of domestic and foreign arbitral awards reflected in the 2002 Act's sections has been achieved. This is primarily due to the fact that the language of the Act clearly states that its intention is to promote arbitration. However, the fact that the *2002 Thai Arbitration Act* does not differentiate between domestic and foreign arbitral awards raises the question of whether the broad approach or the narrow approach to public policy will be applied.[60]

Internationally, it has been accepted that the public policy exception applied to foreign arbitral awards is to be applied and interpreted narrowly which is referred to as 'international public policy',[61] and that is assumed to be the aim of the drafters of the *2002 Thai Arbitration Act*. However, Thai courts' decisions, which will be discussed later in this Chapter, show that the broad standard is used in practice to apply the public policy exception to questions relating to arbitral awards. For example, Thai courts seem to exercise their reviewing power thoroughly by reviewing the merits of the case in order to reach the judgement that the awards or the enforcement of the awards would be contrary to the public order or good

[59] Limparangsri, above n 35, 23.
[60] Anan Chantara-opakorn, 'The Boundary of 'Public Order or Good Moral' for the Enforcement of Arbitral Awards' (2007) 2 *TAI Journal of Arbitration* 17, 21.
[61] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011); See also Committee on International Commercial Arbitration, International Law Association, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (New Delhi, 2-6 April 2002) 31; *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA)*, 508 F 2d 969 (2nd Cir, 1974).

morals of Thailand. This would suggest that the application and interpretation of the public policy exception under the *2002 Thai Arbitration Act* by Thai courts is running counter to the intent of the Act's drafters and international expectations.

Even though it was an admirable intention of the 2002 Act's drafters to elevate the standard of the Thai arbitration system and promote Thai economic growth, this awkward situation shows that Thailand was not ready for such change. Moreover, as noted, the balance between the pro-enforcement bias under the *New York Convention* and the public policy of the State needs to be deliberately taken into consideration. Since Thailand is bound by the provisions in the *New York Convention*, at least the international standard of the public policy exception needs to be applied to foreign arbitral awards. Hence, the distinction between domestic and foreign arbitral awards seems to be a practical solution.

Because there is no distinction between domestic and foreign arbitral awards in the *2002 Thai Arbitration Act*, a broad standard of the public policy exception is applied to all arbitral awards. This consequently creates an incompatibility between the application and interpretation of the public policy exception applied to all arbitral awards, including foreign arbitral awards, in Thailand and the application and interpretation of the public policy exception under the *New York Convention*. Besides the failure of the Thai arbitration law to provide its clear scope of application on the reviewing power of the courts and to distinguish between domestic and foreign arbitral awards, how Thai courts interpret the *2002 Thai Arbitration Act* is also problematic.

3 *The Broad Interpretation of the Courts in Deciding Cases Where the Public Policy Exception May Apply*

Since arbitration tribunals cannot manage to deal with all the proceedings alone, national courts are still granted the supervisory power: the supporting and the reviewing power. Accordingly, the competent courts under the *2002 Thai Arbitration Act* have both the supporting power and reviewing power over arbitration cases in Thailand. Arbitration tribunals may request the courts to exercise their supporting power during the arbitral proceedings where parties are seeking interim measures or an order within their jurisdictions. After an arbitration tribunal renders an arbitral award, the courts may exercise their reviewing power providing recourse against the arbitral award or refusing to enforce the arbitral award.

Regarding the reviewing power of the courts, the public policy exception is a ground to set aside an arbitral award under s 40(2)(b) and as a ground to refuse the enforcement of an arbitral award under s 44. The public policy exception can be raised by the courts when it appears to the courts that an arbitral award or the enforcement of an award is contrary to 'public order or good morals of Thailand'. Accordingly, the public policy exception serves as a shield of the State to protect the fundamental principles and morality within the territory of the State, and it is at the Thai courts' discretion to determine what 'public order or good morals of Thailand' means.

The term 'public policy' is known as an explicitly indefinable term. It has been accepted that 'public policy' is a matter of place and time, and that also happens in Thailand.[62] It has been observed through courts' decisions that during the enforcing period of the *1987 Thai Arbitration Act*, Thai Courts applied the narrow standard of the public policy exception to the arbitration cases concerning the enforcement of foreign arbitral awards which has different criteria from the grounds to refuse the enforcement of domestic arbitral awards. Also, during this period, Thai courts refused to review the merits of the case of foreign arbitral awards which was consistent with the international standard.

As mentioned above, after the 2002 Thai arbitration law reform, Thai courts started to apply the broad standard of the public policy exception. It is noted that the sole standard is applied to all arbitration cases, both setting aside and enforcing arbitral awards, regardless of the place of arbitration.

For instance, the Thai Supreme Court has confirmed the application of a broad approach to the public policy exception in a well-known case in Thailand, that of *The Expressway and Rapid Transit Authority of Thailand ('ETA') v BBCD Joint Venture ('BBCD')*.[63] In this case, ETA, a state-owned enterprise in charge of construction and maintenance of expressways in Thailand, entered into a construction contract with BBCD – consisting of two German companies, Bilfinger Berger Bauaktiengesellschaft, Dyckerhoff & Widman AG, and a Thai company, Ch Karnchang PLC - to build a new USD 1 billion, fifty-five kilometre long Bang Na Expressway (BNE) in Bangkok. A clause in the contract between ETA and BBCD included a condition that ETA was required to assist BBCD to obtain an approval for

[62] Vichai Ariyanuntaka, 'The Boundary of 'Public Order or Good Moral' for the Enforcement of Arbitral Awards' (2007) 2 T*AI Journal of Arbitration* 46; See also Kamol Sandhikshetrin, *Private International Law* (1971) 196.
[63] *The Expressway and Rapid Transit Authority of Thailand (ETA) v BBCD Joint Venture (BBCD)* [2006] 7277/2549 (Supreme Court of Thailand).

building the expressway from the Department of Highway of Thailand within the date specified in the contract, and that in the event that ETA could not acquire permission and deliver the expropriated land for the project within such date, BBCD had the right to be reimbursed by ETA for the additional expense due to the delay. However, as a result of the floods in Bangkok in September to November 1995, ETA could not obtain the approval from the Department of Highway within the time limit specified in the contract. BBCD informed ETA's consulting engineer to extend the completion date of the project and subsequently received the approval of the 11 months extension to complete the project. Before the completion of the project, BBCD requested ETA to pay compensation of approximately THB 8 billion because of the delay in obtaining permission from the Department of Highway. The dispute was brought before the Thai Arbitration Institute by BBCD on 24 May 2000 requesting ETA to compensate it in the amount of THB 6 254 million (around USD 215.65 million) plus interest of 7.5 percent per year. The Arbitration Tribunal rendered an award in favour of BBCD on 20 September 2000. Thus, the BBCD joint venture filed a petition with the Bangkok South Civil Court seeking the enforcement of the award, and the ETA argued that the underlying contract was void because of the ETA governor's corruption. The Court upheld the award and ordered its enforcement on the ground that the underlying contract was not void. Even if the contract is agreed by fraud, the contract would only be voidable.[64] Thus, the voidable act that has never been avoided is still binding. Nevertheless, the ETA appealed the ruling of the Bangkok South Civil Court to the Thai Supreme Court. In 2006, the Thai Supreme Court reversed an earlier judgment by the Bangkok South Civil Court, finding that the underlying contract between the ETA and BBCD was unlawful and void because the concession contract was signed by the corrupt Governor of the Expressway Authority of Thailand who acted in a conflict of interest by secretly receiving a substantial sum of shares from BBCD. The Supreme Court set aside the award on the ground that the underlying contract was unlawful and the enforcement of an arbitral award based on such a contract would be contrary to public order or good morals of Thailand according to s 44 of the *Thai Arbitration Act B.E. 2545* (2002).[65]

[64] Section 159 of the *Civil and Commercial Code* 1925 (Thailand) provides:

> A declaration of intention procured by fraud is voidable.
> An act under paragraph one is voidable on account of fraud only when it is such that without which such juristic act would not have been made.
> When a party has made a declaration of intention owing to a fraud committed by a third person, the act is voidable only if the other party knew or ought to have known of the fraud.

[65] See *Arbitration Act B.E.2545* 2002 (Thailand) s 44.

It is interesting to note that there were some parallel proceedings to the process outlined above. Because the arbitral award of the BBCD case was rendered by the arbitration tribunal on 20 September 2001 and s 5[66] of the *rule of the Prime Minister's Office regarding the enforcement of arbitral awards B.E.2544* (2001) required a government agency to pay compensation upon a condition: the award was reviewed by a committee consisting of three government officers one each from the Ministry of Finance, Office of the Council of State, and the Office of the Attorney General. The committee then considered the arguments of the ETA that the request for compensation of BBCD is contrary to the agreement without any hearing process on this issue, and the admission of evidence is not in accordance with the *1987 Thai Arbitration Act*, the regulation of the Ministry of Justice concerning arbitration, and the *Civil Procedure Code*. As a result, the committee found the arbitral award was legally binding and does not fall within the exceptions set out under s 5 of the rule on the grounds that the arbitration tribunal provided the parties with an opportunity to present the evidence during the proceedings and that the arbitration tribunal does not need to apply the *Civil Procedure Code*.

Surprisingly, a second committee was formed soon afterward because the result from the first committee was deemed to be unreliable due to the high amount of compensation.[67] The second committee opined that the arbitral award was the result of an unjustified act or procedure, so the ETA did not need to pay the compensation according to s 5 of the *rule of the Prime Minister's Office regarding the enforcement of arbitral awards B.E.2544* (2001). During that time, BBCD filed a petition to the Bangkok South Civil Court seeking the enforcement of the arbitral award whose decision was referred to above.

In the BBCD case, the Thai Supreme Court applied the broad standard to the application of the public policy exception. The court used its supervisory power to review the merits of the case decided by the arbitration tribunal. In addition, it should have been questioned whether the allegation that the underlying contract was unlawful due to the corruption of the ETA governor appeared on the face of the arbitral award according to the *prima facie* approach. This did not seem to be the case because the processes had been fulfilled in accordance with

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[66] Section 5 of T*he Rule of the Prime Minister's Office Regarding the Enforcement of Arbitral Awards B.E. 2544* (2001) provides:

> … a government agency shall follow an arbitral award unless the award is contrary to the law governing the dispute, is the result of any unjustified act or procedure, or is outside the scope of the binding arbitration agreement.

[67] Kamolchai Rattana Skaowong, 'The Boundary of 'Public Order or Good Moral' for the Enforcement of Arbitral Awards' (2007) 2 *TAI Journal of Arbitration* 22, 23.

the rules applied and the question of whether the underlying contract was unlawful had never been raised during the arbitration proceedings, only being raised in the court proceedings concerning the enforcement of the arbitral award. Ultimately, the newly raised issue served as the ground to refuse the enforcement of the arbitral award. Generally, an arbitration tribunal cannot render an arbitral award on an issue that exceeds the scope presented by the parties. Accordingly, a competent court, during the proceedings regarding the enforcement of an arbitral award, shall review the arbitral award only to the extent as decided by the arbitration tribunal.[68] Therefore, the court decision in this case appears to ignore this principle by considering a matter beyond those decided by the arbitration tribunal.

Another interesting case is *The Office of the Permanent Secretary, the Prime Minister's Office v ITV Public Company Limited*,[69] which provides an example of the Thai Administrative Court set aside the arbitral award on the ground that it was in conflict with the public order or good morals of Thailand. This case arose from a dispute concerning a concession contract between the Office of the Permanent Secretary, the Prime Minister's Office ('OPS') and the ITV Public Company Limited ('ITV') regarding the UHF television station for 30 years. The contract was signed in 1995, and it contained a condition that the contractual parties shall compromise and agree on the compensation if a third party was allowed to broadcast in radio networks and television with advertising prejudicially affecting the profits of ITV. Then, ITV requested compensation from OPS because OPS allowed third parties to engage in radio and television broadcasting with advertising that adversely affected the revenue of ITV, and the request was denied. The dispute was brought to arbitration at the Thai Arbitration Institute and the award was made in favour of ITV on the ground of breach of contract. Consequently, the OPS filed a petition to the Thai Central Administrative Court requesting the arbitral award to be set aside. The Central Administrative Court set aside the arbitral award on the ground that the award was in conflict with the public order or good morals of Thailand pursuant to s 40(2)(b) of *Thai Arbitration Act B.E. 2545* (2002). The reason given by the court was that the compensation clause of the contract applied by the arbitrators was not applicable since it was added to the contract subsequently without going through the proper process of approval by the Council of Ministers, and thus such a clause was in conflict with the public order or good morals of Thailand. The said clause of the contract required OPS to negotiate in order to settle a measure to compensate ITV in cases

[68] Chantara-opakorn, above n 60, 19.
[69] *The Office of the Permanent Secretary, the Prime Minister's Office v ITV Public Company Limited* [2006] 349/2549 (Supreme Administrative Court of Thailand).

where a government entity concluded a similar concession agreement with a third party which severely affected the financial status of ITV. Then, ITV appealed the decision of the Central Administrative Court to the Supreme Administrative Court, and finally the Supreme Administrative Court affirmed the decision of the lower court on the same ground.

The Supreme Administrative Court in this ITV case clearly adopted a very broad definition of the concept of public policy to include the executive approval of the clause which was added after the bid of ITV had been accepted. In the court proceedings, ITV argued that it was the internal practice to propose the matter to the Council of Ministers which ITV had no knowledge of or involvement in at the time of contract. ITV also argued that the issue had not been raised during the arbitration proceedings, so the matter should not be admissible in this case. However, the courts ruled that ITV should have known the processes of engaging into a contract with a government entity, and it would be unfair to other bidders if the added clause was considered binding without the cabinet's approval. Nonetheless, the courts did not provide any clarification about the admissibility of the matter. Besides the BBCD case, the ITV case is another case where Thai courts accept and decide on the issue raised for the first time during the court proceedings, and that issue eventually becomes the ground to set aside the arbitral award because, according to the particular issue, the enforcement of the award is contrary to the public order or good morals of Thailand. In relation to this case, Sorawit Limparungsri observes:

> An interesting aspect of this case is that the parties themselves have never disputed over the existence and binding effect of the modified and inserted terms. The court found such irregularity from its own enquiry into the facts in the case. Such enquiry is a part of the ordinary process in administrative cases in which the courts take quite an active role in summoning evidence and witnesses to gather all necessary information on its own initiative.[70]

Nevertheless, there was another argument raised which questioned whether the person acting as an agent of the government entity signed the contract on behalf of OPS in excess of his authority[71] or without authority.[72] Under the *Thai Civil and Commercial Code*,[73] the two

[70] Limparangsri, above n 35, 28.

[71] Section 822 of the *Civil and Commercial Code* 1925 (Thailand) provides:

> If an agent does an act in excess of his authority, but the third person had reasonable grounds, arising from the act of the principal, to believe that it was within his authority, the provisions of the foregoing section apply correspondingly.

[72] Section 823 of the *Civil and Commercial Code* 1925 (Thailand) provides:

> If an agent does an act without authority or beyond the scope of his authority, such act does not bind the principal unless he ratifies it.

scenarios lead to different conclusions under the law concerning agency. If the person acted as an agent of the government, the approval of the Council of Ministers would be needed to endorse his authority. Hence, if the added clause is obviously not binding, why was it that this argument was not raised in the arbitration proceedings? Then, it comes to whether the issue clearly appears on its face that the courts may exercise the reviewing power and reach a conclusion to set aside the arbitral award on the public policy exception. This case shows how the courts balance the two public policy goals of protecting the 'public order or good morals of Thailand' and the finality of arbitral awards.

Another important case in which the public policy exception was broadly applied by the Thai court is *TOT Public Company Limited v True Corporation Company Limited*.[74] This case revolved around a joint venture agreement concluded between TOT Public Company Limited ('TOT') and True Corporation Company Limited ('True') regarding the extension of telephone services. Clauses 12(a)(3) and (4) of the contract stated that 'if a third party or TOT provides special services via the network of True, True has the right to share the profits as agreed by the contractual parties.' TOT indeed provided special service to its customers via the network of True. True thus requested a share of the profits made by TOT through such service. The dispute was brought to arbitration in 2002 for adjudication, and the arbitration tribunal rendered the award in favour of True for 50% of the profit that TOT made by providing special service to its customers via True's network. Subsequently, TOT filed a petition to the Thai Central Administrative Court, requesting the arbitral award to be set aside. The Thai Central Administrative Court set aside the arbitral award on the ground that enforcement of the award was contrary to the public order or good morals of Thailand under s 40(2)(b) of *Thai Arbitration Act B.E. 2545* (2002) since both TOT and True did not agree on sharing the benefits according to cls 12(a)(3) and (4) of the contract in this occasion and that the award rendered by the arbitration tribunal was clearly in direct conflict with the joint venture agreement between the parties.

The Thai Administrative Court's decision to set aside the arbitral award on the basis of the facts of this case amounts to a *de novo* review or curial intervention, and thus undermines two basic principles of arbitration: first, 'there is a need to recognise the autonomy of the arbitral

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If the principal does not ratify, the agent is personally liable to third persons, unless he proves that such third persons knew that he was acting without authority or beyond the scope of the authority.

[73] *Civil and Commercial Code* 1925 (Thailand).

[74] *TOT Public Company Limited v True Corporation Company Limited* [2012] 1660/2555 (Central Administrative Court of Thailand).

process by encouraging the finality'[75] of the matter and secondly, 'parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts'.[76] The principles of autonomy and finality of arbitration have been accepted internationally. It could be argued that if these principles are not valued, then arbitration may not be seen as an effective dispute resolution mechanism.

Even though the court in the TOT case, unlike the BBCD and the ITV cases, does not make a judgment that the arbitral award is contrary to the public order or good morals of Thailand due to a newly raised issue, it is important to consider how far judicial review should reach in arbitration cases. Should a national court review the merits of the case, given that the *2002 Thai Arbitration Act* provides the sole standard of the public policy exception to be applied to all arbitration cases? There are some academic comments on this point - the extent of the application of the public policy exception internationally. First, it is inevitable for national courts to review the merits of arbitral awards since it is the national courts' duty to protect the State without any restriction.[77] Secondly, national courts shall not review the merits of arbitral awards unless the arbitral awards are clearly contrary to public policy.[78] Thirdly, national courts may only review procedural issues, but the courts may not review substantive issues of arbitral awards.[79] The second and the third opinions fall within the narrow standard of international public policy which is the accepted international standard of the interpretation of the public policy exception under the *New York Convention* and which used to be applied to foreign arbitral awards during the enforcement of the *1987 Thai Arbitration Act* by Thai courts.

However, Thai courts, after the introduction of the *2002 Thai Arbitration Act*, exercise their reviewing power of arbitral awards through the public policy exception by applying the broad standard of domestic public policy, and they also generally engage in reviewing the merits of cases. This latter course of action may very well lead to a decrease in the efficiency and effectiveness of arbitration. Notably, there were some recent cases that Thai courts refused to

[75] *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (CA) [65].
[76] Ibid.
[77] International Council for Commercial Arbitration, above n 61, 5. It is noted that this opinion came from some members of the Committee, mostly from developing countries, while the majority of the Committee believed that the discretion of national courts is limited.
[78] Fifi Junita, 'Public Policy Exception in International Commercial Arbitration - Promoting Uniform Model Norms' (2012) 5(1) (31 May 2012) *Contemporary Asia Arbitration Journal* 45, 649.
[79] Donald Francis Dono, 'International Commercial Arbitration and Public Policy' (1995) 27(3) *New York University Journal of International Law and Politics* 645, 649.

review the merits of the cases[80] and to set aside an arbitral award due to a corruption argument.[81] *The Pollution Control Department v NVPSKG Joint Venture*[82] (also known as the 'Klong Dan case') is an example. This case arose from a dispute concerning a construction contract to build the Klong Dan waste water treatment facility between the Pollution Control Department (PCD) and the NVPSKG Joint Venture. The dispute was brought to arbitration under the TAI on the 4th of September 2003. Then, in 2011, the arbitration tribunal rendered the award in favour of the NVPSKG Joint Venture for the compensation worth THB 4.9 billion and USD 31 million plus the interest of 7.5 percent per year calculated from 28 February 2003. Thus, the PCD filed a petition to the Central Administrative Court of Thailand seeking the setting aside of the arbitral award while the NVPSKG Joint Venture filed a petition to the same court seeking the enforcement of the arbitral award. The Central Administrative Court of Thailand denied to set aside the award holding that there was no ground to set aside the award and ordering the PCD, a Thai government entity, to pay the compensation as specified in the arbitral award. The PCD appealed the decision of the Central Administrative Court of Thailand to the Supreme Administrative Court of Thailand. In this case, the Supreme Administrative Court of Thailand upheld the decision of the Central Administrative Court of Thailand on the same ground.

There actually was a corruption argument in this case that used to be successfully invoked as one of the public policy exception to set aside arbitral awards in the previous cases. Surprisingly, in this case, the courts denied to set aside the arbitral award holding that there was no ground to set aside the arbitral award according to s 40 of the *2002 Thai Arbitration Act*. Furthermore, when Mr Praphat Panyachartrak, a former Natural Resources and Environment Minister of Thailand, filed a petition seeking a retrial of the case, the Central Administrative Court of Thailand rejected the petition holding that he had no right to file the petition since he was not a direct stakeholder. Even though the Klong Dan case shows that Thai courts tend to apply a narrower standard to the public policy exception, there has been a certain amount of inconsistency and unpredictability with respect to their practice of reviewing the merits of cases and applying the public policy exception in the enforcing arbitral awards matters.

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[80] *Royal Thai Air Force v Environmental Tecnonics Corporation Co. Ltd.* [2010] 10668/2553 (Supreme Court of Thailand); See also J*&W Development Co. Ltd. v Chujak Construction Co. Ltd*. [2013] 1875/2556 (Supreme Court of Thailand).

[81] *The Pollution Control Department v NVPSKG Joint Venture* [2014] Aor. 487-488/2557 (Supreme Administrative Court of Thailand).

[82] Ibid.

From most of the cases mentioned above, the courts deem to review arbitral awards on the merits of the case and review the arbitration proceedings thoroughly which runs counter to the aim of the Act's drafters and the international expectation under the *New York Convention*. This calls into question why the application and interpretation of the public policy exception in relation to arbitration cases has changed.

One explanation may emanate from the structure of the Thai court system. The court system was structured as a single court system until the *Constitution of the Kingdom of Thailand B.E. 2540* (1997) which proposed a current dual court system.[83] As a result, the Administrative Courts were established in 1999 in order to hear administrative cases in which arbitration cases regarding administrative contracts[84] are included. Moreover, the courts' proceedings are also different. While the Courts of Justice use the accusatorial system, the Administrative Courts use an inquisitorial system in which the judges play an active role.[85] To further clarify the differences between the Courts of Justice and the Administrative Courts, it is important to note that a judge in the Courts of Justice only needs to be a law graduate whereas a judge in the Administrative Courts must be an expert on law, political science, public administration, economics, social science, or administrative organisation of the State. Basically, the judges in the different courts, Courts of Justice and Administrative Courts, would have different perspective on cases.

Consequently, according to the *2002 Thai Arbitration Act*, not only the Courts of Justice but also the Administrative Courts of First Instance and the Supreme Administrative Court have jurisdiction over arbitration matters. Before the establishment of the Administrative Courts, only the Courts of Justice exercised the supporting and reviewing power to arbitration matters applying the equity principle and the private law principle, but never the public law principle.[86] However, it has been accepted by a number of Thai jurists that the public law principle should be applied to any lawsuits involving administrative contracts.

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[83] *Constitution of the Kingdom of Thailand B.E.2540* (Thailand) 11 October 1997, Government Gazette Vol. 114 Part 55 Kor s 276.

[84] See *Act on Establishment of Administrative Court and Administrative Procedure B.E. 2542* (Thailand) 10 October 1999, Government Gazette Volume 116 Part 94 Kor. Section 3 provides:

> Administrative contracts include contracts that at least one of the parties is an administrative agency or its agent and that fall into the categories of concession contracts, public service contracts, public supply contracts, or contracts seeking to benefit from natural resources.

[85] *The Administrative Courts' Proceedings,* Thai Administrative Court <www.admincourt.go.th/admincourt/site/02judicial.html?page=02judicial_750>.

[86] 'Conclusion of the Conference on Contract between Government Sector and Private Sector: Administrative Court Jurisdiction or Arbitration and Practical Difficulties' (Paper presented at the Conference on Contract

Associate Professor Dr.Worajet Phakeerat argues that an administrative contract is different from contract in private law, and that an administrative contract is recognised by the countries that differentiate between the private law system and the public law system.[87] Moreover, the State acquires privileges over the private party in administrative contracts because the purpose of administrative contracts is for the public interest, not the private interest. Therefore, the public law principle should be applied instead of the private law principle.[88] Professor Sansoen Kraijitti states that this aspect is influenced by the French public law.[89] There are even discussions about whether an arbitration agreement concerning an administrative contract is applicable, and the answer to that appears in s 15[90] of the *2002 Thai Arbitration Act* indicating that the disputes concerning administrative contracts are arbitrable. Thus, Professor Vichai Ariyanuntaka concludes that the administrative courts have the supporting and reviewing power over arbitration cases involved in administrative contracts[91] by applying the public law principle since the State does not deal equally with private parties in this type of contract.[92] It is obvious that the public law principle is applied to administrative contracts.[93]

The Administrative Courts are responsible for creating and applying the public law principle, and it is evident that the French public law has influenced the Thai legal system. Accordingly, the Thai courts appear to put more weight on the public interest than before. Furthermore, the *2002 Thai Arbitration Act* provides the sole standard to apply to all arbitration agreements concerning both commercial and administrative contracts. Similarly,

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between Government Sector and Private Sector: Administrative Court Jurisdiction or Arbitration and Practical Difficulties, Bangkok, Thailand, 1 September 1999) 30.

[87] Ibid 21.

[88] Ibid 24-26.

[89] Ibid 31.

[90] Section 15 of the *Arbitration Act B.E. 2545* 2002 (Thailand) provides:

> In a contract between a government agency and private party, whether administrative contract or not, the parties thereto may agree to settle their disputes by arbitration. The parties to the contract shall be bound by such arbitration agreement.

[91] 'Conclusion of the Conference on Mutual Perspective between Private Law Jurists and Public Law Jurists Concerning Administrative Contract and Arbitral Jurisdiction' (Paper presented at the Conference on Mutual Perspective between Private Law Jurists and Public Law Jurists Concerning Administrative Contract and Arbitral Jurisdiction, Bangkok, Thailand, 23 June 2000) 112-113.

[92] Ibid 76.

[93] These are the example of cases that the Supreme Administrative Court of Thailand applied the public law principles: *A.B.S (1990) Partnership v Latchado Municipal District and Sumrerng Kespradit* [2013] Aor. 503/2556 (Supreme Administrative Court of Thailand); *Chuchart Areejitranusorn, et al. v The Election Commission of Thailand and Ministry of Finance* [2009] Aor. 64/2552 (Supreme Administrative Court of Thailand); *Somboon Areerob v Department of Lands and Minister of Interior* [2003] Phor. 18/2546 (Supreme Administrative Court of Thailand); *Puchong Soonthornthai v The Government Pension Fund Commission of Thailand* [2003] 394/2546 (Supreme Administrative Court of Thailand); *Jiwseree Partnership Limited v Pattani Province* [2002] Aor. 5/2545 (Supreme Administrative Court of Thailand); *Sukij Ponwitsanukul v National Housing Authority* [2002] 594/2545 (Supreme Administrative Court of Thailand).

according to the Act, all arbitral awards, both domestic and foreign arbitral awards, are treated according to the same standard. Thus, the Act places the burden onto the courts to apply and interpret the law which is meant to serve the various purposes of the main contracts, either commercial or administrative contract, governed by arbitration agreement. This is a very problematic issue for the courts.

As noted, the issue about the lack of specialised judges in some bureaus involving the recognition and enforcement of arbitral awards is a matter of concern. In the line of the Courts of Justice, the Thai Intellectual Property and International Trade Courts which also have jurisdiction over international commercial arbitration cases were established in 1997, and the Thai Supreme Court also has the department of intellectual property and international trade to hear cases involving international commercial arbitration. Therefore, it is expected that there are specialised judges in the specialised courts and department to hear the cases involving international commercial arbitration. However, the Administrative Courts do not have any specialised departments, and the courts have jurisdiction to hear arbitration cases involving administrative contracts. It is true that the Administrative Courts will probably hear only domestic arbitration cases. Notwithstanding, the fact that the *2002 Thai Arbitration Act* does not differentiate between the provisions dealing with the enforcement of domestic arbitral awards and foreign arbitral awards would cause the courts to hesitate to apply and interpret the provisions regarding the enforcement of arbitral awards under either the domestic or international standard. This is very problematic since Thailand is free to set a standard for the enforcement of domestic arbitral awards, but Thailand is bound to the provisions regarding the enforcement of foreign arbitral awards set forth in the *New York Convention* as a Contracting State.

In addition, the Thai Arbitration Institute (TAI), a well-known arbitration institution in Thailand, is part of the Alternative Dispute Resolution Office, Office of Judiciary, and the Office of Judiciary is the administrative office of the Courts of Justice. The Thai Arbitration Institute, established in 1990 in response to the rapid growth of international trade, has arbitrated an increasing number of arbitration matters. Furthermore, administrative contracts that contain arbitration clauses usually specify the Thai Arbitration Institute to provide the service. Also, private parties may agree to arbitrate in order to solve their disputes under the rule and organisation of the Thai Arbitration Institute. However, the fact that the Thai Arbitration Institute is an organisation under the supervision of the Office of Judiciary may

cause an unusual circumstance regarding the reviewing power of the courts. Oddly, arbitral awards rendered by arbitration tribunals formed by the Thai Arbitration Institute are subject to be reviewed by the Courts of Justice. Although there was an attempt, which began in 1997, to remove the Thai Arbitration Institute from the umbrella of the Courts of Justice to ensure their autonomy and the impartiality of the institute, the Thai Arbitration Institute is still part of the Courts of Justice.

Obviously, the broad application and interpretation of the public policy exception is different from the international standard as proposed by the *New York Convention*. As mentioned above, there are a number of factors that affect the courts' interpretation and determination of matters that may offend the 'public order or good morals' of Thailand. A significant factor that has the potential to influence the courts to apply a broad interpretation of the public policy exception is the Thai legal culture which will now be discussed.

4 *Cultural Impediments Influencing the Application and Interpretation of the Public Policy Exception*

The legal culture of a State is another factor influencing the legislative processes and the practice of the courts. In fact, it is accepted that it would be impossible for every State to share the same legal culture. Although, the world community has created mutual commitments between Member States through the United Nations, there is still a question about their compatibility in relation to these commitments in practice. The struggle to uniformly apply and interpret the public policy exception under art V of the *New York Convention* is one example. As discussed earlier in this Chapter, Thai courts are reluctant to appropriately interpret and apply the public policy exception in accordance with the international standard. The Thai legal culture that influences the application and interpretation of the public policy exception will be discussed in this part. It will note that the black letter law interpretation is a general practice of Thai judges and jurists, sovereign immunity sometimes is accepted in arbitration matters, and political policy can also be considered as public order or good morals of Thailand.

(a) The Black Letter Law Interpretation

Thailand is a civil law country. However, sometimes Thailand adopts aspects of the common law legal framework. The *1987 Thai Arbitration Act* is an example of adopting English

arbitration laws.[94] Recently, as mentioned above, the French legal framework was shown to have influenced the Thai legal system with respect to prioritising the strict public law principle.[95] It is also accepted that Thai legal practitioners take a literal view of statutory interpretation. They apply and interpret the law precisely as it appears in a black letter law sense regardless of how the source country of the law applies it unless it is clearly stated in the law.[96] Accordingly, the fact that the *2002 Thai Arbitration Act* does not have separate sections handling domestic and foreign arbitral awards, due to the fact that the Act does not state explicitly whether the domestic or international standard is to be applied, and that the Act is silent with respect to the principle of international reciprocity[97] is like an invisible wall limiting the discretion of Thai courts. Moreover, unlike the judiciary of common law countries, the judges in civil law countries cannot create law through court decisions. Court decisions in Thailand serve only as legal norms, so the interpretation of law in Thailand is strictly based on the black letter law.

This Thai legal culture also affects the application and interpretation of the public policy exception in arbitration matters. It can be observed that the narrow application of the public policy exception applied during the enforcing period of the *1987 Arbitration Act*, the previous Thai arbitration law. Perhaps, the narrow standard of the public policy exception was then taken by the courts because the section concerning the public policy exception as a ground for the refusal of the recognition and enforcement of foreign arbitral award contained not only references to the public order or good morals but also the principle of international reciprocity. Therefore, the courts were then allowed to refer to the international standard. On the other hand, the *2002 Arbitration Act*, the current Thai arbitration law, refers only to the public order or good morals, but not to the principle of international reciprocity. Thus, the courts might be reluctant to apply the international standard of the public policy exception because the language of the Act appears to limit the extent of the public policy exception regardless of the intent of the Act's drafters.

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[94] The *Arbitration Act B.E. 2530* 1987 (Thailand) largely based on English arbitration laws; See also Suvanpanich, above n 26; Ariyanuntaka, above n 26; Chantara-opakorn, above n 26.
[95] See 'Conclusion of the Conference on Contract between Government Sector and Private Sector', above n 86, 31.
[96] Ibid 32.
[97] In s 35 of the *Arbitration Act B.E. 2530* 1987 (Thailand) the public policy exception, a ground to refuse the recognition and enforcement of foreign arbitral awards, also included the principle of international reciprocity. However, s 44 of the *Arbitration Act B.E. 2545* 2002 (Thailand) excludes the principle of international reciprocity.

Furthermore, during the discussions before or even after the *New York Convention* was adopted, there were debates about the differences between the term 'public policy' commonly used in common law countries and the term '*ordre public*' used in civil law countries. The differences between these two terms were once suggested as the cause of the inconsistencies of the application of the public policy exception. Since the term 'public policy' is claimed to be narrower than the term '*ordre public*', the standard of the term '*ordre public international*' in the private international law area is believed to be the filling of the gap[98] when it comes to international matters. Nevertheless, the *2002 Thai Arbitration Act* contains only 'public order or good morals' in the public policy exception, and the Thai competent courts may only apply the public policy exception as they perceive it. Possibly, if Thai arbitration law specifies explicitly the type of public policy to be applied, the difficulties would dissipate. In addition, the broad term 'good morals' might be considered as another gap that allows Thai courts to interpret the public policy exception broadly. However, it is important to note that there are a number of Thai laws using the term 'public order or good morals',[99] but there is none using the term 'public policy'. Thus, the term 'public order or good morals' seems to be used only to maintain the consistency of Thai laws.

(b) Sovereign Immunity

The doctrine of sovereign immunity means that a suit against a State is prevented unless the State's legislative consent is given.[100] So, can this immunity be invoked in a lawsuit regarding the enforcement of a foreign arbitral award? Since arbitration is a form of dispute resolution where one or more arbitrators are appointed by the parties to make a binding decision on the dispute, it can be implied that a State, as a party, already waives the sovereign immunity and is actually bound to the arbitral award. Nonetheless, sovereign immunity may be pleaded in two different stages which are immunity from jurisdiction and immunity from execution. There are two opinions concerning the relation between the two kinds of sovereign immunity. First, there is a firm distinction between consent to jurisdiction and consent to execution. As a result, the consent to jurisdiction over the proceedings is not enough to

[98] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration' (1990) 21(3) *Law and Policy in International Business* 389, 395.
[99] See, eg, *Civil and Commercial Code* 1925 (Thailand), ss 150, 188, 1465, and 1679; *Act on Conflict of Laws B.E. 2481* (Thailand) 20 March 1938, Government Gazette Volume 55 Page 1021, s 5.
[100] Joseph D Block, 'Suits against Government Officers and the Sovereign Immunity Doctrine' (1946) 59(7) *Harvard Law Review* 1060, 1060; See also Malcolm N Shaw, *International Law* (Cambridge: Grotius Publications, 2nd ed, 1986), 373.

demonstrate the consent to the execution of any judgment from the proceedings.[101] Second, the two forms of sovereign immunity cannot be absolutely separated because 'both immunities share more or less the same sources of their justifications'.[102] Obviously, the second opinion is much more beneficial to international commercial arbitration in which a State is a party. Unless the arbitral award is enforceable, the agreement and the whole arbitration proceedings eventually become a waste of resources. Notably, the pro-enforcement bias under the *New York Convention* and the public policy of the State needs to be balanced.

There is a well-known case where Thailand invoked sovereign immunity in the German courts, namely *Walter Bau AG v The Kingdom of Thailand*.[103] The dispute was brought to arbitration in Geneva, Switzerland. The Arbitration Tribunal rendered the award to Walter Bau AG for damages and interest in 2009 on the ground that Thailand breached the fair and equitable treatment provision in the Bilateral Investment Treaty (BIT) between Germany and Thailand. In 2010, instead of requesting recognition and enforcement of the arbitral award in the competent authority in Thailand, Walter Bau AG filed a petition to the United States District Court Southern District of New York and the Kammergericht at Berlin, the court at first instance in Germany. For the case in the United States, Thailand argued on the grounds of *forum non conveniens* and non-arbitrability, not sovereign immunity, and Thailand also argued that the enforcement of such an arbitral award would be contrary to the public policy of the United States. The United States District Court Southern District of New York dismissed the arguments of Thailand and enforced the arbitral award in favour of Walter Bau AG and against Thailand.[104] After that, Thailand appealed the decision to the United States Court of Appeals, Second Circuit in 2012, and the court affirmed the decision of the lower court on the same grounds.[105]

For the case in Germany, Thailand argued on the ground of non-arbitrability and pleaded sovereign immunity in the Kammergericht at Berlin where the court dismissed the arguments

[101] Hazel Fox, *The Law of State Immunity* (Oxford University Press Inc., 2nd ed, 2008) 486; See also Sorawit Limparangsri, 'State Immunity in International Commercial Arbitration' in *Cases and Materials on Arbitration* (Thai Arbitration Institute, 2nd ed, 1997) vol 2, 434-436.
[102] Dhisadee Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May Ltd., 1st ed, 2007), 60.
[103] Bundesgerichtshof [German Federal Court of Justice], III ZB 40/12, 30 January 2013; See also Kammergericht, 20 Sch 10/11, 4 June 2012 reported in (2012).
[104] *Werner Schneider (as liquidator of Walter Bau AG) v The Kingdom of Thailand,* 10 Civ. 2729 (DAB) (SD NY, 2011).
[105] *Werner Schneider (as liquidator of Walter Bau AG) v The Kingdom of Thailand,* 11-1458-cv (2nd Cir, 2012).

of Thailand and enforced the arbitral award[106] by depending on the provisions in the *European Convention on International Commercial Arbitration* (also known as the '*European Convention*').[107] At the time, this case caused the seizure of the crown prince of Thailand's airplane in Germany in 2011. Thailand appealed the decision of the Kammergericht at Berlin to the German Supreme Court (Bundesgerichtshof, BGH). The BGH reversed the decision of the first instance court and remanded the case back to the court of first instance.[108] The BGH pointed out that sovereign immunity either from jurisdiction or from execution may be applied in the case concerning the recognition and enforcement of foreign arbitral awards. The BGH went on to rule that the sovereign immunity from jurisdiction and the sovereign immunity from execution shall be determined separately, so the waiver of immunity from jurisdiction is not sufficient to construe the waiver of immunity from execution.

With regard to this point, Roland has observed that

> '[i]f the waiver of jurisdictional immunity by a State's submission to arbitration would not encompass recognition and enforcement proceedings, this would enable States to easily avoid the negative consequences of an arbitral award by invoking State immunity even though being generally obliged to comply with the award.'[109]

The BGH also addressed the scope of sovereign immunity from execution noting that it cannot exceed the scope of application of the arbitration agreement. It has also been concluded that, 'in the case of immunity from execution, the purpose of the property against which execution is sought (the airplane) is decisive.[110] Moreover, the court mentioned the fact that Thailand did not challenge the arbitral award in Switzerland, the place of arbitration, until 2011[111] is not enough to establish an implied waiver of immunity from execution. Also, the BGH held that the *European Convention* is not applicable in this case since Thailand is not a Member State of the *European Convention*. It seems that the BGH only hesitated to affirm the arbitral award because the court wished to still leave the door open for the

[106] Kammergericht, 20 Sch 10/11, 4 June 2012 reported in (2012).
[107] *European Convention on International Commercial Arbitration*, opened for signature 21 April 1961, 484 UNTS 349 (entered into force 7 January 1964).
[108] Bundesgerichtshof [German Federal Court of Justice], III ZB 40/12, 30 January 2013.
[109] Roland Klager, 'Werner Schneider (liquidator of Walter Bau AG) v Kingdom of Thailand: Sovereign Immunity in Recognition and Enforcement Proceedings under German Law' (2014) 29(2) *ICSID Review* 1, 4.
[110] Ibid 3.
[111] Swiss Supreme Court, 4A 570/2011, 23 July 2012.

enforcement of the arbitral award for Walter Bau by ordering Thailand to pay a security deposit of about €40 million for the release of the crown prince of Thailand's airplane.

This case establishes that the courts of Thailand and Germany allow sovereign immunity to bar the recognition and enforcement of an arbitral award. Hence, arbitration proceedings may be conducted only for the purpose of fulfilling the statement in the contract, but the decision of the arbitration tribunal will never be enforceable, then the parties will eventually need to litigate the matter. Accordingly, if sovereign immunity is successfully raised, the result may be that 'the private parties will not get the benefit of their bargains and be left hand free'.[112] The fact that the German Supreme Court concluded in this case that sovereign immunity from jurisdiction and sovereign immunity from execution is to be assessed separately becomes an impediment to the growth of international commercial arbitration because the arbitral award resulting from the arbitration proceedings eventually becomes unenforceable due to the plea of sovereign immunity from execution.[113]

Therefore, the notion of sovereign immunity in arbitration matters demonstrates the protectionist attitude of Thai courts. A consideration of the theories underpinning arbitration provides some explanations. The four well-known theories describing the legal nature of arbitration are the jurisdictional theory, the contractual theory, the mixed or hybrid theory, and the autonomous theory.[114] First, the jurisdictional theory recognises the power of State to control and regulate arbitration within the territory. Secondly, the contractual theory recognises arbitration as a contractual activity and rejects the interference of the State. Thirdly, the mixed or hybrid theory accepts both the power of the State within its jurisdiction and the contractual character of arbitration. Under this theory, arbitration depends upon both the power of State and the principle of freedom of contract. Fourthly, the autonomous theory focuses on the use and the purpose of arbitration, and this theory is usually used for academic purposes.[115] Currently, the mixed or hybrid theory is the most acceptable theory concerning arbitration.[116] Thus, it is widely accepted that arbitration cannot stand alone without the power of a State or the contractual character, but achieving a balance between these two

[112] Limparangsri, above n 101, 426.
[113] Alexis Blane, 'Sovereign Immunity as a Bar to the Execution of International Arbitral Awards' (2009) 41(2) *New York University Journal of International Law and Politics* 452, 464.
[114] Julian D M Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications, Inc., 1978) 51-61.
[115] Ibid 51-61; See also Saowanee Asawaroj, *Explanation of the Law Concerning Commercial Dispute Resolution by Arbitration* (Thammasat Press, 3rd ed, 2011) 33-37; See also Suvanpanich, above n 26, 16-19.
[116] Suvanpanich, above n 26, 285.

elements will be necessary to allow arbitration to truly act as an alternative dispute resolution and promote world trade sufficiently.

The underlying theory taken by a State determines the State's policy and action when it comes to arbitration. Even though the acceptance of the mixed theory is extensive, how a State weighs the power of State and the contractual character can be problematic. This is where the public policy exception comes to play. Since sovereign immunity is not a ground under art V of the *New York Convention*, sovereign immunity can only be invoked through the public policy exception. It has been accepted internationally that the public policy exception under the *New York Convention* is to be applied narrowly which is in accordance with the intent to promote international commercial arbitration of the Convention. If a State puts a lot of weight on the power of the State, the result will be different in practice since national courts have the supporting and reviewing power over all arbitration cases. The invocation of sovereign immunity of Thailand in the Walter Bau case would indicate that Thailand is prioritising the State's interest, rather than the finality of arbitration. Consequently, the underlying theory will affect the application and interpretation of the law, including the public policy exception, when arbitration cases are brought before Thai courts.

(c) The Political Intervention on Arbitration Matters

It is noted that the *2002 Thai Arbitration Act* contains art 15[117] which expresses a pro-arbitration intention in considering arbitration agreements between a government agency and a private party.[118] In addition, the boilerplate contract for procurement contract between government agencies and private contractors under the *rule of the Prime Minister's Office regarding inventory B.E.2535* (1992) contained the arbitration clause in order to promote the use of arbitration as assigned by the resolution of the Thai cabinet in 1992. Nonetheless, the Thai government's positive attitude to arbitration changed. There has been some government intervention which effectively overrides art 15 and the pro-arbitration policy. On 27 January 2004, the Thai cabinet passed a resolution stating that concession contracts were to be considered as administrative contracts, so contracts between the government sector and the private sector, either domestic or foreign, should not contain any arbitration clause. If there were any difficulties or necessity, the Thai cabinet would consider and approve them on a case-by-case basis. Additionally, concerning administrative contracts, the primary contract

[117] *Arbitration Act B.E. 2545 2002* (Thailand).
[118] Veena Anusornsena, 'Public Policy as a Ground for Setting Aside an Arbitral Award in Thailand: Relevant Laws and Current Situation ' (2010) 2(1) *UTCC Law Journal* 102, 108.

must be written in Thai language which could be translated to other languages. Moreover, the administrative contracts should be interpreted and enforced under Thai laws. After that, on 4 May 2004, the cabinet clarified that it intended to impose the obligations set out in the resolution onto concession contracts only.

On 28 July 2009, the Thai cabinet passed a resolution that contained more strict prohibitions concerning the use of arbitration clauses in all types of contracts between a governmental organisation and a private company, not just concession contracts, unless the Thai cabinet's approval was obtained. The reason behind passing the resolution was that government agencies had lost a lot of arbitration cases and were ordered to pay high amounts of compensation. This resolution was criticised for imposing unnecessary restrictions on arbitration and undermining the confidence of foreign investors in the Thai arbitration system merely because the Thai government wished to avoid any potential risks of large compensation payments awarded against the Thai state enterprises in the future. Obviously, this shows that economic issues had been taken into consideration as a bar to the use of arbitration and to the enforcement of arbitral awards. However, on 7 December 2010, the cabinet reconsidered the resolution resolving that the use of the above arbitration clause should be limited in administrative contracts. If administrative contracts or concession contracts might impact the public interest or national security, the cabinet may reserve the use of arbitration as the dispute resolution method.

In 2010, the Ministry of Justice proposed a new draft Thai arbitration law that sought to reform the *2002 Thai Arbitration Act*. The drafters intended to make an amendment to include a chapter concerning arbitration agreements attached to contracts between a government entity and a private sector organisation. The proposed chapter strictly limited the contracts involving a government agency that may be agreed to between the parties to choose arbitration as the dispute resolution mechanism. Moreover, the proposed chapter set out that there should be at least five arbitrators of which two or more needed to be experts in public law, and it also stated the qualification of the arbitrators. Nevertheless, the draft was rejected by the Thai cabinet that acted in accordance with the opinion of the Office of the Council of State. At the time, the draft was widely criticised by both government and business sectors. Although the proposed draft was rejected, this event showed the perspective of the people in Thai society. While some people, especially business people, opposed the draft Bill, a

number of people supported the draft Bill since they did not want the government to pay high amounts of compensations resulted in arbitral awards.

Recently, there is another interesting development. On 3 November 2015, the Thailand Arbitration Center (THAC) was established.[119] According to the *Thai Arbitration Center Act B.E. 2550* (2007),[120] the THAC is an independent regulatory agency supervised by the Minister of the Ministry of Justice.[121] The aims of the THAC are to promote, develop, operate, and enlighten the public about conciliation and arbitration.[122] Although the THAC is claimed to be independent, its operation should be monitored to see whether there is any political influence. If the THAC is truly independent and free from political intervention, it may be the first step to a more compliant phase in the development of the arbitration system in Thailand.

D *Conclusion*

It has been acknowledged that foreign investors play an important role in Thailand both in transactions between private parties and transactions involving State agencies concerning infrastructure development and national resource concessions.[123] It is common that contracts between international businesspeople contain an arbitration agreement to avoid the litigation in either country because of the difference in terms of language and law, the delay due to national courts' overloaded work, and the awkward situation caused by the litigation atmosphere. Thus, the broad interpretation and application of the public policy exception as a bar to the recognition and enforcement of arbitral awards becomes an obstacle to the economic growth and the development of Thailand.

This Chapter has identified the problematic issues regarding the public policy exception under the current Thai arbitration law such as:

- The ambiguity of the *2002 Thai Arbitration Act* in relation to the court's power to review arbitral awards;

[119] *The Establishment of the Thailand Arbitration Center,* Thai News Agency <http://www.tnamcot.com/content/322561>.
[120] *Thailand Arbitration Center Act B.E. 2550* (Thailand) 27 June 2007, Government Gazette Vol. 124, Part 34 Kor.
[121] Sections 30 and 31 of the *Thailand Arbitration Center Act B.E. 2550* 2007 (Thailand).
[122] Section 7 of the *Thailand Arbitration Center Act B.E. 2550 2007* (Thailand).
[123] Limparangsri, above n 101, 425.

- The failure of the legislation to distinguish between domestic and foreign arbitral awards;
- The broad interpretation adopted by Thai courts in deciding arbitration cases where the public policy exception may apply; and
- Cultural impediments influencing the application and interpretation of the public policy exception.

The issues mentioned above have created situations that will arguably significantly affect the economic growth and the development of Thailand. Since it has been accepted that arbitration is a preferable dispute resolution mechanism when there is a dispute between parties regarding business transactions; especially international transactions, the inconsistency of Thai courts' decisions on this matter will definitely create hesitation on the part of foreign investors in deciding to conduct business in Thailand. This is primarily because the investors may lose confidence in the ability of Thai courts to uphold the wishes of the parties expressed in arbitration agreements and to provide them with finality of disputes.

The next Chapter will compare and analyse the problems being experienced in other selected countries and evaluate the solutions they have implemented in order to suggest a set of reforms to the current Thai arbitration law. More specifically, the Chapter will then discuss the incompatibility between the application and interpretation of the public policy exception under the Thai arbitration law and those other States, the application and interpretation of the public policy exception in the selected countries, and the public policy exception in the *New York Convention* will be analysed in order to draw appropriate recommendations.

CHAPTER IV ISSUES APPLYING THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION: A COMPARATIVE PERSPECTIVE

A *Introduction*

Arbitral awards, which are rendered by the arbitration tribunals chosen by the parties, are expected to be final and binding in order to solve the disputes justly and confidentially as soon as possible. However, the losing parties do not always voluntarily abide by the arbitration tribunal decisions. To enforce arbitral awards against an involuntary losing party, the prevailing party needs the power of a State to force the losing party to act. On the other hand, the losing party may ask for the annulment of an arbitral award from the competent authority of the State of primary jurisdiction. In both these instances, it is obvious that the parties rely on the power of State when it comes to setting aside or enforcing arbitral awards, and that is why States have been given the power of judicial review over arbitral awards.

However, in order to maintain party autonomy, the bilateral, regional, and international commitments have been signed to limit State intervention in arbitration matters, and the *New York Convention* is one of them. Whereas the *New York Convention* aims to promote the use of arbitration, encourage the recognition and enforcement of foreign arbitral awards, and limit State intervention, it does not mean that all Contracting States fully comply.[1]

As mentioned in Chapter II, there is some ambiguity in the *New York Convention*, especially relating to the public policy exception under art V(2)(b). Although the United Nations Commission on International Trade Law (UNCITRAL) introduced the *Model Law* in 1985, and some guidance is provided by a number of organisations, it does not completely resolve the problems. The *Model Law* provides the same grounds to set aside arbitral awards made within the territory of the State as those to refuse the recognition or enforcement of an arbitral award irrespective of where it was made. Accordingly, the public policy exception is one of the grounds, and that can be difficult since, in the text, there is no explicit clarification of the type of public policy to be applied to which scenario. Moreover, the shift from domestic and foreign arbitration to international arbitration[2] introduced by the *Model Law* has resulted in

[1] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 625.

[2] Article 1(3) of the *Model Law* provides:

> An arbitration is international if:
> (d) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

the adoption of only one standard in national arbitration law. The sole standard under the *Model Law* can be interpreted two ways: as an international standard to be applied to all arbitration cases, or as a national standard to be applied to all arbitration matters. Notwithstanding, some States do not distinguish between domestic and international arbitration, but they still differentiate between domestic and foreign arbitral awards. The reasons behind the distinction between domestic and foreign arbitral awards are to retain full control over domestic arbitration and to fulfil the obligations to which they are bound by bilateral, regional, and international commitments.

Moreover, how national courts interpret and apply the laws is very important. Besides the guidelines mentioned in Chapter II, the courts' decisions in the countries that are the popular places of arbitration show how the courts apply the public policy exception. Additionally, legal culture is also significant as it influences a national courts' application of the public policy exception.

This Chapter will compare how the chosen jurisdictions deal with the four issues identified in Chapter III in order to find solutions that may be suitable for Thailand.

B *Setting Aside Arbitral Awards as a Bar to the Enforcement*

Arbitral awards were once subject to judicial review primarily in the enforcing state evidenced in Roman law in the Middle Ages and under the Napoleonic Codes.[3] Then, setting aside arbitral awards was separated from the enforcement proceedings in order that a losing party need not wait until the prevailing party sought the enforcement of an arbitral award. In particular, when an arbitral award involves international parties, it is possible that the prevailing party seek the enforcement of the award in more than one country. In that case, the award may be enforced in one country but not in another. Setting aside an arbitral award, if successful, makes the award unenforceable in the State of origin,[4] and it is likely to be

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(e) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(f) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

[3] Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?' (2014) 29(2) *ICSID Review* 263, 266.

[4] According to art V(1)(e) of the *New York Convention*, the State of origin can be either the place of arbitration or the State of applicable law.

unenforceable elsewhere. However, there is another scenario where an arbitral award that is set aside in the State of origin is still enforceable in another country.[5] Maybe, it is because the competent authority in that country puts a lot of weight on the pro-enforcement bias that it is willing to look at the arbitral award again; even though, the arbitral award has already been set aside in the State of Origin.

In the *1927 Geneva Convention*, the antecedent of the *New York Convention*, setting aside was a ground to refuse the enforcement of foreign arbitral awards.[6] The *1958 New York Convention* follows the *1927 Geneva Convention* in this respect. Consequently, the *1985 Model Law*,[7] a proposed uniform arbitration law introduced by UNCITRAL, provides the same grounds upon which to set aside arbitral awards and to refuse the recognition and enforcement of arbitral awards including the public policy exception. However, unlike the *New York Convention*, art 34 of the *Model Law* is applicable to setting aside arbitral awards in the place of arbitration excluding the State of applicable law.

At the national level, the grounds for setting aside arbitral awards are still different except where States adopted the *Model Law*. In terms of the reviewing power, only the State of origin may theoretically exercise its judicial review power twice over on an arbitral award. Therefore, it is possible that a competent authority of the State of origin attain two chances to consider the public policy exception as a bar to the enforcement of arbitral awards through the setting aside and enforcement proceedings. Interestingly, even though it has been accepted broadly that only the State of origin, as the primary jurisdiction, may set aside an arbitral award, the competent authorities in some countries set aside arbitral awards made

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[5] Manu Thadikkaran, 'Enforcement of Annulled Arbitral Awards: What is and What Ought to Be?' (2014) 31(5) *Journal of International Arbitration* 575, 575; See also Jane Jenkins, 'Chapter 13: Effect of the Award' in *International Construction Arbitration Law* (Kluwer International, 2013) 288.

[6] Article 2 of the Geneva Convention provided:

> Even if the conditions laid down in Article 1 hereof were fulfilled, recognition and enforcement of the award should be refused if the Court was satisfied:
>
> > (a) That the award had been annulled in the country in which it has been made;
> > (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
> > ©That the award did not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contained decisions on matters beyond the scope of the submission to arbitration.
>
> If the award had not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award was sought could, if it thought fit, postpone such recognition or enforcement or granted it subject to such guarantee as that authority might decide.

[7] In 2013, the *Model Law* has been adopted in 67 States in a total of 97 jurisdictions while the *New York Convention* has 149 Contracting States.

outside their territories and made under another State's arbitration law. Consequently, it is possible that a State which is not the State of origin can exercise its reviewing power over a foreign arbitral award through both setting aside and enforcement proceedings, and that is incompatible with the *New York Convention*. Thailand is one of such countries as mentioned in Chapter III.

It has been widely accepted that the power to set aside arbitral awards is for the State of origin of the awards. However, it can be observed that States apply and interpret the power to set aside arbitral awards differently. There are two main paradigms: first only the State of origin has the power to set aside arbitral awards, and secondly the State may set aside arbitral awards irrespective of where they are made or to which procedural law was applied. Obviously, the first theory aligns with the *New York Convention* and the *Model Law,* but not the other theory. The first theory has been adopted by a lot of States; for example, France, Germany, Singapore, Switzerland, the United Kingdom, and the United States while Indonesia, the Philippines, and Thailand have adopted the second theory.

The analysis of this issue will be categorised according to the two paradigms: States where only the State of origin acquires the power to set aside arbitral awards and States that allow their competent authority to set aside arbitral awards irrespective of where they were made or which procedural law was applied.

1 *States Where Only the State of Origin Acquires the Power to Set Aside Arbitral Awards*

Like the *New York Convention*, States mentioned here are those States whose arbitration laws provide that only the State of origin may set aside arbitral awards such as France, Germany, Singapore, Switzerland, the United Kingdom, and the United States.

(a) France

Setting aside arbitral awards is mentioned in the *French Code de procédure civile*[8] in two parts: first in arts 1490-1493 in relation to domestic arbitration and second in art 1518 with respect to international arbitration. For international arbitration, the law states clearly that the only recourse against an international arbitral award made in France is setting aside.[9] The law

[8] *Code de procedure civile* [Code of Civil Procedure] (France).

[9] Article 1518 of the *Code de procedure civile* [Code of Civil Procedure] (France) provides:

> The only means of recourse against an award made in France in an international arbitration is an action to set aside.

provides the grounds for setting aside arbitral awards made in France in arts 1492[10] for domestic awards and 1520[11] for international awards, and both contain the public policy exception. Thus, only arbitral awards made in France, either domestic or international, can be set aside by the French competent authorities.

Notably, the French arbitration law provides that different standards of the public policy exception can be applied to domestic and international or foreign arbitral awards. For setting aside domestic arbitral awards, an award may be set aside where the award is contrary to '*ordre public*' (public policy).[12] Yet, with respect to refusing the recognition and enforcement of foreign or international arbitral awards,[13] setting aside international arbitral awards made in France,[14] and denying to recognise and enforce arbitral awards made abroad at the appeal level[15] is that the recognition or enforcement of such awards is contrary to '*ordre public international*' (international public policy).

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[10] Article 1492 of the *Code de procedure civile* [Code of Civil Procedure] (France) provides:

> An award may only be set aside where:
>
> (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or
> (2) the arbitral tribunal was not properly constituted; or
> (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or
> (4) due process was violated; or
> (5) the award is contrary to public policy; or
>
> (6) the award failed to state the reasons upon which it is based, the date on which it was made, the names or signatures of the arbitrator(s) having made the award; or where the award was not made by majority decision.

[11] Article 1520 of the *Code de procedure civile* [Code of Civil Procedure] (France) provides:

> An award may only be set aside where:
>
> (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or
> (2) the arbitral tribunal was not properly constituted; or
> (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or
> (4) due process was violated; or
> (5) recognition or enforcement of the award is contrary to international public policy.

[12] Article 1492.

[13] Article 1514 of the *Code de procedure civile* [Code of Civil Procedure] (France) provides:

> An arbitral award shall be recognised or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy.

[14] Article 1520.

[15] Article 1525 of the *Code de procedure civile* [Code of Civil Procedure] (France) provides:

> An order granting or denying recognition or enforcement of an arbitral award made abroad may be appealed.
>
> …
>
> The Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in art 1520.

(b) Germany

In Germany, s 1059 of the *German Code of Civil Procedure*[16] governs the application and lays down the grounds for setting aside an arbitral award. Even though the section does not state explicitly the kind of arbitral awards to which this applies, it can be implied from the law's scope of application that setting aside arbitral awards can be done only if Germany is the place of arbitration.17

The grounds for setting aside an arbitral award are those that ground a refusal to recognise and enforce domestic arbitral awards[18] while the *New York Convention* governs the recognition and enforcement of foreign arbitral awards.[19] Both s 1059(2) of the *German Code of Civil Procedure* and art V(2)(b) of the *New York Convention* contain the public policy exception; therefore, the public policy exception is a ground to set aside, refuse the enforcement of arbitral awards made in Germany, and refuse the recognition and enforcement of foreign arbitral awards under German arbitration law.

A sample case where the German court rejected a request to annul an arbitral award made in the United States is *Subsidiary Company of Franchiser v Franchisee*.[20] The Oberlandesgericht, Thuringia (the German Higher Regional Court of Thuringia) rejected the request for annulment of the arbitral award, which was made in the United States, filed by Franchisee 'holding that this request was inadmissible because only enforcement, not the annulment, of a foreign arbitral award can be sought in Germany.'[21] In addition, the *German Code of Civil Procedure* even provides a solution in a situation where a foreign arbitral award has been set aside by another State after the award was enforced by a German court and that is the declaration of enforceability may be set aside.[22]

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[16] *Zivilprozessordnung* [Code of Civil Procedure] (Germany).

[17] Section 1025(1) of the *Code of Civil Procedure* (Germany) provides:

> (1) The provisions of this Book apply if the place of arbitration as referred to in [s] 1043 [sub-s] 1 is situated in Germany.

[18] Sections 1059 and 1060.

[19] Section 1061.

[20] Oberlandesgericht [German Court of Appeal], 1 Sch 01/08, 13 January 2011.

[21] Oberlandesgericht Thuringer [German Higher Regional Court of Thuringer], 1 Sch 01/08, 13 January 2011, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 2012*, (Kluwer Law International, vol XXXVII, 2012) 221.

[22] Section 1061(3) of the *Code of Civil Procedure* (Germany) provides:

> (3) If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made.

(c) Singapore

Singapore laws concerning arbitration are the *2002 International Arbitration Act*[23] (the "*IAA*") and the *2001 Arbitration Act*.[24] First, the *IAA*, implementing the *Model Law*, applies to international arbitration as defined in the *Model Law*.[25] For setting aside arbitral awards, the *IAA* adopts the grounds for setting aside arbitral awards from the *Model Law* and adds two more grounds that the High Court of Singapore may set aside arbitral awards on its own motion,[26] the Act does not specify explicitly the kind of arbitral awards to be set aside under this section. Moreover, the *IAA* does not clearly state the scope of application as provided by the *Model Law* that the setting aside provision is applied only if the place of arbitration is the State, in this case Singapore.[27] However, the Act clearly states that 'the *Model Law*, with the exception of Chapter VIII thereof, shall have the force of law in Singapore' and 'this State' means Singapore.[28] Hence, setting aside arbitral awards, the only recourse against arbitral awards, under the *IAA* may be made only if the place of arbitration is in the territory of Singapore. Second, the *2001 Arbitration Act* applies to arbitration where Singapore is the place of arbitration and which is not governed by the *IAA*.[29] Therefore, setting aside arbitral awards applies only to arbitral awards made in Singapore.

It can be concluded that setting aside arbitral awards under Singapore's arbitration laws only applies to the arbitral awards made in Singapore. Regarding the public policy exception, the public policy exception is a ground to set aside international arbitral awards and to refuse the enforcement of foreign arbitral awards under the *IAA*.[30] Moreover, it is also the ground to set aside arbitral awards under the *2001 Arbitration Act*.[31] Furthermore, it is to be noted that, in Singapore, the court hearing an application to set aside an arbitral award does not have the

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[23] *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed).
[24] *Arbitration Act 2001* (Singapore).
[25] See *Model Law* art 1(3).
[26] Section 24 of the *International Arbitration Act* (Singapore) provides:

> Notwithstanding art 34(1) of the *Model Law*, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if –
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

[27] Article 1(2) of the *Model Law*.
[28] Section 3.
[29] Section 3.
[30] Sections 24 and 31 respectively.
[31] Section 48.

power to review the merits of the case and the matter of law or fact decided by the arbitration tribunal.[32]

(d) Switzerland

There are two arbitration laws in Switzerland: one governs international arbitration,[33] chapter 12 of the *Private International Law Statute* (the "*PIL*"),[34] and the other governs domestic arbitration, part 3 of the *Civil Procedure Code* (the "*CPC*").[35]Both Swiss arbitration laws contain grounds for setting aside arbitral awards.

First, the *PIL* provision does not specify what type of arbitral awards a Swiss competent authority has the power to set aside. Nonetheless, the *PIL* governs international arbitration as defined in art 176[36]. Hence, the Swiss competent authorities may set aside arbitral awards where Switzerland is the place of arbitration and at least one of the parties is not domiciled or does not habitually reside in Switzerland. Second, the *CPC* governs arbitration where Switzerland is the place of arbitration and that is not covered by the *PIL*.[37] Therefore, according to the Swiss arbitration law, the Swiss competent authorities may set aside arbitral awards only where Switzerland is the place of arbitration.

Regarding the public policy exception, the *CPC* does not contain any public policy exception. On the other hand, the *PIL* has two public policy exceptions: one as a ground to annul international arbitral awards and the other is a ground to refuse the recognition and enforcement of foreign arbitral awards under the *New York Convention*.[38]

(e) The United Kingdom

The current English arbitration law, the *Arbitration Act 1996*,[39] authorises 'the court'[40] to set aside arbitral awards in challenging the award: substantive jurisdiction[41] and challenging the

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[32] Lawrence G.S. Boo, *The Law & Practice of Arbitration in Singapore Asean Law* (2003) <http://www.aseanlawassociation.org/docs/w4_sing1.pdf> 187.

[33] Article 176(1) of the *Swiss Federal Statute on Private International Law* provides:

> The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

[34] Bundesgesetz uber das Internationale Privatrecht [Federal Statute on Private International Law] (Switzerland) 18 December 1987, Chapter 12 International Arbitration.

[35] *Zivilrechtspflege* [Civil Procedure Code] (Switzerland) Part 3 Arbitration.

[36] *Swiss Federal Statute on Private International Law* art 176(1)

[37] *Civil Procedure Code* (Switzerland) art 353

[38] It is noted that the *New York Convention* governs the recognition and enforcement of foreign arbitral awards in Switzerland under art 194 of the *Swiss Federal Statute on Private International Law*.

[39] *Arbitration Act 1996* (UK) s 23.

award: serious irregularity.42 For challenging the award: substantive jurisdiction, the court may confirm, vary, or set aside (in whole or in part) the award upon an application challenging an award of the arbitral tribunal as to its substantive jurisdiction. The provision concerning challenging the award: serious irregularity provides serious irregularity grounds which if one or more affect(s) the tribunal, the court may remit the award (in whole or in part) to the tribunal for reconsideration, set aside the award (in whole or in part), or declare

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[40] Section 105(1) of the *Arbitration Act 1996* (UK) provides:

In this Act "the court" means the High Court or a county court, subject to the following provisions.

[41] Section 67 of the *Arbitration Act 1996* (UK) provides:

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court --

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction;

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see s 73) and the right to apply is subject to the restrictions in s70(2)-(3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order –

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

[42] Section 68 of the *Arbitration Act 1996* (UK) provides:

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see s 73) and the right to apply is subject to restrictions in s 70(2)-(3)

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

(a) failure by the tribunal to comply with s 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see s 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its power;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be in appropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

the award to be of no effect (in whole or in part). It is to be emphasised that in challenging the award: serious irregularity confines the power of the court not to 'exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.'[43]

In regard to the kind of arbitral award that can be set aside under the *Arbitration Act 1996*, the scope of application of provision provides that the provisions in this part, including the setting aside provisions, apply where the place of arbitration is in England and Wales or Northern Ireland.[44] Thus, it can be implied that only arbitral awards made in England and Wales or Northern Ireland may be set aside under this Act. In terms of the public policy exception, the *Arbitration Act 1996* contains the public policy exception as a ground to set aside arbitral awards[45] and to refuse the recognition and enforcement of the *New York Convention* awards.[46]

(f) The United States

The United States, which is a Contracting State of the *New York Convention* and the *Panama Convention*, enacted the *Federal Arbitration Act*[47] (the '*FAA*') to govern federal arbitration cases and to implement both the *New York Convention* and the *Panama Convention*. Section 10(a)[48] of the *FAA* provides the grounds for vacating arbitral awards, and it also specifies that '… the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration …' Hence, the United States court has the power to vacate arbitral awards made within its territory. As mentioned above that the *FAA* implements the *New York Convention* and the *Panama Convention*, both the set aside arbitral awards and the public policy exception are grounds to refuse the recognition and enforcement of the arbitral awards under both Conventions.

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[43] Section 68.
[44] Section 2.
[45] Section 68.
[46] Section 103.
[47] *Federal Arbitration Act*, 9 USC (1947 & Supp 1970 and 1990).
[48] Section 10(a) of the *Federal Arbitration Act* provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --
>
> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and define award upon the subject matter submitted was not made.

All the countries mentioned above indicate explicitly in their arbitration laws that only an arbitral award's State of origin may set aside the arbitral award, and that is compatible with the *New York Convention*[49] and the *Model Law*.[50] In a number of countries, especially countries adopting the *Model Law*, the public policy exception is both a ground to set aside and to refuse the recognition and enforcement of arbitral awards. Thus, indicating explicitly in the legislation that only the State of origin of arbitral awards may set aside the awards would eradicate the likelihood of a court considering the public policy exception twice through the setting aside and enforcement proceedings of a foreign arbitral award.

2 *States That Allow Their Competent Authority to Set Aside Arbitral Awards Irrespective of Where They Were Made or to Which Procedural Law Was Applied*

In some States, such as Indonesia, the Philippines, and Thailand, even though they are not the States of origin of arbitral awards, their competent authorities set aside arbitral awards made elsewhere and under another State's procedural law. Since the Thai case has already been discussed in Chapter III, this part will analyse only the cases of Indonesia and the Philippines.

(a) Indonesia

In *Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara; Et Al*,[51] the case lays down the fact that an arbitral award made in Geneva, Switzerland was annulled by the Central District Court of Jakarta, Indonesia. Karaha Bodas Co., LLC ('KBC'), a Cayman Islands company, entered into two contracts to produce electricity from geothermal sources in Indonesia with Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ('Pertamina'), an oil, gas, and geothermal energy company owned by the Republic of Indonesia, and both contracts contained arbitration clauses to be taken place in Geneva, Switzerland under the *UNCITRAL Arbitration Rules*.[52]

The dispute occurred when the government of Indonesia temporarily suspended the project because of a financial crisis. KBC then brought the dispute to arbitration in Switzerland. The

[49] Albert Jan van den Berg, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards United Nations*, Audiovisual Library of International Law <legal.un.org/avl/pdf/ha/crefaa_e.pdf>.
[50] The *Model Law* further clarifies and limits the State which has the power to set aside arbitral awards to only the State where is the place of arbitration.
[51] *Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara;* Et Al, 364 F 3d 274 (5th Cir, 2004).
[52] *Arbitration Rules of the United Nations Commission on International Trade Law*, GA Res 31/98, UN GAOR, 6th Comm, 31st sess, Agenda Item 108, UN Doc A/RES/31/98 (15 December 1976); as revised in 2010, *UNCITRAL Arbitration Rules as revised in 2010*, GA Res 65/22, UN GAOR, 6th Comm, 65th sess, 57th mtg, Agenda Item 77, UN Doc A/RES/65/22 (6 December 2010).

arbitration tribunal rendered the award in favour of KBC on the ground of breach of contract. Pertamina filed a petition to annul the arbitral award to the Supreme Court of Switzerland, which later was rejected, and to the Central District Court of Jakarta, Indonesia while KBC sought the enforcement of the award in the United States, Hong Kong, and Canada.

The district judge of the Southern District of Texas enforced the award, and one of the reasons given was that the argument of Pertamina, stating that the award was already annulled by the Central District Court of Jakarta, Indonesia, was not a defence to enforcement under the *New York Convention*. Pertamina appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit. The court examined the effect of the Indonesian court's annulment of the arbitral award that, according to art V(1)(e) of the *New York Convention*, only Switzerland is the country of primary jurisdiction; therefore, it held that the annulment by the Indonesian court would not lead to the refusal of the award's enforcement under the *New York Convention*. Consequently, the Court of Appeals for the Fifth Circuit affirmed the decision of the district court.

During the proceedings of this case, Pertamina argued that the contracts signed by the parties specified Indonesian substantive law to govern the contracts, so Indonesia was 'the country…under the law of which, that award was made' under art V(1)(e) of the *New York Convention*. However, it has been widely accepted that 'the country…under the law of which, that award was made' refers exclusively to procedural law governing arbitration itself (the *lex arbitri*), but not the substantive law applied to the case.[53] Therefore, in this case, only Switzerland is the country of primary jurisdiction which means only the competent authority in Switzerland may set aside the arbitral award under the *New York Convention*.

It is to be noted that the *Indonesian Arbitration Law*[54] does not specify the kind of arbitral award to be nullified by the competent authority of Indonesia,[55] and that is similar to the *2002 Thai Arbitration Act*. In this case, the ambiguity of arbitration laws in Indonesia and Thailand seem to lead to the peculiar situation that the national courts of the two countries interpret the

[53] Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law International, 1981) 350; See also *Yusuf Ahmed Alghanim & sons, W.L.L. v Toys* "R" us, Inc., 126 F 3d 15, 21 (2nd Cir, 1997); *M & C Corp. v Erwin behr GmbH & Co.,* 87 F 3d 844, 848 (6th Cir, 1996); *International Standard Elec. Corp. v Bridas Sociedad anonima petrolena, industrial y commercial*, 745 F Supp 172, 177 (SD NY, 1990); *Oil & Natural Gas Commission v Western Company of North America* [Supreme Court of India], 16 January 1987.

[54] *Undang-undang Nomor 30 Tahan 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa Umum (UU Arbitrase)* [Law number 30 of 1999 on Arbitration and Alternative Dispute Resolution (Indonesian Arbitration Law)].

[55] Article 70-72 of the *Indonesian Arbitration Law*.

laws in a way different from that of the *New York Convention*. The *Indonesian Arbitration Law* provides the grounds for the annulment of arbitral awards in art 70[56] excluding the public policy ground; however, the public policy exception is a ground to refuse the enforcement of both national[57] and international arbitral awards.[58] Therefore, the consideration of the public policy exception under the *Indonesian Arbitration Law* may occur only in the enforcement of arbitral awards proceedings, and that is different from what happens in Thailand.

(b) The Philippines

In *Steel Corporation of the Philippines v International Steel Services, Inc.*,[59] the Steel Corporation of the Philippines ('SCP'), a Filipino corporation, filed a petition to confirm an arbitral award which was made in Singapore against the International Steel Services, Inc. ('ISSI'), a Delaware corporation. The fact of the case is that SCP and ISSI entered into two contracts: the Acid Regeneration Plant Supply and Installation Agreement ('ARP contract') and the Iron Oxide Sales Agreement ('IOSA contract'), and both contracts contained arbitration clauses.

There were two disputes arising from the two contracts: one was a claim under the ARP contract brought before the Construction Industry Arbitration Commission of the Philippines against SCP where the commission rendered an award of USD 150 000 in favour of ISSI ('ISSI award'), and the other was a claim under the IOSA contract against ISSI brought before the International Chamber of Commerce International Court of Arbitration in Singapore which awarded USD 647 965.50 in favour of SCP ('SCP award').

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[56] Article 70 of the *Indonesian Arbitration Law* provides:

> An application to nullify an arbitration award may be made if the award is alleged to contain the following elements:
>
> (a) letters or documents submitted in the hearings which are admitted to be forged or are declared to be forgeries after the award has been rendered;
>
> (b) documents are found after the award has been rendered which are decisive in nature and were deliberately concealed by the opposing party; or
>
> (c) an award is made based on fraud committed by one of the parties to the dispute.

[57] Article 62(2) of the *Indonesian Arbitration Law* provides:

> The Chairman of the District Court contemplated in paragraph (1) must first examine whether the arbitration award fulfils the provisions of arts 4 and 5 and ensure that it does not conflict with public morality and order before issuing the order for its execution.

[58] Article 66(c) of the *Indonesian Arbitration Law* provides:

> The International Arbitration Awards contemplated in item (a), which may only be enforced in Indonesia, are limited to those which do not conflict with public order.

[59] *Steel Corporation of the Philippines v International Steel Services, Inc.,* 354 Fed Appx 689 (3rd Cir, 2009).

In regard to the SCP award, it specified that '[t]he applicable law of the arbitration proceedings is the Singapore International Arbitration Act. The validity, performance and enforcement of … the [IOSA contract is] governed by the law of the Philippines', but instead of filing for setting aside the arbitral award to the competent authority in Singapore, ISSI filed a petition to vacate the SCP award with the Philippines Regional Trial Court. There was an alleged mistake preventing SCP from receiving an order, then the court declared SCP in default of the ISSI's petition to vacate the award. Later, SCP filed an Urgent Motion for Reconsideration which received no response from the court on this motion, then the matter was referred to mediation which later failed. In the meantime, ISSI sought the enforcement of the ISSI award in the Philippines which was enforced by the trial court. However, the Philippines Court of Appeals set aside the ISSI award at the appeal level on the ground that ISSI was obliged to pay, according to the SCP award, the greater amount to SCP. Furthermore, the Philippines Court of Appeals noted that the Philippines Regional Trial Court did not have jurisdiction to vacate the SCP award.[60]

As mentioned above, SCP sought to confirm the SCP award under the *New York Convention* in the United States, and the Western District Court of Pennsylvania confirmed the award. ISSI appealed the district court's decision to the United States Court of Appeals for the Third Circuit. ISSI argued that the Philippines Regional Trial Court's declaration against SCP on the ISSI petition to vacate the SCP award prevented the enforcement of the award under art V(1)(e) of the *New York Convention* and that 'enforcing the SCP award would violate the fundamental principles of *res judicata* and judicial comity and would run contrary to the public policy against forum shopping in the United States'[61] under art V(2)(b) of the *New York Convention*. The United States Court of Appeals for the Third Circuit concluded that the Philippines was not the country with primary jurisdiction since the SCP award was made in Singapore under the *Singapore International Arbitration Act* and that the 'enforcement of the SCP award does not violate [the United States'] "most basic notions of morality and justice."'[62] The Court, then, affirmed the decision of the District Court.

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[60] *Steel Corporation of the Philippines v Construction Industry Arbitration Commission, International Steel Services, Inc., and the clerk of court/ex-officio Sheriff of the Regional Trial Court (RTC) of Makati city* [Republic of the Philippines Court of Appeals], CA-GR SP No 91785, 17 July 2007, 11.

[61] *Steel Corporation of the Philippines v International Steel Services, Inc.,* 354 Fed Appx 689 (3rd Cir, 2009) 694.

[62] *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA),* 508 F 2d 969, 974 (2nd Cir, 1974).

The current Philippines' arbitration laws are the *Republic of the Philippines Act no. 9285*[63] (an Act to institutionalize the use of an alternative dispute resolution system in the Philippines and to establish the office for alternative dispute resolution, and for other purposes) adopting the *Model Law* and the *Republic of the Philippines Act no. 876*[64] (an Act to authorize the making of arbitration and submission agreements, to provide for the appointment of arbitrators and the procedure for arbitration in civil controversies, and for other purposes) governing domestic arbitration. From both of the Philippines' arbitration laws, only domestic arbitral awards may be vacated in the Philippines. Domestic arbitration in the Philippines means an arbitration that is not international as defined in the *Model Law*,[65] and is governed by the *Republic Act no. 876* which provides the grounds for vacating domestic arbitral awards similar to the *United States FAA*.[66] However, under the provision governing vacation domestic arbitral awards[67] of the *Republic Act no. 9285* refers to the grounds under s 25[68] of the *Republic Act no. 876*. It is obvious that, according to the

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[63] *Republic Act of the Philippines number 9285* (Philippines) approved 2 April 2004.
[64] *Republic Act of the Philippines number 876* (Philippines) approved 19 June 1953.
[65] Section 32 of the *Republic Act of the Philippines number 9285*.
[66] Section 24 Grounds for vacating award of the *Republic Act of the Philippines number 876* provides:

> In any one of the following cases, the court must make an order vacating the award upon the petition of any party to the controversy when such party proves affirmatively that in the arbitration proceedings:
>
> (a) The award was procured by corruption, fraud, or other undue means; or
> (b) That there was evident partiality or corruption in the arbitrators or any of them; or
> (c) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; that one or more of the arbitrators was disqualified to act as such under section nine hereof, and wilfully refrained from disclosing such disqualifications or of any other misbehaviour by which the rights of any party have been materially prejudiced; or
> (d) That the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.

Where an award is vacated, the court, in its discretion, may direct a new hearing either before the same arbitrators or before a new arbitrator or arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrator or arbitrators, and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.
Where the court vacates an award, costs, not exceeding fifty pesos and disbursements may be awarded to the prevailing party and the payment thereof may be enforced in like manner as the payment of costs upon the motion in an action.
[67] Section 41 of the *Republic Act of the Philippines number 9285* provides:

> A party to a domestic arbitration may question the arbitral award with the appropriate regional trial court in accordance with the rules of procedure to be promulgated by the Supreme Court only on those grounds enumerated in s 25 of *Republic Act No. 876*. Any ground raised against a domestic arbitral award shall be disregarded by the regional trial court.

[68] Section 25 Grounds for modifying or correcting the award of the Republic Act No. 876 provides:

> In any one of the following cases, the court must make an order modifying or correcting the award, upon the application of any party to the controversy which was arbitrated:
>
> (a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award; or
> (b) Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matter submitted; or

legislation, it is unlikely that a competent authority in the Philippines would exercise its reviewing power over a foreign arbitral award through both setting aside and enforcement proceedings.

Surprisingly, the Philippines Regional Trial Court did set aside a foreign arbitral award in the aforementioned case conflicting with the Philippines' arbitration laws as noted by the Philippines Court of Appeals, the court of appellate jurisdiction that the Philippines Regional Trial Court does not have jurisdiction to vacate the SCP award.[69] In terms of the public policy exception, it is not a ground to vacate arbitral awards in the Philippines. Nevertheless, the public policy exception is a ground to refuse the recognition and enforcement of international and foreign arbitral awards under s 40[70] and 45[71] respectively. Hence, the public policy exception would be considered only in the enforcement proceedings in the Philippines.

Apparently, even though Indonesia, Malaysia, and Thailand are Contracting States of the *New York Convention*, the cases mentioned above and the Thai case: *Krungthai Feedmill Public Co., Ltd. v Cargill Siam Co., Ltd.,*[72] mentioned in Chapter III, point out how the courts in these countries interpret the laws quite differently to that advocated by the *New York Convention*. The ambiguity of national arbitration laws is probably one significant factor causing the inconsistent interpretation of national courts. However, how national courts apply

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> (c) Where the award is imperfect in a matter of form not affecting the merits of the controversy, and if it had been a commissioner's report, the defect could have been amended or disregarded by the court.

The order may modify and correct the award so as to effect the intent thereof and promote justice between the parties.

[69] *Steel Corporation of the Philippines v Construction Industry Arbitration Commission, International Steel Services, Inc., and the clerk of court/ex-officio Sheriff of the Regional Trial Court (RTC) of Makati city* [Republic of the Philippines Court of Appeals], CA-GR SP No 91785, 17 July 2007, 11.

[70] Section 40 of the *Republic Act of the Philippines number 9285* provides:

> '… The recognition and enforcement of an award in an international commercial arbitration shall be governed by art 35 of the Model Law …'

Article 35(1) of the *Model Law* provides:

> An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of art 36 [which contains the public policy exception as a ground to refuse the recognition or enforcement of international awards.]

[71] Section 45 of the *Republic Act of the Philippines number 9285* provides:

> A party to a foreign arbitration proceeding may oppose an application for recognition and enforcement of the arbitral award in according with the procedural rules to be promulgated by the Supreme Court only on those grounds enumerated under art V of the *New York Convention* [which contains the public policy exception as a ground to refuse the recognition and enforcement of foreign arbitral awards.] Any other ground raised shall be disregarded by the Regional Trial Court.

[72] *Krungthai Feedmill Public Co., Ltd. v Cargill Siam Co., Ltd.* [2009] 5511-5512/2552 (Supreme Court of Thailand).

and interpret their domestic arbitration laws would definitely affect the performance of the Contracting States bound to the *New York Convention*.

3 *Summary Table*

To make it easier to follow, the summary of this section is presented in the table below. Table 4.1 illustrates how the selected countries' arbitration laws set out the scope of the reviewing power that the competent authorities under the laws may exercise through setting aside arbitral awards proceedings.

Table 4.1: The Summary Table of Setting Aside Arbitral Awards as a Bar to the Enforcement

State	The Courts at the State of Origin Have the Power to Set Aside Arbitral Awards – according to legislation		Containing the Public Policy Exception	
	The Courts at the Place of Arbitration	The Courts at the State of Applicable Law	As a Ground to Set Aside Arbitral Awards	As a Ground to Refuse the Enforcement of Foreign Arbitral Awards
1. States where only the State of origin acquires the power to set aside arbitral awards				
France	/	-	/	/
Germany	/	-	/	/
Singapore	/	-	/	/
Switzerland	/	-	/	/
The United Kingdom	/	-	/	/
The United States	/	-	-	/

2. States that allow their competent authority to set aside arbitral awards irrespective of where they were made or which procedural law was applied				
Indonesia	The Indonesian arbitration law does not specify whether only the national courts at the State of origin have the power to set aside arbitral awards.		-	/
The Philippines	/	-	-	/

From the table above, the arbitration laws of the six most popular places of arbitration and the Philippines allow their competent courts to set aside only arbitral awards where the countries are the place of arbitration while Indonesian arbitration law is ambiguous on this issue. It can also be observed that the arbitration laws of all countries mentioned in this section contain the public policy exception as a ground to refuse the enforcement of foreign arbitral awards. Most of them also contain the public policy exception as a ground to set aside arbitral awards. However, under the arbitration laws of the United States, Indonesia, and the Philippines, the public policy exception is not a ground to set aside arbitral awards.

Hence, a clear scope of the judicial review power in legislation is needed to be certain that the law is compatible with the *New York Convention*. Nonetheless, the Philippines is an example of where the legislation is clear, yet the courts still apply it differently. Furthermore, if national arbitration laws do not differentiate domestic, international, and foreign arbitral awards, the courts may interpret the ambiguous laws irresponsibly which would lead to an uncommon situation and the incompatibility with the *New York Convention* in some respects.

C *The Efficiency of Distinguishing Domestic and Foreign Arbitral Awards*

The *New York Convention* distinguishes domestic and foreign arbitral awards while the *Model Law*, a non-binding international instrument intended to enhance the application and

interpretation of the *New York Convention*, proposed the trend of international arbitration and international arbitral awards as discussed in Chapter II. It has been noticed that although it is possible that domestic, foreign, and international arbitration can be treated using the same legal standard, a number of legal systems differentiate the three types of arbitration in order to provide national courts more power over domestic arbitration.[73] It has also been noted that it is not necessary to distinguish domestic and foreign arbitral awards, but as noted by the United Nations Commission on International Trade Law (UNCITRAL) ' … for the sake of clarity and possible different treatment of domestic and foreign awards in other respects, it was advisable to have separate articles on those two types of awards.'[74]

As mentioned in Chapter III, the *Thai 2002 Arbitration Act* does not distinguish domestic, foreign, and international arbitral awards, and there is no explicit scope of application to which types of arbitration the law applies. Hence, it can be implied that all types of arbitral award are treated according to the same standard in Thailand, and that is different from many countries like France, Germany, Singapore, Switzerland, the United Kingdom, and the United States. Accordingly, some of these States distinguish both types of arbitration and types of arbitral awards, but some of them distinguish only types of arbitral awards. It can be observed that every State mentioned in this Chapter makes a distinction between the types of arbitral awards. Thus, it can be suspected that domestic, international, and foreign arbitral awards are treated differently including the issue of public policy exception.

1 *States Distinguishing Both the Types of Arbitration and the Types of Arbitral Awards*

France, Singapore, and Switzerland distinguish the types of arbitration in order to control arbitration contracts and the procedures of arbitration tribunals. These States also distinguish the types of arbitral awards in order to control what recourses can be taken against arbitral awards and the enforcing state.

(a) France

In France, the *French Code de procédure civile* distinguishes between domestic arbitration governed by arts 1442-1503 and international arbitration governed by arts 1504-1527. In terms of the enforcement of arbitral awards, for international arbitral awards, the French

[73] Jonathan Hill, 'Some Private International Law Aspects of the Arbitration Act 1996' (1997) 46(2) *The International and Comparative Law Quarterly* 274, 276.
[74] United Nations Commission on International Trade Law, *Report of the Working Group on International Contract Practices on the Work of Its Fifth Session*, 16th sess, UN Doc A/CN.9/233 (28 March 1983) [122].

arbitration law further differentiates international awards made in France from international awards made abroad. Regarding the public policy exception, it is both a ground to set aside arbitral awards and to refuse the recognition or enforcement of arbitral awards made abroad.

Notwithstanding, different standards of the public policy exceptions are to be applied to domestic and international or foreign arbitral awards. In particular, '*ordre public interné*' (domestic public policy) is to be applied to domestic arbitral awards[75] while '*ordre public international*' (international public policy) is to be applied to international or foreign arbitral awards.[76] To emphasise, the French arbitration law states clearly that 'international public policy' is to be applied to international or foreign arbitral awards, and that is compatible to the international standard under the *New York Convention*.

(b) Singapore

The Singaporean arbitration laws also distinguish between domestic and international arbitration and recognise the differences between domestic, international, and foreign arbitral awards. The *2001 Arbitration Act* governs domestic arbitration, and there is only one public policy exception as a ground for setting aside domestic arbitral awards. The *2002 International Arbitration Act* (the "*IAA*") governing international arbitration actually differentiates international and foreign arbitral awards.

Regarding the public policy exception, the *IAA* has two public policy exceptions: one that relates to the bar of arbitration[77] and the other as a ground to refuse the enforcement of foreign arbitral awards.[78] It has been observed that even though the *IAA* does not specify the term 'international public policy', the public policy consideration under the *IAA* is applied narrowly in the same application and interpretation as international public policy.[79]

(c) Switzerland

The Swiss arbitration laws distinguish between domestic and international arbitration: part 3 of the *Civil Procedure Code* (the '*CPC*') governs domestic arbitration and chapter 12 of the *Private International Law Statute* (the '*PIL*') governs international arbitration.

[75] Article 1492.
[76] Article 1514, 1520 and 1525.
[77] Section 11(1).
[78] Section 31(4)(b).
[79] Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 1st ed, 2011) 462.

In terms of judicial review of arbitral awards, the Swiss arbitration laws differentiate between domestic, international, and foreign arbitral awards. However, since Switzerland has not adopted the *Model Law*, the definition of international arbitration of the *PIL* differs from that of the *Model Law*. Article 176(1) of the *PIL* states that

> 'the provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland'.

Accordingly, the *PIL* defines international arbitral awards more narrowly than the definition provided by the *Model Law*, and it can be implied that international arbitral awards under the *PIL* are made in the territory of Switzerland. Therefore, it would not be incompatible with the *New York Convention* that international arbitral awards can be annulled in Switzerland.

As mentioned above, the *CPC* has no public policy exception while there are two public policy exceptions in the *PIL*. One public policy exception is a ground to annul international arbitral awards[80] and the other is a ground to refuse the recognition and enforcement of foreign arbitral awards under the *New York Convention*.[81] It is observed that although the two public policy exceptions use the same general term, the application and interpretation of them are different. The Swiss courts have made it clear in their decisions that a narrower standard would be applied to foreign arbitral awards than that applied to annul international arbitral awards.[82]

2 *States Distinguishing Only the Types of Arbitral Awards*

Although Germany, the United Kingdom, and the United States do not distinguish between the types of arbitration, they distinguish between the types of arbitral awards. Possibly, there are differences concerning the treatment between the types of arbitral awards.

[80] Article 190.
[81] Article 194.
[82] Cour De Justice (First Section), Canton de Geneva [Court of Appeal of the Canton of Geneva], 17 September 1976, cited in Sanders, Pieter (ed), *Yearbook Commercial Arbitration 1979* (Kluwer Law International, vol IV, 1979) 311; See also Camera di Esecuzione e Fallimenti, Canton Tessin [Court of Appeal of the Canton of Ticino, Execution and Bankruptcy Chamber], 19 June 1990, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 1995*, (Kluwer Law International, vol XX, 1995) 762.

(a) Germany

The *German Code of Civil Procedure* does not distinguish domestic, international, and foreign arbitration.[83] Even though Germany largely adopts the *Model Law*, the *German Code of Civil Procedure* does not follow the international arbitration trend. Nevertheless, in the German arbitration law, there is a distinction between domestic and foreign arbitral awards under the *New York Convention*.

For domestic arbitral awards, the German arbitration law provides the same grounds for setting aside as for refusing the enforcement of arbitral awards which include the public policy consideration. For foreign arbitral awards, the *New York Convention* is identified as the rule governing foreign arbitral awards, so the public policy exception may bar the recognition and enforcement of foreign arbitral awards.

(b) The United Kingdom

The *English Arbitration Act 1996* does not differentiate between domestic, international, and foreign arbitration, but it recognises arbitral awards made within the territory of England, Wales, and Northern Ireland and certain foreign arbitral awards such as the awards under the *Geneva Convention* and the *New York Convention*. For domestic arbitration, the only public policy exception applying to domestic arbitral awards is a ground to challenge the awards.[84]

For foreign arbitral awards, the *Arbitration Act 1996* provides that arbitral awards under the *Geneva Convention* are to be governed by part II of the *Arbitration Act 1950*[85] where the public policy exception is a ground not to enforce a foreign arbitral award.[86] For the *New York Convention* arbitral awards, the public policy exception is the bar to the recognition or enforcement of the awards.[87]

(c) The United States

The *United States Federal Arbitration Act* (the '*FAA*') contains three chapters: chapter 1 General Provisions, chapter 2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and chapter 3 Inter-American Convention on International Commercial

[83] Thomas Kopp, Richard Kreindler and Nicole Rothe, *Arbitration Guide: Germany, International Bar Association Arbitration Committee* <www.ibanet.org/Document/Default.aspx?DocumentUid=72111D60-6585-412C-B239-189ABF22108F>.
[84] Section 68(2)(g).
[85] *Arbitration Act 1950* (UK) c 27.
[86] Section 99 of the *Arbitration Act 1996* (UK) together with s 37(1)(e) of the *Arbitration Act 1950* (UK).
[87] Section 103(3) of the *Arbitration Act 1996* (UK).

Arbitration. The *FAA* does not clearly differentiate between domestic, international, and foreign arbitration.

In terms of arbitral awards, it can be implied that the *FAA* recognises domestic arbitral awards made in the United States, foreign arbitral awards under the *New York Convention*, and arbitral awards under the *Panama Convention*. The *FAA* provides that 'the court must grant such an order [confirming arbitral awards made in the United States] unless the award is vacated, modified, or corrected as prescribed in ss 10 and 11 of this title'[88] Accordingly, ss 10 and 11 of the *FAA* do not contain any public policy exception. However, in chapter 2 and 3 adopting the *New York Convention* and the *Panama Convention*, both Conventions contain the public policy exception as a ground to refuse the recognition and enforcement of foreign arbitral awards and arbitral awards under the *Panama Convention*.

3 *Summary Tables*

The tables below summarise this section. They will show how each selected country distinguishes the types of arbitration and arbitral awards in its legislation including the impact of the public policy exception as a bar to the enforcement of arbitral awards. Table 4.2 shows that distinguishing the types of arbitration in the legislation is not necessary while distinguishing the types of arbitral awards, at least between domestic and foreign, is essential. In addition, the public policy exception as a ground to bar the enforcement of arbitral awards through either setting aside or enforcement proceedings will be shown for the purpose of comparison. Then, Table 4.3 will provide more details about the types of arbitration and arbitral awards in the arbitration laws of the selected countries.

[88] Section 9.

Table 4.2: The Summary Table of the Efficiency of Distinguishing Domestic and Foreign Arbitral Awards

State	Distinguishing Types of Arbitration in Legislation	Distinguishing Types of Arbitral Awards in Legislation	Containing the Public Policy Exception		
			As a Ground to Set Aside Arbitral Awards of Which the Country is the Place of Arbitration	As a Ground to Refuse the Enforcement of Domestic Arbitral Awards	As a Ground to Refuse the Enforcement of Foreign Arbitral Awards
1. States distinguishing both the types of arbitration and the types of arbitral awards					
France	/	/	/	/	/
Singapore	/	/	/	-	/
Switzerland	/	/	/	-	/
2. States distinguishing only the types of arbitral awards					
Germany	-	/	/	/	/
The United Kingdom	-	/	/	-	/
The United States	-	/	/	-	/

Table 4.3: The Types of Arbitration and Arbitral Awards in the Main Selected Countries

State	Arbitration (Procedure)	Arbitral Award (Enforcement)
France	- Domestic Arbitration - International Arbitration: international trade interests are at stake.	- Domestic Awards - International Awards made in France (in case of recourse against awards made in France) - Foreign or International Awards
Germany	- Domestic Arbitration *There are three sets of provisions: 1. The provisions apply to cases where Germany is the seat of arbitration. 2. The provisions apply to all cases. 3. The provisions concern the specific court functions if the respondent or the claimant has his place of business or habitual residence in Germany.	- Domestic Awards - Foreign Awards
Singapore	- Domestic Arbitration - International Arbitration – adopting the *Model Law*	- Domestic Awards - International Awards - Foreign Awards *International awards are to be enforced in the same manner as a judgment. However, they can be set aside.
Switzerland	- Domestic Arbitration - International Arbitration *The scope of application of the Swiss international arbitration law does not contain all elements stated in the *Model Law*.	- Domestic Awards - International Awards - Foreign Awards
United Kingdom	- Domestic Arbitration	- Awards under the English arbitration law

	*There are two sets of provisions: 1. The provisions apply to cases where the United Kingdom is the seat of arbitration. 2. The provisions apply to all cases.	-Foreign Awards
United States	- Domestic Arbitration *The American arbitration law does not specify what type of arbitration the law applies.	- Domestic Awards - Foreign Awards

It appears that the firm distinction between domestic and international arbitration in a national arbitration law is not essential as long as the scope of application of the law is clear. On the other hand, the distinction between domestic and foreign arbitral awards is crucial. States actually have full power over legal cases that fall under their jurisdictions unless they are bound to any commitments like bilateral treaties, regional conventions, and international treaties. Therefore, in terms of arbitral awards, a State may regulate its arbitration law to broaden the grounds for setting aside arbitral awards made within its territory or restrict the enforcement of arbitral awards as long as it does not violate any commitments it made. However, States legislating such arbitration law need to accept the consequences that they would be an unattractive place for investors and that they would be far behind from other countries regarding alternative dispute resolution, which becomes more popular and tends to be used even more in the future. Although it is possible that a national arbitration law can provide the sole standard for all arbitral awards and treats them all the same, it usually becomes stricter when a case involves domestic characters; especially when a government entity is a party. Thus, distinguishing between domestic and foreign arbitral awards is a solution that compromises a State's desire to retain full power over domestic arbitral awards while the State does follow the mainstream and not contravene its commitments.

For the public policy exception, when a national arbitration law does not distinguish between domestic, international, and foreign arbitral awards, the question arises as to which type of public policy is to be applied. If the said national arbitration law is clear upon its face like the French arbitration law saying that 'international public policy' shall be applied to foreign arbitral awards, it would not be problematic. Alternatively, in a situation where there is no distinction between the three types of arbitral awards in a State's arbitration law which

contains the public policy exception as a ground to set aside and to refuse the enforcement of arbitral awards, the law leaves the courts to decide which type of public policy should be applied to all arbitration matters. Accordingly, the courts seem to be reluctant to apply international public policy since the same type of public policy is to be applied to setting aside domestic arbitral awards implicitly. Thus, it is more likely that the courts will apply the broad standard of domestic public policy in such circumstances. Consequently, the application and interpretation of the public policy exception by the said court would be incompatible with the *New York Convention*.

D *Judicial Application of the Public Policy Exception under the New York Convention*

National courts exercise judicial review over arbitral awards when the awards are challenged or sought for the enforcement. Although many States ratified the *New York Convention*, how national courts apply the grounds for the refusal of the recognition and enforcement of foreign arbitral awards under art V still vary. Article V(2)(b): the public policy exception is even more problematic than the other grounds because what constitutes public policy exception is different in each State and changes over time. Hence, it is very hard to predict what the consequence might be. The fact that 'international public policy' was introduced as the standard applied to the public policy exception under the *New York Convention* provided a better safeguard to the parties. Still, not every national court fully follows the guidance. It is important to examine how national courts in the popular places of arbitration, both civil law and common law countries, deal with arbitration matters concerning the public policy exception.

1 *Civil Law Countries*

The distinctive point of the civil law system is the codification of the laws. Thus, it is the legislature's job to produce the laws, and the judges' job is to interpret and apply the laws. National courts in some civil law countries apply the laws stricter than others, and this is probably the case with their application of the public policy exception. The court decisions of France, Germany, and Switzerland will now be examined.

(a) France

As mentioned before, the French arbitration law specifically indicates 'international public policy' in the public policy exceptions as a ground to refuse the recognition and enforcement of arbitral awards made abroad or in international arbitration and as a ground to set aside

international arbitral awards made in France.[89] As a consequence, the French courts make judgments accordingly. There is no question that the narrow notion of international public policy has been applied to arbitration matters in France.

According to the cases, the courts provide some clarification about the limit of judicial power regarding the public policy ground such as:

- Concerning the public policy exception, 'a court shall only examine whether the award's recognition or enforcement constitutes a flagrant, effective and concrete violation of international public policy.'[90]
- The review on the merits is prohibited under the French arbitration law.[91]
- The mistakes in fact or in law by arbitrators even such errors are manifest do not establish the public policy exception as a ground to refuse the recognition and enforcement of international arbitral awards in France.[92]

It can be concluded that the French legislation makes it clear that international public policy is to be applied to the recognition and enforcement of foreign or international arbitral awards, and the public policy exception should be construed narrowly. Therefore, the French courts' application of the public policy exception concerning arbitration matters is compatible with the *New York Convention*.

(b) Germany

The German arbitration law, unlike the French arbitration law, does not specify what type of public policy should be applied as a ground to refuse the recognition and enforcement of foreign arbitral awards. However, the German courts have decided that the narrow concept of international public policy is the standard of the public policy exception as a ground to refuse the recognition and enforcement of foreign arbitral awards in Germany.[93] Moreover, there

[89] Articles 1514 and 1520.
[90] Cour de cassation [French Court of Cassation], 06-15320, 4 June 2008 reported in (2008) Revue de l'Arbitrage no 1, 160-161, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 2008,* (Kluwer Law International, vol XXXIII, 2008) 489.
[91] Cour d'Appel [French Court of Appeal], 10 January 2008 reported in (2008) Revue de l'Arbitrage no 1, 161, cited in van den Berg, Albert Jan (ed), above n 90, 482.
[92] Cour de cassation [French Court of Cassation], 13 October 1981 reported in (1983) Revue de l'Arbitrage, 63-68, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 1986,* (Kluwer Law International, vol XI, 1986) 493.
[93] Bundesgerichtshof [Federal Supreme Court], III ZR 269/8838, 18 January 1990, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 1992*, (Kluwer Law International, vol XVII, 1992) 504; See also

were efforts to provide the definition of the public policy exception applied to arbitration matters by the German courts such as 'a grave defect that touches the foundation of the State and economic functions'[94] and 'when recognition leads to a result which is manifestly irreconcilable with a fundamental principle of German law, and particularly with a basic of civil right (*Grundrechte*).'[95]

There are also some clarifications identified by the German courts such as:

- Foreign judgments and foreign arbitral awards should be treated using the same standard which is the narrow concept of public policy.[96]
- In case of proper notification, if a party fails to take part in the arbitration proceeding on his own, the recognition and enforcement of the arbitral awards from the tribunal will not violate German public policy by this cause.[97]
- The fact that the arbitration tribunal did not apply the contractually agreed law to the merits of the dispute does not establish the public policy defence.[98]
- If there is an alleged procedural fraud and there is no criminal proceeding because of any grounds but lack of evidence, the public policy exception cannot be invoked.[99]

It is obvious that the German courts construe the concept of the public policy exception as outlined in the *New York Convention*, ie, using the international standard.

(c) Switzerland

With respect to the recognition and enforcement of foreign arbitral awards, art 194 of the Swiss arbitration law governing international arbitration[100] simply refers to the provisions in

Oberlandesgericht Karlsruhe [Higher Regional Court of Karlsruhe], 9 Sch 2/09, 4 January 2012, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 2013,* (Kluwer Law International, vol XXXVIII, 2013) 381.

[94] Bundesgerichtshof [Federal Supreme Court], 15 May 1986, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 1987,* (Kluwer Law International, vol XII, 1987) 489; See also Bundesgerichtshof [Federal Supreme Court], 14 April 1988, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 1990*, (Kluwer Law International, vol XV, 1990) 453.

[95] Oberlandesgericht Hamburg [Hamburg Court of Appeal], 26 January 1989, cited in van den Berg (1992), above n 93, 493.

[96] Bundesgerichtshof [Federal Supreme Court], 15 May 1986, cited in van den Berg (1987), above n 94, 489.

[97] Landgericht Bremen [Bremen Regional Court], 8 June 1967, cited in Sanders, Pieter (ed), Yearbook Commercial Arbitration 1977 (Kluwer Law International, vol II, 1977) 234.

[98] Landgericht Zweibrucken [Zweibrucken Regional Court], 11 January 1978, cited in Sanders, above n 82, 262.

[99] Bundesgerichtshof [German Federal Court of Justice], III ZB 40/12, 30 January 2013, cited in van den Berg (2013), above n 93, 392.

the *New York Convention*. Thus, it does not specify explicitly what type of public policy is to be applied to the public policy exception. However, the Swiss courts have made it clear that the narrow standard of international public policy is to be applied to the enforcement of foreign arbitral awards cases.[101]

In addition, the Swiss courts have tried to define the public policy exception applied to foreign arbitral awards. For instance,

> 'a violation of Swiss public policy will only be deemed to be present where the innate feeling of justice is hurt in an intolerable manner, where fundamental provisions of the Swiss legal order have been disregarded, or where the Swiss legal thinking compels prevalence over the applicable or applied law.'[102]; and
>
> 'a foreign (arbitral) decision violate[s] Swiss public policy when [it] manifestly contrast[s] with justice as understood in the Swiss legal system, and den[ies] its fundamental principles, either substantial or formal.'[103]; and
>
> 'the presence of violation of the fundamental principles of the Swiss legal system, which hurt the innate feeling of justice in an intolerable manner.'[104]

There are also further clarifications concerning the public policy exception made by the Swiss courts such as:

- The enforcing court has no power to review the merits of an arbitral award.[105]
- The burden of proof is placed on the party opposing the enforcement of an arbitral award.[106]

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[100] See Lawrence, above n 32.
[101] Obergericht of Basel [Court of Appeal of the Canton of Basel-Stadt], 3 June 1971, cited in Sanders, above n 82, 310; See also Bezirksgericht, Affoltern am Albis [District Court of Affoltern am Albis], 30, 26 May 1994, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 1998,* (Kluwer Law International, vol XXII, 1998) 758; Tribunal Federal [Federal Supreme Court of Switzerland, 1st Civil Law Chamber], 8 December 2003, van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 2004,* (Kluwer Law International, vol XXIX, 2004) 838; Tribunal Federal [Federal Supreme Court of Switzerland, 1st Civil Law Chamber], 4A 233/2010, 28 July 2010, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 2011,* (Kluwer Law International, vol XXXVI, 2011) 338.
[102] Obergericht of Basel [Court of Appeal of the Canton of Basel-Stadt], 3 June 1971, cited in Sanders (1979), above n 82, 310.
[103] Camera di Esecuzione e Fallimenti, Canton Tessin [Court of Appeal of the Canton of Ticino, Execution and Bankruptcy Chamber], 19 June 1990, cited in van den Berg (1995), above n 82, 762.
[104] Tribunal Federal [Federal Supreme Court of Switzerland, 1st Civil Law Chamber], 8 February 1978, cited in van den Berg (1986), above n 92, 539; See also Cour de Justice, Geneva [Court of Appeal of the Canton of Geneva], 11 December 1997, cited in van den Berg (1998), above n 101, 768.
[105] Tribunal Federal [Federal Supreme Court of Switzerland, 2nd Civil Law Chamber], 5A_427/2011, 10 October 2011, cited in van den Berg (2012), above n 21, 303.

- The narrower standard of public policy is applied to foreign arbitral awards in the context of enforcement than the one applied to the annulment of arbitral awards made in Switzerland.[107]

- The recognition and enforcement of foreign court decisions and arbitral awards is under the same standard.[108]

- The public policy exception includes both substantive and procedural public policy.[109]

- A foreign arbitral award rendered by a sole arbitrator who is a drafter of the underlying contract and the lawyer of both parties causes the impartiality of the arbitrator and then violates the Swiss public policy.[110]

It can be observed that the Swiss courts apply the public policy exception to foreign arbitral awards narrowly. Thus, the practice of the Swiss courts in this aspect is compatible to the *New York Convention*. Even though the exact same term is used as a ground to annul international arbitral awards and to refuse the recognition and enforcement of foreign arbitral awards, the Swiss courts make it clear in their decisions that the two public policy exceptions are different.

French, German, and Swiss courts have consistently applied the narrow standard of international public policy that is compatible to the international standard under the *New York Convention*. Although the term used in the public policy exception of the French arbitration law is more specific than that of the German and Swiss arbitration laws, the courts in France, Germany, and Switzerland apply the same standard.

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[106] Bezirksgericht, Zurich [District Court of Zurich], 14 February 2003, cited in van den Berg (2004), above n 101, 827; See also Bundesgerichtshof [Federal Supreme Court of Switzerland, 1st Civil Law Chamber], 4 October 2010, cited in van den Berg (2011), above n 101, 342.
[107] Cour De Justice (First Section), Canton de Geneva [Court of Appeal of the Canton of Geneva], 17 September 1976, cited in Sanders (1979), above n 82, 311; See also Camera di Esecuzione e Fallimenti, Canton Tessin [Court of Appeal of the Canton of Ticino, Execution and Bankruptcy Chamber], 19 June 1990, cited in van den Berg (1995), above n 82, 762.
[108] Tribunal Federal [Federal Supreme Court of Switzerland, 2nd Civil Law Chamber], 5A_427/2011, 10 October 2011, cited in van den Berg (2012), above n 21, 302.
[109] Tribunal Federal [Federal Supreme Court of Switzerland, 1st Civil Law Chamber], 8 December 2003, cited in van den Berg (2004), above n 101, 839; See also Bundesgericht [Federal Supreme Court of Switzerland, 2nd Civil Law Chamber], 5A_754/2011, 2 July 2012, cited in van den Berg (2012), above n 21.
[110] Bezirksgericht, Affoltern am Albis [District Court of Affoltern am Albis], 30, 26 May 1994, cited in van den Berg (1998), above n 101, 759.

2 *Common Law Countries*

In the common law system, judge made law gives the same effect as statutory. When national courts in the common law countries interpret the laws, it becomes binding. Sometimes, the courts provide clarification and further details of the laws in their decisions. Regarding the public policy exception in arbitration matters, the Singaporean, English, and American courts application of the public policy exception will be examined.

(a) Singapore

Singaporean courts' decisions have identified the narrow standard of international public policy to be applied when the public policy exception is raised in arbitration matters.[111] Apparently, the restrictive interpretation and application of the public policy exception has been adopted in case law that a foreign arbitral award must be enforced unless 'exceptional circumstances exist'[112] or the award 'offends against [Singapore's] basic notions of justice and morality.'[113] It can be observed that Singaporean courts derive the definition of the public policy exception from other jurisdictions: New Zealand, the United Kingdom and the United States.[114] Hence, the definition of the public policy exception taken by the Singaporean courts is

> 'where the holding of an arbitral award would shock the conscience, was clear injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public, or would violate the forum states most basic notions of morality and justice.'[115]

Moreover, the further clarification concerning the procedural public policy exception has been provided by Singaporean courts that:

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[111] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 [59] (Court of Appeal); See also *Strandore Invest A/S and others v Soh Kim Wat* [2010] SGHC 151 (14 May 2010) [26] (Quentin Loh JC) (High Court); *Strandore Invest A/S and others v Soh Kim Wat [*2010] SGHC 174 (10 June 2010) [15] (Quentin Loh J) (High Court).

[112] *Hainan Machinery Import and Export Corporation v Donald & McArthy Pte Ltd* [1995] 3 SLR(R) 354, [45] (Judith Prakash J) (High Court).

[113] *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174, [75] (Judith Prakash J) (High Court).

[114] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 [59] (Court of Appeal); See also *Strandore Invest A/S and others v Soh Kim Wat* [2010] SGHC 151 (14 May 2010) [26] (Quentin Loh JC) (High Court); *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2013] SGHC 248 (14 November 2013) [37] (Belinda Ang Saw Ean J) (High Court).

[115] *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2013] SGHC 248 (14 November 2013) [37] (Belinda Ang Saw Ean J).

- An arbitral award procured through fraud during the arbitration proceedings like bribery, corrupt the professional integrity and independence of the tribunal, or wilful destruction or withholding of evidence violates the public policy.[116]

- Mistakes of fact or of law by the arbitration tribunal are not sufficient to establish the public policy exception as a ground to set aside or refuse the enforcement of arbitral awards in Singapore.[117]

- The burden of proof is placed on the party resisting the enforcement of an arbitral award.[118]

(b) United Kingdom

English courts have construed the public policy exception narrowly[119] that enforcement of an award under the *New York Convention* should be enforced 'except in certain limited cases.[120] There are attempts to provide the definition of the public policy exception; for example, 'the forum State's most basic notions of morality and justice',[121] and

> 'the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed number of the public on whose behalf of the State are exercised'[122]

The English courts have also provided clarification in cases dealing with the public policy exception such as:

- Reviewing the merits of an arbitral award should not be done.[123]

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[116] *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871, [139] (Chan Seng Onn J) (High Court); See also *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1, [48] (Judith Prakash J) (High Court).
[117] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597, [54] (Court of Appeal); See also *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2013] SGHC 248 (14 November 2013) [41] (Belinda Ang Saw Ean J).
[118] *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2013] SGHC 248 (14 November 2013) [45] (Belinda Ang Saw Ean J).
[119] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Ors.* [1998] 4 All ER 570, 418; See also *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm.) 315; *Tongyuan (USA) International Trading Group v Uni-Clan Limited* 2001 WL 98036.
[120] *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm.) 146, 222.
[121] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Ors.* [1998] 4 All ER 570, 418.
[122] *Deutsche Schachtbau-und Tiefbohr-Gesellschaft mbH v Shell International Petroleum Co. Ltd.* [1990] 1 AC 295.

- Errors of law or of facts are not sufficient to establish the public policy ground in an enforcing arbitral award case.[124]

- The burden of proof is placed on the party resisting to comply with the arbitral award.[125]

- The *prima facie* approach has been taken in dealing with the public policy exception.[126]

- The same standard is applied to the enforcement of foreign judgments and foreign arbitral awards.[127]

- In some cases, the English courts mentioned the balance between the policy of finality of arbitral award and the public policy of the State that the two policies are to be weighed against each other.[128]

However, it was once claimed that none of the English courts had applied the public policy exception to bar the enforcement of arbitral awards.[129] *Soleimany v Soleimany*[130] is the first case where the court refused to enforce the arbitral award on the public policy ground.[131]

In this case, a father and son entered into an agreement that the son smuggled valuable carpets out of Iran, and the carpets would be sold by the father in the United Kingdom. The dispute arose about the division of the proceeds of sale and was brought before the Beth Din, the Court of the Chief Rabbi in London, which applied Jewish law. Under Jewish law, the rights of the parties overrode the breach of Iranian revenue and export control laws. Thus, the

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[123] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Ors*. [1998] 4 All ER 570; see also *Soinco SACI & Anor v Novokuznetsk Aluminium Plant & Ors.* [1998] CLC 730; *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm.) 146.
[124] *Deutsche Schachtbau-und Tiefbohrgesellscharft mbH v Ras Al Khaimah National Oil Co.* [1987] 2 All ER 769, 1034; See also *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005] APP.L.R., (Commerical Court) (27 April 2005) [51].
[125] *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm.) 315, 324; See also *Gater Assets Limited v Nak Naftogaz Ukrainiy* [2007] EWCA Civ 988 (17 October 2007) [15].
[126] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Anor* [1999] 3 All ER 864, 1191.
[127] *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm.) 315; See also *Soleimany v Soleimany* [1999] QB 785.
[128] *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm.) 315; See also *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Ors.* [1998] 4 All ER 570, 430; *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Anor* [1999] 3 All ER 864, 1191.
[129] Michael Kerr, 'Concord and Conflict in International Arbitration' (1997) 13(2) *Arbitration International* 121, 140.
[130] *Soleimany v Soleimany* [1999] QB 785.
[131] Loukas A Mistelis, Julian D M Lew and Stefan Michael Kroll, 'Chapter 26 Recognition and Enforcement of Foreign Arbitral Awards' in Julian D M Lew, Loukas A Mistelis and Stefan Kroll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 687, 724.

arbitral award was rendered in favour of the son. The father then failed to comply with the award, so the son sought the enforcement of the arbitral award in the United Kingdom. During the proceedings, the father argued that the underlying agreement and transaction were illegal, and the enforcement of the arbitral award would be contrary to English public policy. Consequently, the enforcement of the arbitral award was refused due to the public policy exception: illegality.

There is an interesting difference between two cases in the United Kingdom, namely, *Westacre Investments Inc. v Jugoimport-SDPR Holdings Co. Ltd. & Anor*[132] and *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*.[133] The courts dealt with the enforcement of arbitral awards where the underlying contracts were alleged to be illegal in the place of performance on the grounds of involving personal influence and maybe bribery. The underlying contracts in both cases are contrary to the law of the place of performance: Kuwait and Algeria respectively, but they are not contrary to the proper law governing the arbitration agreement and the curial law. Moreover, the arbitration tribunals did decide that the underlying contracts were not illegal. The only difference in the fact of these two cases is that the resisting party in the *Westacre case* filed the application to set aside the award to the court at the seat and failed while the resisting party in the *Omnium case* did not. The question appears to be whether the court in the enforcing State should allow the resisting party to re-open the facts. In the *Westacre case*, Waller LJ in the Court of Appeal stated that

> 'the answer is that so far as public policy is concerned it is always unattractive for one party to be able to take the point, but the English court is concerned with the integrity of its own system, and concerned that its executive power is not abused. If the agreement represented a contract to pay a bribe, Westacre should not be entitled to enforce the agreement before an English court and should not be entitled to enforce an award based on it.'[134]

In this case, Mantell LJ did make the dissenting opinion agreed upon by Sir David Hirst that

> 'It is of crucial importance to evaluate both the majority decision in the arbitration and the ruling of the Swiss Federal Court, Swiss law being both the proper law of the contract and the curial law of the arbitration and Switzerland, like the UK, being a party to the *1958 New York Convention*. From the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected. Had it not been rejected the claim would have failed,

[132] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Anor* [1999] 3 All ER 864.
[133] *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm.) 146.
[134] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Anor* [1999] 3 All ER 864, 1196.

> Swiss and English public policy being indistinguishable in this respect. Authority apart, in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award.'[135]

In the *Omnium case*, Walker J in the High Court of Justice, Queen's Bench Division stated that

> 'I am not adjudicating upon the underlying contract. I am deciding whether or not an arbitration award should be enforced in England. In this context it seems to me that (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point. Indeed, the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced.'[136]

These two cases were decided in the same month and year, but the results are very different. The inconsistency of how far the English courts will go in this situation may cause some hesitancy on the part of businesspeople. Reopening the case is obviously unfavourable, especially when the issue has been raised and failed without further very strong evidence.

(c) United States

The courts in the United States apply the narrow standard of international public policy to arbitral awards.[137] The American courts made efforts to define the public policy exception under the *New York Convention* in many cases. For instance, the enforcement of an arbitral award would 'violate the forum state's most basic notions of morality and justice',[138] violate

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[135] Ibid.
[136] *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm.) 146.
[137] *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA),* 508 F 2d 969, 974 (2nd Cir, 1974); See also *Union Employers Division of Printing Industry of Washington, D.C., Inc. v Columbia Typographical Union no. 101,* 353 F Supp 1348, 1349 (D DC, 1973); Fotochrome Inc. v Copal Co., Ltd., 517 F 2d 512, 516 (2nd Cir, 1975); Biotronik Mess-Und Therapiegeraete GmbH & Co. v Medford Medical Instrument Co., 415 F Supp 133, 139 (D NJ, 1976); Antco Shipping Co. Ltd. v Sidermar S.p.A., 417 F Supp 207, 216 (D NY, 1976); Brandeis Intsel Ltd. v Calabrian Chemicals Corp., 656 F Supp 160, 166 (SD NY, 1987); Telenor Mobile Communications AS v Storm LLC, 584 F 3d 396, 405 (2nd Cir, 2009); Camilo Costa, et al. v Celebrity Cruises Inc., 768 F Supp 2d 1237, 1241 (SD Fla, 2011); TermoRio S.A. E.S.P. v Electranta S.P., 487 F 3d 928, 938 (DC Cir, 2007); Lito Martinez Asignacion v Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG, 783 F 3d 1010, 1016 (5th Cir, 2015).
[138] *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA),* 508 F 2d 969, 973 (2nd Cir, 1974); See also *Biotronik Mess-Und Therapiegeraete GmbH & Co. v Medford Medical Instrument Co.,* 415 F Supp 133, 140 (D NJ, 1976); *Jorf Lasfar Energy Company, S.C.A. (Morocco) v AMCI Export Corporation (US)* (WD Pa, Civil Action No 2:05-cv-00423-GLL, 5 May 2006); *NTT Docomo, Inc. v*

the 'law or conduct contrary to accepted public policy',[139] 'conflict with other laws and legal precedents and clearly violate an identifiable public policy',[140] and be 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.'[141] Moreover, the American courts provided clarification for some particular points such as:

- The limited judicial review includes no review on the merits.[142]
- '[E]rroneous legal reasoning or misapplication of law is generally not a violation of public policy.'[143]
- Manifest disregard of law does not necessarily establish the public policy defence.[144]
- The burden of proof is placed on the party defending against enforcement.[145]
- There needs to be *prima facie* evidences: very strong, clear, and direct evidences in order to establish the public policy defence.[146]
- Challenges that were not raised during the arbitration cannot be mentioned in front of the reviewing court. '[I]t is well settled that a party may not sit idle

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Ultra d.o.o. (SD NY, 10 Civ 3823 (RMB) (JCF), 12 October 2010); *Chevron Corp. v Republic of Ecuador,* 949 F Supp 2d 57, 69 (D DC, 2013).

[139] *Gulf States Telephone Co. v Local 1692, International Brotherhood of Electrical Workers, Aflcio, et al.,* 416 F 2d 198, 201 (5th Cir, 1969).

[140] *W.R. Grace and Company v Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 US 757, 766 (1983); See also *United Paperworkers International Union, AFL-CIO, et al. v Misco, Inc.,* 484 US 29, 43 (1987); *ESCO Corporation v Bradken Resources Pty Ltd.* (D Or, Civ No 10-788-AC, 31 January 2011).

[141] *Chamis Tahan v John G. Hodgson*, 662 F 2d 862, 866 (DC Cir, 1981); See also *TermoRio S.A. E.S.P. v Electranta S.P.*, 487 F 3d 928, 938 (DC Cir, 2007); *Tamimi Global Company Limited v Kellogg Brown & Root LLC, et al.* (SD Tex, Civil Action No H-11-0585, 24 March 2011 and 12 May 2011).

[142] *Union Employers Division of Printing Industry of Washington, D.C., Inc. v Columbia Typographical Union* no. 101, 353 F Supp 1348, 1349 (D DC, 1973); See also *United Steelworkers of America v Enterprise Wheel and Car Corp.,* 363 US 593, 596 (1960); *Stead Motors of Walnuts Creek v Automotive Machinists Lodge no. 1173, International Association of Machinists and Aerospace Workers*, 886 F 2d 1200, 1212 (9th Cir, 1989).

[143] *NTT Docomo, Inc. v Ultra d.o.o.* (SD NY, 10 Civ 3823 (RMB) (JCF), 12 October 2010); See also *Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*; Et Al, 364 F 3d 274 (5th Cir, 2004); *Chevron Corp. v Republic of Ecuador*, 949 F Supp 2d 57, 71 (D DC, 2013).

[144] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Jack Bobker,* 808 F 2d 930, 934 (2nd Cir, 1986); See also *Brandeis Intsel Ltd. v Calabrian Chemicals Corp.,* 656 F Supp 160, 165 (SD NY, 1987); *Hall Street Associates v Mattel, Inc.,* 552 US 576 (2008); *Prime Therapeutics LLC v Omnicare, Inc.*, 555 F Supp 2d 993, 999 (D Minn, 2008).

[145] *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA)*, 508 F 2d 969, 973 (2nd Cir, 1974); See also *Fitzroy Engineering, Ltd. v Flame Engineering, Inc.* (ND Ill, 94 C 2029, 13 December 1994); *Overseas Cosmos, Inc. v NR Vessel Corp.* (SD NY, 97 Civ 5898 (DC), 8 December 1997); *Telenor Mobile Communications AS v Storm* LLC, 584 F 3d 396, 405 (2nd Cir, 2009); *Encyclopaedia Universalis S.A. v Encyclopaedia Britannica, Inc.*, 403 F 3d 85, 91 (2nd Cir, 2005).

[146] *Transmarine Seaways Corp. of Monrovia v Marc Rich & Co.* A.G., 480 F Supp 352, 357 (SD NY, 1979); See also *Fitzroy Engineering, Ltd. v Flame Engineering, Inc.* (ND Ill, 94 C 2029, 13 December 1994).

through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse.'[147]

- Article V of the *New York Convention* is also recognised as exhaustive grounds for setting aside.[148]

- The American courts balanced between the two public policies: one favouring international arbitration and the other concerning the public policy of the United States.[149]

The Singaporean, English, and American courts have obviously applied the narrow standard of the international public policy. Moreover, the courts attempted to define the public policy exception as precisely as possible. Also, it seems that the courts have tried to shape the border of the public policy exception. It is to be noted that, unlike national courts in the civil law countries, national courts in the common law countries often cited courts' decisions from other jurisdictions. Since the public policy exception is to be applied in accordance with the *New York Convention*, it is not surprising.

3 *Summary Table*

The national courts' application of the public policy exception as a bar to the recognition and enforcement of foreign arbitral awards mentioned in this section will be summarised in the following table:

[147] *Nick Marino v Writers Guild of America, East, Inc.*, 992 F 2d 1480, 1484 (9th Cir, 1993); See also *Wendell Wellman v Writers Guild of America, West, Inc.*, 146 F 3d 666, 673 (9th Cir, 1998); *ESCO Corporation v Bradken Resources Pty Ltd.* (D Or, Civ No 10-788-AC, 31 January 2011).
[148] *China Minmetals Materials Imp. and Exp. Co. Ltd. v Chi Mei Corp.*, 334 F 3d 274, 283 (3rd Cir, 2003); See also *Jorf Lasfar Energy Company, S.C.A. (Morocco) v AMCI Export Corporation* (US) (WD Pa, Civil Action No 2:05-cv-00423-GLL, 5 May 2006).
[149] *Encyclopaedia Universalis S.A. v Encyclopaedia Britannica, Inc.*, 403 F 3d 85, 91 (2nd Cir, 2005); See also *Ameropa AG v Havi Ocean Co. LLC* (SD NY, 10 Civ 3240 (TPG), 16 February 2011); *Tamimi Global Company Limited v Kellogg Brown & Root LLC, et al.* (SD Tex, Civil Action No H-11-0585, 24 March 2011 and 12 May 2011); *Belize Social Development Limited v The Government of Belize* (D DC, Civil Case No 09-2170 (RJL), 11 December 2013).

Table 4.4: The Summary Table of Judicial Application of the Public Policy Exception under the *New York Convention*

Practice of National Courts of the Selected Countries	Civil Law Countries			Common Law Countries		
	France	Germany	Switzerland	Singapore	The UK	The US
1. The narrow standard of international public policy is applied to foreign arbitral awards.	/	/	/	/	/	/
2. Mistakes in facts or in law by arbitrator(s) are not sufficient to establish the public policy exception.	/	/		/	/	/
3. There should be no review on the merits of an arbitral award.	/		/		/	/
4. The burden of proof is placed on the party resisting to comply with the arbitral award.			/	/	/	/
5. Foreign judgments and arbitral awards are to be treated under the same narrow standard of public policy exception.		/	/		/	
6. The *prima facie* approach needs to be applied when the public policy exception is considered.					/	/
7. The courts balance between the policy of finality of arbitral award and the public policy of the State.					/	/

8. The public policy exception includes both substantive and procedural grounds.			/			
9. If a party is proper notified but fails himself to take part of the arbitral proceedings, the enforcement of the arbitral awards rendered by the tribunal will not violate the public policy		/				
10. If there is an alleged procedural fraud and there is no criminal proceeding because of any grounds but lack of evidence, the public policy exception cannot be invoked.		/				
11. The narrower standard of public policy is applied to foreign arbitral awards than domestic ones.			/			
12. A foreign arbitral award rendered by a sole arbitrator who is a drafter of the underlying contract and the lawyer of both parties causes the impartiality of the arbitrator and violates the public policy.			/			
13. An arbitral award procured through fraud during the arbitration proceedings like bribery, corrupt the professional integrity and independence of the tribunal, or wilful destruction or withholding of evidence violates the				/		

public policy.						
14. Challenges that was not raised during the arbitration proceedings cannot be mentioned in front of the reviewing court.						/

From the table, it can be observed that these selected countries share some common grounds and practice – something to be desired when applying the public policy exception to foreign arbitral awards. Even though the practice of national courts of these countries is very consistent, the English courts lately seem to be conflicting. As mentioned earlier, in some cases, the English courts seemed to take more control over arbitral awards than what they did historically. Still, the public policy exception rarely bars the enforcement of foreign arbitral awards. It should also be pointed out that although international public policy consists of a few categories like fundamental principles of law, morality, and *lois de police*, national courts of the selected countries have not categorised the presented grounds into categories. They simply apply one very narrow standard of public policy to all foreign arbitral awards.

Even though it has been claimed that most national courts have construed the public policy exception narrowly, there are a handful of countries where their national courts apply a broader standard.[150] For instance, Chinese arbitration laws[151] refer to 'social and public interest' as a ground to set aside or to refuse the enforcement of arbitral awards instead of public policy or *ordre public*. There is a guideline for interpreting the 'social and public interest' consideration saying that it includes a breach of fundamental principles of Chinese law, the State Sovereignty or national security, or the Chinese customs and basic moral standards.[152] Therefore, the 'social and public interest' exception is broader than the standard of the public policy exception under the *New York Convention* because it includes 'tradition,

[150] Nigel Blackaby, above n 1, 623.
[151] *Arbitration Law of the People's Republic of China* (People's Republic of China) President of the People's Republic of China, Order No 31, 31 August 1994, art 58; See also *Civil Procedure Law of the People's Republic of China* (People's Republic of China) National People's Congress, Order No 44, 9 April 1991; as amended by the Decision of 31 August 2012 on Amending the Civil Procedure Law of the People's Republic of China, arts 237 and 274 (replacing arts 217 and 260 of the former version of *the Civil Procedure Law of the People's Republic of China* respectively).
[152] The Supreme People's Court, 'Explanations on and Answers to Practical Questions in Trial of Foreign-Related Commetcial and Maritime Cases (No.1)' (8 April 2004), art 43, cited in Kun Fan, 'Recognition and Enforcement of Arbitral Awards' in *Arbitration in China: A Legal and Cultural Analysis, China and International Economic Law Series* (Hart Publishing, 2013) 71, 100.

custom or societal sentiment.'[153] Consequently, there has been concern that the 'social and public interest' consideration would bar the enforcement of arbitral awards in order to protect local interest.[154]

An example of where a Chinese court protected a region's local interest is *Dongfeng Garments Factory of the Kai Feng City and Tai Chu International Trade (HK) Co., Ltd. v Henan Garments Import and Export (Group) Co*.[155] In this case, the three parties established a joint venture in China, namely Henan Kaida Garments Co. The contract contained an arbitration clause which specified the China International Economic and Trade Arbitration Centre (CIETAC) as the arbitration institution organising the arbitration proceedings. The conflict arose when Henan Garments breached the contract by not fulfilling its obligations. As a result, Dongfeng Garments instituted arbitration proceedings against Henan Garments and Tai Chu in 1991. In 1992, both a partial and final arbitral awards were rendered in favour of Dongfeng Garments. Then, soon after the arbitral awards were rendered, Dongfeng Garments sought the enforcement of the arbitral awards before the Zhengzhou Intermediate People's Court (IPC).

The Zhengzhou IPC held that

> 'according to the current [S]tate policies, laws, and regulations, if the enforcement of an arbitral award would seriously harm the [S]tate's economic interest and social public interest, or adversely affect the foreign trade order of the [S]tate, the court shall rule to refuse to enforce it in accordance with [art] 260 (2) of the [People's Republic of China (PRC)] Civil Procedure Law (1991).'[156]

It has been observed that the Zhengzhou IPC decision did not provide detailed reasoning. Afterward, Dongfeng Garments appealed the decision of the Zhengzhou IPC to the Zhengzhou Higher People's Court (HPC). Surprisingly, 'the case made its way up to the SPC, though it is unclear how.'[157] The Supreme People's Court (SPC) overruled the decision

[153] Lanfang Fei, 'Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach' (2010) 26(2) *Arbitration International* 301, 311; See also Li Hu, 'Enforcement of the International Commercial Arbitration Award in the People's Republic of China' (1999) 16(4) *Journal of International Arbitration* 1, 15.
[154] Fan, above n 152; See also Gary B Born, 'Recognition and Enforcement of International Arbitral Awards' in *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) 3394, 3439.
[155] *Dongfeng Garments v Henan Clothing et al. (1992)*, SPC, 06 November 1992, Kluwerarbitration <http://www.kluwerarbitration.com/CommonUI/chinese-court-decision-summaries.aspx>. This case is believed to be the first case that Chinese courts considered the public policy exception.
[156] Ibid.
[157] Ibid.

of the Zhengzhou IPC and held that '…this Court has examined the case and it is of the opinion that it was incorrect for the Zhengzhou Intermediate People's Court to refuse to enforce the arbitral award on the grounds that enforcement would seriously harm the economic interests of the States'.[158]

This case raised the awareness of the protectionist view of Chinese courts and their lack of understanding of the public policy exception standard taken by the SPC.[159] Moreover, it has been claimed that criticism of protectionism in general and more specifically the decisions in this case triggered the implementation of the Prior Reporting System in China.[160] The Prior Reporting System requires a lower court who decides to annul to refuse enforcement of a foreign-related or foreign award to report that decision to a higher court and if that court agrees, then the matter must be reported to the SPC.[161] A decision to annul or refuse the enforcement of an award can only be made if the SPC confirms that proposed decision. Assumedly, this process occurred in the Dongfeng case, given that the proceedings shifted from the Zhengzhou HPC to the SPC where a decision was made. It has been reported that 'this reporting system has proven to be very efficient and safeguards the enforceability of arbitral awards as the backbone of international commercial arbitration, which the PRC itself wants to promote in order to strengthen its economy in a globalised world'.[162]

Additionally, in *Kangwei Pharmaceutical v Asia Pharmaceutical*,[163] the SPC stated that 'a court could and should review issues of merits in an arbitral award to decide whether the arbitral award breached PRC public policy [known as social and public interest]'.[164] Even though the SPC found that the arbitral award in this case did not violate the social and public

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[158] Michael J Moser, 'China and the Enforcement of Arbitral Awards' (1995) 61(1) *Journal of the Chartered Institute of Arbitrators* 46, 51, cited in Guiguo Wang, 'One Country, Two Arbitration System Recognition and Enforcement of Arbitral Awards in Hong Kong and China' (1997) 14(1) *Journal of International Arbitration* 5, 35.

[159] Wang Sheng Chang, 'The Practical Application of Multilateral Conventions Experience with Bilateral Treaties Enforcement of Foreign Arbitral Awards in the People's Republic of China' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series* (Kluwer Law International, 1999) 461, 491.

[160] See Moser, above n 158.

[161] Jan Paulsson and Lise Bosman (eds), 'Notice of the Supreme People's Court on Handling by People's Court of Relevant Issues Pertaining to Foreign-related Arbitration and Foreign Arbitration' in *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International, 2008) 1.

[162] Christine Heeg and Thomas Weimann, 'Chapter II: The Arbitration Agreement and Arbitrability, CEAC Arbitration - Bridging the Gap between China and Europe' in Peter Klein et al (ed), *Austrian Yearbook on International Arbitration* (Manz'sche Verlags - und Universitatsbuchhandlung, 2013) vol 2013, 125, 133.

[163] *Kangwei Pharmaceutical v Asia Phamaceutical (2012)*, Supreme People's Court of the People's Republic of China, 19 December 2012 Kluwerarbitration <http://www.kluwerarbitration.com/CommonUI/chinese-court-decision-summaries.aspx>.

[164] Ibid.

interest of the PRC, it seems that the court exceeded its power to review a foreign arbitral award165 according to the international standard.[166]

Notably, the protectionist viewpoint of the local Chinese courts mentioned above is deemed to be similar to that of the Thai courts evinced by the Thai courts decisions mentioned in Chapter III. Randomly, the courts of both States review the merits of cases in order to determine whether or not an arbitral award in China is contrary to its social and public interest or in Thailand its public order or good morals or not. Also, they tend to be extremely protective when the enforcement of an arbitral award might affect the society economically.

In addition, a number of arbitral awards have not been enforced by Russian courts on the ground of the public policy exception because the awards include punitive damages or impose disproportionate damages in their view.[167] Nevertheless, it should be noted that the Russian courts have normally refused to review the merits of arbitral awards.[168]

Although the narrow standard of international public policy has been identified and guided by international organisations, judges, and scholars, there are still some countries applying a broader standard. Thailand is also one of them. As discussed earlier, the narrow standard of the public policy exception has been applied and interpreted by the national courts of the main selected countries, and that is compatible with the intention of the *New York Convention*. Thus, Thailand should follow the application of the public policy exception by the main selected countries' national courts so that its law and practice will align with the *New York Convention*. Then, Thailand will gain the trust of investors and businesspeople in investing and arbitrating in Thailand. Nonetheless, there is another significant factor that would influence how national courts apply the public policy exception and that is legal culture.

[165] Although this case is concerning a foreign-related arbitral award, the same standard would be applied to a foreign-related and a foreign arbitral award in China.
[166] Hu, above n 153, 17.
[167] Nigel Blackaby, above n 1, 646; See, eg, Presidium of the Supreme Court of Arbitration of the Russian Federation, 5243/06, 19 September 2006, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 2007*, (Kluwer Law International, vol XXXII, 2007) 485-488.
[168] See, eg, Federal Arbitration Court of Northwestern District, A42-4747/04-13, 9 December 2004, cited in van den Berg (2008), above n 90, 658-665; Supreme Court of Arbitration of the Russian Federation, 9899/09, 11 September 2009, cited in van den Berg (2012), above n 21, 285-289; Federal Arbitration Court of Northwestern District, A05-10560/2010, 10 March 2011, cited in van den Berg (2011), above n 101, 322-324.

E *Influence of Legal Culture on the Application of the Public Policy Exception*

Since legal culture of a State differs from that of others, the influence of it would lead national courts to apply the public policy exception differently.[169] The issues concerning legal culture identified in Chapter III are the strict interpretation of the laws in some civil law countries, the absolute concept of sovereign immunity, and the political intervention on arbitration matters.

1 *The Strict Interpretation of the Black Letter Law*

As noted, it is the nature of the civil law system that laws are codified, and judges cannot make law. Judges interpret and apply the laws according to how the laws are expressed, ie, by the letter of the laws. However, it is obvious that not every court in civil law countries interprets the law literally, ie, according to the black letter law, but Thai courts are the exception. As mentioned in Chapter III, Thai courts seem to interpret the law strictly in accordance with the black letter law. Thus, the ambiguity of a law is likely to lead to unusual decisions. So does the application of the public policy exception.

Some civil law countries, such as France, Portugal, Lebanon, Algeria, and Tunisia, crystallise the public policy exception by indicating the type of international public policy to be applied in their arbitration laws. It is also to be noted that the practice occurs only in civil law countries.

In common law countries, like Singapore, the United Kingdom, and the United States, their arbitration laws contain the broad public policy exception provision. Nonetheless, judges have made it clear that the narrow standard of international public policy should be applied to arbitration matters in the courts' decisions as mentioned above. Interestingly, many civil law countries take the same approach as the common law countries with no practical problems like Germany and Switzerland.

Therefore, it can be concluded that the French model of indicating 'international public policy' in the legislation would be suitable for the legal culture of some civil law countries.

[169] Thailand The Arbitration Office, *Alternative Mechanism for the Settlement of Transnational Commercial Disputes* (1998) 87.

2 *Sovereign Immunity*

The underlying principle of the doctrine of sovereign immunity is that 'one state is not subject to the jurisdiction of another state.'[170] As mentioned in Chapter III, sovereign immunity is divided into two categories: immunity from jurisdiction and immunity from execution. It is certain that the waiver of immunity from jurisdiction must precede the execution, but it is not necessary that the actual execution of arbitral awards will follow.[171] In the area of international commercial arbitration, it has already been settled that '[a] State does not enjoy immunity from the jurisdiction of the arbitral tribunal'[172] since an arbitration agreement is construed as an implied waiver of immunity from jurisdiction.[173] Therefore, only the sovereign immunity from execution is to be examined.

Traditionally, the doctrine of sovereign immunity was absolute, so a State and its assets are immune unless there is an express or implied waiver.[174] According to today's business world, 'adherence to a doctrine of absolute immunity would do more harm than good as it would place individuals on a lower pedestal than the state party at the private level.'[175] In the commercial sphere, many States apply the restrictive theory of sovereign immunity distinguishing between sovereign acts (*acta jure imperii*) and commercial activities (*acta jure gestionis*).[176] To clarify the concept of restrictive sovereign immunity, immunity attaches only to sovereign acts but not commercial activities. There are a number of cases in which national courts in various countries apply the restrictive approach to sovereign immunity; for example, *Sedelmayer v Russian Federation*,[177] *Maldives Airports Co. Ltd. v GMR Malé*

[170] Hazel Fox, *The Law of State Immunity* (Oxford University Press Inc., 2nd ed, 2008) 57.
[171] Samarth Sagar, 'Waiver of Sovereign Immunity Clauses in Contracts: an Examination of Their Legal Standing and Practical Value in Enforcement of International Arbitral Awards' (2014) 31(5) *Journal of International Arbitration* 609, 626.
[172] Ibid 615.
[173] Sompong Sucharitkul, *Sixth Report on Jurisdictional Immunities of States and Their Property*, UN GAOR, Agenda Item 3, UN Doc A/CN.4/376 and Add.1 and 2 (31 January and 18 April 1984) [255]; See also *Westland Helicopters Ltd. v Arab Organization for Industrialization (AOI)* (1984) 23 ILM 1071, 1089; *Libyan American Oil Co. (LIAMCO) v Socialist Prople's Republic of Libya* [1980] 62 ILP 225 (Svea Court of Appeal).
[174] Nicholas Brown and James D A Lewis, 'Game of Thrones: a Narrowing Immunity?' (2013) 30(6) *Journal of International Arbitration* 689, 690.
[175] Sagar, above n 171, 622; See also Brown and Lewis, above n 174, 690-691.
[176] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 488; See also Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims Against the State' (2007) 56(2) *International and Comparative Law Quarterly* 371, 373.
[177] *Sedelmayer v Russian Federation* [2011] Nytt Juridiskt Arkiv 475 (Swedish Supreme Court).

International Airport Pte. Ltd.,[178] and *La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC*.[179]

In *Sedelmayer v Russian Federation*, Franz J. Sedelmayer's assets were appropriated by Russian authorities during 1994 to 1996, and the dispute was brought before the arbitration tribunal in accordance with the 1989 bilateral investment agreement between Germany and the Soviet Union. In Stockholm, the award was rendered in favour of Sedelmayer for USD 2.350 million. The arbitral award was then challenged before the Swedish courts, but the challenge did not succeed. Sedelmayer also sought the enforcement of the arbitral award against a block of flats and the rental payments owed by the tenants. The Swedish enforcement authority and the Nacka District Court ruled that the property was immuned from the execution. Later, the Svea Court of Appeal overruled. The Russian Federation appealed the decision of the Svea Court of Appeal to the Swedish Supreme Court. In this case, the Swedish Supreme Court affirmed the decision of the Svea Court of Appeal by applying the doctrine of restrictive immunity. The Swedish Supreme Court determined that 'the only category of usage that unequivocally speaks in favour of immunity is official usage and related usage.[180] The property in this case is used for diverse purposes, and a property not substantially used for official intention will be available for execution.[181]

In *Maldives Airports Co. Ltd. v GMR Malé International Airport Pte. Ltd.*, there was a concession contract between the parties to rehabilitate, expand, modernise, and maintain the Malé International Airport. According to the contract, the government of the Republic of Maldives was subject to payment of a sum of money and allowed GMR to impose a departure fee on passengers; however, the latter condition was later judged illegal by the Malé Civil Court. At the time, the government of the Republic of Maldives negotiated and consented to increase payments to GMR in order to compensate for the loss of profit. Nevertheless, after a change of government in the Republic of Maldives, the new government withdrew the consent. Thus, GMR brought the dispute before an arbitration tribunal in Singapore. Later, GMR received a notice from the Maldives government that the concession contract was void *ab initio*, and the Maldives government would take over the airport. Moreover, the Maldives

[178] *Maldives Airport Co. Ltd. and another v GMR Male International Airport Pte. Ltd.* [2013] SGCA 16 (13 February 2013).
[179] *La Generale des Carrieres et des Mines v F.G. Hemisphere Associates LLC* [2012] UKPC 27 (17 July 2012).
[180] Pal Wrange, 'Sedelmayer v. Russian Federation' (2012) 106(2) *The American Journal of International Law* 347, 351.
[181] *Sedelmayer v Russian Federation* [2011] Nytt Juridiskt Arkiv 475 [16] (Swedish Supreme Court).

government commenced arbitration proceedings requesting, among other things, the tribunal to declare that the concession contract was void. Accordingly, GMR sought an interim injunction from the Singapore High Court to prevent the intervention with the concession contract or taking control of the airport, and the interim injunction was granted.

The Maldives government appealed to the Singapore Court of Appeal arguing that the courts in Singapore had no power to issue the injunction, especially against the government of a foreign State. In this case, the Court of Appeal, by applying the restrictive conception of sovereign immunity, indicated that the Maldives government 'waived any immunity from being subject to the injunction'[182] as provided in cl 23 of the concession contract.[183] Furthermore, the Court of Appeal distinguished between acts done in the exercise of a State's supreme sovereign power and those by private parties.

In *La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC*, FG Hemisphere Associates LLC purchased two substantial ICC arbitral awards against the Democratic of the Congo (the 'DRC'), and sought the enforcement against the assets of La Generale des Carrieres et des Mines, a DRC state-owned entity. The question put to the court was whether the DRC state-owned entity could be considered as part of the DRC. If this is the case, the assets of La Generale des Carrieres et des Mines could be executed in accordance with the two arbitral awards. The judicial committee applied the restrictive approach of sovereign immunity by clarifying the limits of sovereign immunity. In this case, the judicial committee confirmed that a state-owned entity may be liable for the State's debts and *vice versa*.

Obviously, the restrictive concept of sovereign immunity is in favour of international commercial arbitration. Limiting the invocation of sovereign immunity to only sovereign acts would provide any private parties more chance and confidence in the enforcement of arbitral awards against a State party. In addition, the States' courts that have adopted the doctrine of restrictive sovereign immunity are more likely to apply the narrow standard in reviewing arbitral awards.

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[182] *Maldives Airport Co. Ltd. and another v GMR Male International Airport Pte. Ltd.* [2013] SGCA 16 (13 February 2013) [22].

[183] Clause 23 of the concession contract provides:

> To the extent that any of the Parties may in any jurisdiction claim for itself … immunity from service of process, suit, jurisdiction, arbitration … or other legal or judicial process or other remedy …, such Party hereby irrevocably and unconditionally waives any such immunity to the fullest extent permitted by the laws of such jurisdiction.

3 *Political Intervention on Arbitration Matters*

In an international investment regime, the confidence of investors is very important. To encourage the investment and the economic status of a State, investor-state arbitration clauses are contained in international investment treaties. The clauses serve as a protection for businesspeople guaranteeing a tribunal and a judiciary which are free from political influence. However, lately there has been a backlash against investment arbitration preoccupied by some developing countries in Latin America;[184] for example, Bolivia, Ecuador, and Venezuela,[185] which withdrew from the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (also known as the '*Washington Convention*').[186] Recently, Australia is claimed to be the first developed country announcing that investor-state arbitration clauses would not be contained in its future international investment treaties anymore.[187] The reasons are provided in the Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity as follows:[188]

- Investor-state dispute resolution clauses would confer greater legal rights on foreign businesspeople than local businesspeople.
- Investor-state dispute resolution clauses imperil the ability of Australian governments to determine the public policy of the State.

Currently, the trend of subject matters submitted to investor-state arbitration has changed from direct expropriation to environmental regulations.[189] Accordingly, the new trend supports the latter reason mentioned in the Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity.

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[184] Michael Waibel et al, *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010), xxiv.
[185] Daniel de Andrade Levy and Rodrigo Moreira, 'ICSID in Latin America: Where Does Brazil Stand?' in Daniel de Andrade Levy, Ana Gerdau de Borja and Adriana Noemi Pucci (eds), *Investment Protection in Brazil* (Kluwer International, 2013) 17, 17.
[186] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).
[187] Albert Monichino and Alex Fawke, *Australia and the Backlash against Investment Arbitration* (March 2013) ADR Rreporter <http://barristers.com.au/wp-content/uploads/2013/05/Australia-and-the-Backlash-Against-Investment-Arbitration.pdf>.
[188] Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (April 2011) Australian Government <http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf>.
[189] Kenneth J Vandevelde, 'Model Bilateral Investment Treaties: the Way Forward' (2011) 18(1) *Southwestern Journal of International Law* 307, 308-309.

However, there will be negative effects of excluding investor-state arbitration clauses since investors will no longer be protected under the former standard if there are disputes.[190] Foreign investors obviously prefer arbitration over litigation because of unfamiliar procedure and 'antagonistic and antagonistic political or economic interests.'[191] The fact that the Australian government will exclude investor-state arbitration clauses in the future investment treaties[192] will cause a certain amount of reluctance on the part of investors to invest in Australia. Interestingly, even though the new trade policy of Australia is not beneficial to international trade and the development of international arbitration, it does not affect the recent Australian courts' application of the public policy exception.

For example, the courts in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*[193] applied the narrow standard of international public policy. In this case, Uganda Telecom and Hi-Tech entered into an agreement which required Uganda Telecom to provide telecommunications services to Hi-Tech. A dispute had arisen between the parties and Uganda Telecom commenced arbitration in Uganda, alleging that Hi-Tech had failed to provide a guarantee or pay invoices as required by the agreement. Consequently, an arbitrator was appointed by Uganda Telecom, and the arbitration was conducted in Uganda without any participation from Hi-Tech. The arbitrator rendered an award in favour of Uganda Telecom, and Uganda Telecom then applied to the Federal Court of Australia for enforcement of the arbitral award against Hi-Tech according to s 8 of the *Australian International Arbitration Act 1974* (Cth).[194] The main arguments advanced by Hi-Tech were, inter alia, that the amount of general damages awarded by the arbitrator in the award was excessive as it was arrived at by an erroneous reasoning process involving mistakes of fact and law and that the court should refuse to enforce the award since to do so would be contrary to public policy under sub-ss 8(5) and 8(7)[195] of the *Australian International Arbitration Act 1974* (Cth) which set out the

[190] Christoph Schreuer, 'Preventing a Backlash Against Investment Arbitration: Could the WTO be the Solution?' (2011)12 *Journal of World Investment & Trade* 435, 436.
[191] Gary B Sullivan, 'Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits' (1983) 18(2) *Texas International Law Journal* 329, 339.
[192] It should be noted that this policy was adopted only during the Gillard Government.
[193] *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011)* 277 ALR 415 [125]-[126].
[194] *International Arbitration Act 1974* (Cth).
[195] Sections 8(5) and 8(7) of the *International Arbitration Act 1974* (Cth) provides:

> (5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
>
> > (a) that party, being a party to the arbitration agreement in pursuance of which the arbitral award was made, was, under the law applicable to him or her, under some capacity at the time when the agreement was made;

grounds on which a court may refuse to enforce a foreign arbitral award. These provisions of the Act are substantially based on art V of the *New York Convention* and arts 34 and 36 of the *Model Law*. The Federal Court held that the public policy ground for refusal to enforce a foreign arbitral award in sub-s 8(7)(b) of the *Australian International Arbitration Act 1974* (Cth) is to be read narrowly in conjunction with the pro-enforcement purpose of the *New York Convention* and the objects of the *Australian International Arbitration Act 1974* (Cth).[196] For this reason, the Court rejected Hi-Tech's challenge to enforcement of the arbitral award based on the public policy exception since '[e]rroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the *New York Convention*'.[197]

In addition, in *Altain Khuder LLC v IMC Mining Inc.,*[198] Altain Khunder LLC, a Mongolian company and IMC Mining Inc., a company incorporated in the British Virgin Islands entered into the Operations Management Agreement (OMA) concerning an iron ore mine in

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(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
(c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;
(d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.
…

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:
(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
(b) to enforce the award would be contrary to public policy.

(7A) To avoid doubt and without limiting paragraph (7) (b), the enforcement of a foreign award would be contrary to public policy if:
(a) the making of the award was induced or affected by fraud or corruption; or
(b) a breach of the rules of natural justice occurred in connection with the making of the award.

[196] *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 [127]–[129]. The Federal Court in this case cited the United States Court of Appeals' decisions in *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA)*, 508 F 2d 969, 974 (2nd Cir, 1974) and *Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara;* Et Al, 364 F 3d 274 (5th Cir, 2004).

[197] Ibid citing *Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*; Et Al, 364 F 3d 274 (5th Cir, 2004) [133], [134].

[198] *Altain Khuder LLC v IMC Mining Inc* (2011) 246 FLR 47.

Mongolia. The agreement contained an arbitration clause indicating Mongolia as the place of arbitration. In 2009, the dispute arose concerning the provision of services, and Altain commenced an arbitration in Mongolia seeking damages. Later, with the absence of IMC Mining, the arbitration proceedings were conducted, and the arbitration tribunal rendered an arbitral award in favour of Altain. Interestingly, the tribunal ordered another company named IMC Mining Solutions Pty Ltd (IMC Solutions), an Australian company, to make a payment on behalf of IMC Mining. Altain, then, sought the verification of the arbitral award before the Khan-Uul District Court in Mongolia and succeeded.

In 2010, Altain sought to enforce the arbitral award against IMC Mining and IMC Solutions in Victoria, Australia. The Supreme Court of Victoria pointed out that the grounds to refuse the enforcement of foreign arbitral awards are limited as can be seen in sub-ss 8(5) and 8(7) of the *Australian International Arbitration Act 1974*. Moreover, the Court also mentioned that the public policy exception under the *New York Convention* should be construed narrowly, that IMC Solutions was not entitled to relitigate the merits of the case, and that the court favoured the pro-enforcement bias under the *New York Convention*.

Besides the exclusion of investor-state arbitration in Australia, the United States did limit the impact of investor-state arbitration through the change of the model Bilateral Investment Treaty (BIT) in 2004. The 2004 model BIT reduced the discretion that could be exercised by investor-state arbitration tribunals, took some particular issues away from investor-state arbitration tribunals, and discouraged the use of investor-state arbitration.[199] Nevertheless, the United States courts' decisions regarding the public policy exception have still favoured the finality of arbitral awards as cited earlier in this Chapter.

It is to be noted that although the discussion in this section concerns a specific area of international investment arbitration, it exhibits the States' perspectives about arbitration. Moreover, it has been widely accepted that when a dispute arises from an agreement between a State or a State entity and a private party, a dispute resolution usually occurs with undue hardship.[200] Thus, States where their governments somehow limit or act against the use of arbitration are more likely to put a lot of weight on their public interests. However, as noted from the cases of Australia and the United States, it is not necessary that such a political policy will influence the national courts to apply the public policy exception accordingly.

[199] Vandevelde, above n 189, 310.
[200] Paolo Contini, 'International Commercial Arbitration: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 8(3) *The American Journal of Comparative Law* 283, 309.

F *Conclusion*

Even though the *New York Convention* does have some ambiguity, many countries solve the possible difficulties by shaping their explicit arbitration laws to avoid the incompatibility with the ratified conventions. There has been a lot of guidance universally provided by either academics or judges for only the country of primary jurisdiction to obtain the power to set aside an arbitral award and the international public policy to be applied to foreign arbitral awards. However, peculiar situations caused by ambiguity are still happening. These issues need to be addressed in order that arbitration will be more favourable and effective and that a Contracting State of the *New York Convention* is restricted from interpreting the law in contradiction of the Convention.

In a State that allows its competent authority to set aside arbitral awards irrespective of where the awards were made, if the State's arbitration law contains the public policy exception both as a ground to set aside and to refuse the enforcement of arbitral awards, the question whether domestic public policy or international public policy should be applied needs to be clarified. Then, it is at the national courts' discretion to interpret and apply the public policy exception as they find appropriate. Moreover, under the *New York Convention*, it is theoretically possible that only the State of origin of an arbitral award acquires the power to review the awards twice through setting aside and enforcement proceedings.[201] Therefore, States allowing their courts to set aside arbitral awards made elsewhere would invalidate the theory by providing them excessive power of judicial review over arbitral awards. Besides the explicit scope of national courts to review arbitral awards, the distinction between types of arbitral awards should also be recognised in the legislation. Unless the language of an arbitration law is clear, the vagueness may unpredictably cause peculiar consequences.

Although legislation is a significant factor causing these difficulties, how national courts exercise their discretion applying and interpreting the law is also extremely important. The narrow standard of international public policy has already been adopted by many national courts, and it seems that they all look at the same direction to promote the use of international arbitration and the finality of arbitral awards. Therefore, Thailand's arbitration law needs to be reformed. These matters will be discussed in the following Chapter.

[201] The said situation is often not the case because the prevailing party usually asks the competent court, during the setting aside proceedings, to enforce an arbitral award if the court find it binding and enforceable.

CHAPTER V REFORMING THE ARBITRATION LAW OF THAILAND RE: THE PUBLIC POLICY EXCEPTION

A *Introduction*

The international standard of the public policy exception under the *New York Convention* has been accepted as a narrow standard.[1] Even though the *New York Convention* does not specify its intention explicitly in the text, it clearly aims to promote the finality of foreign arbitral awards and to limit the judicial review power of national courts.[2] Thailand, a Contracting State of the *New York Convention*, has ratified the Convention and is therefore bound to comply with its provisions. It is expected that Thai courts will take this approach and interpret the public policy exception as a ground to refuse the recognition and enforcement of foreign arbitral awards cautiously.

However, as was identified in Chapter III, there are some significant gaps in relation to the *2002 Thai Arbitration Act* regarding the public policy exception in terms of its scope of application, definitions, and explanations. In order to be able to recommend solutions, this thesis has examined the application of the Thai arbitration law and identified certain issues. It then conducted a comparative analysis of the selected countries'[3] arbitration laws and practices, and the information and analysis gained from that exercise form the basis of the recommendations presented below.

This Chapter will begin by showing that it is necessary to reform the Thai arbitration law, and then it will set out some proposed changes and possible barriers that may be confronted during that process.

B *Why Does the Thai Arbitration Law Needs to be Reformed?*

The use of arbitration as a dispute resolution method is increasing. Therefore, this thesis argues that Thailand would benefit from ensuring that its arbitration law system is both efficient and effective. This thesis aims to identify the problematic issues of the Thai arbitration law, and to provide practical recommendations concerning the public policy

[1] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011) 106.
[2] Joseph T McLaughlin and Laurie Genevro, 'Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts' (1986) 3(2) *Berkeley Journal of International Law* 249, 251.
[3] The main selected countries consist of France, Germany, Singapore, Switzerland, the United Kingdom, and the United States.

exception as a bar to the recognition and enforcement of foreign arbitral awards. As discussed in Chapter III, there are four problematic issues with respect to the Thai arbitration law and these relate to how the public policy exception is being applied, that is, as a bar to the recognition and enforcement of foreign arbitral awards.

First of all, the *2002 Thai Arbitration Act*'s scope of application concerning the judicial review power of the courts is ambiguous. The fact that the *2002 Thai Arbitration Act* does not specify clearly what type of arbitral awards can be set aside has resulted in the court applying the same standard of the public policy exception to arbitration cases in two scenarios: both setting aside and refusing recognition and enforcement of arbitral awards. It is important to note that, unlike the refusal of the enforcement of foreign arbitral awards, Thailand has no commitment to apply the narrow standard of the public policy exception to setting aside arbitral awards. The unclear scope of application of the Thai arbitration law allows the sole standard of the public policy exception, obviously the broad standard, to be applied to all types of arbitral awards in all cases. This situation leads to the incompatibility with the *New York Convention*.

Second, the *2002 Thai Arbitration Act* fails to distinguish between domestic and foreign arbitral awards. Because the Act does not differentiate between domestic and foreign arbitral awards, all arbitral awards are treated under the same standard. In terms of the public policy exception, the broad standard of public policy seems to be applied to all arbitral awards, and as explained above, that is incompatible with the intention of the *New York Convention*.

In many States, their arbitration laws distinguish between domestic and foreign arbitral awards and treat them differently. These States would then legitimately determine how the domestic arbitral awards are treated without violating the *New York Convention*.

Third, Thai courts apply the broad interpretation of the public policy exception to arbitration matters. Although it has been accepted that the standard of the public policy exception under the *New York Convention* is a narrow one, Thai courts do not seem to follow this standard. Consequently, their decisions are incompatible with the *New York Convention*.

Last, cultural, legal, and political impediments influence the broad application and interpretation of the public policy exception in arbitration matters. The black letter law interpretation, sovereign immunity, and political intervention into arbitration matters

influence and support the broad application of the public policy exception – thus violating Thailand's obligations under the *New York Convention*.

Thus, it is necessary for Thailand to resolve these issues and amend the law so that it is compatible with the provisions of the Convention.[4] Moreover, if Thailand expects to be an economic leader in the region, then ensuring that it has an effective arbitration system in place is crucial. Hence, for the reasons mentioned above, Thailand should reform its arbitration law. Later, after setting out some proposed recommendations, this Chapter will also discuss certain barriers that may potentially obstruct the suggested reform.

C *Proposal to Reform Thailand's Arbitration Law*

As a Contracting State, Thailand is obliged to fulfil its obligations under the *New York Convention* in all aspects including how it applies the public policy exception. The *New York Convention* does not explicitly specify what factors establish a public policy exception except to say that each State is responsible for determining what it means for their own State. However, the intention of the Convention is clearly to promote the enforcement of foreign arbitral awards. This means that the public policy exception should be applied narrowly, and there are guidelines that express this.[5] Yet, there is some resistance to this goal. For instance, at the International Law Association's (ILA) conference in 2002, a minority of the committee on international arbitration, mainly from developing countries, expressed their protectionist views on this issue that 'there should be no attempt to restrict the scope of public policy'.[6] Therefore, the *New York Convention* might not be fully successful in terms of achieving its goal with respect to promoting the enforcement of arbitral awards and discouraging the application of the public policy exception to reject applications of their recognition and enforcement.

Achieving an appropriate balance between the pro-enforcement bias of the *New York Convention* and applying the public policy exception in order to protect the enforcing States internal corporations/institutions is critical. As mentioned in Chapter II, the ILA endeavoured to outline a uniform framework on how to apply the public policy exception under the *New York Convention* and the *Model Law*. In the ILA final report, the committee found that 'most

[4] Saowanee Asawaroj, Business Law Reform Law, *Reform Commission of Thailand* (2014, 10 December) <http://www.lrct.go.th/th/?p=13676>.
[5] International Council for Commercial Arbitration, above n 1, 106-111; See also Committee on International Commercial Arbitration, International Law Association, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (New Delhi, 2-6 April 2002) 3.
[6] International Council for Commercial Arbitration, above n 1, 4 [17].

State courts favour a restrictive interpretation and application of public policy, which has resulted in a notable consistency of decisions amongst courts of different countries and legal traditions.'[7] The findings in the ILA final report together with the courts' decisions mentioned in Chapter IV show the consistency of the narrow application and interpretation of the public policy exception. All in all, the narrow application and interpretation of the enforcing State's public policy is widely accepted as the standard under the *New York Convention*. Consequently, this thesis suggests that the practice of the Courts in dealing with foreign arbitral awards be aligned with the international framework in order to fulfil its obligation under the *New York Convention* and promote Thailand's economy and arbitration system.

1 *The Explicit Power of Thai Courts to Review Arbitral Awards*

While Thailand is bound to apply and interpret the public policy exception in accordance with the *New York Convention*, it has no obligation to apply such a narrow standard of the public policy exception to setting aside matters. If the Thai arbitration law makes clear what type of arbitral awards Thai courts may set aside, the public policy exception as a ground to set aside arbitral awards made in Thailand can be of any standard.

The *Model Law*, a non-binding document enhancing the interpretation of the *New York Convention*, contains two public policy exceptions: one as a ground to set aside arbitral awards and the other as a ground to refuse the recognition and enforcement of arbitral awards. Since Thailand adopted the *Model Law*, the public policy exception is applied on both grounds. There has been an attempt to determine that the standard of the two public policy exceptions should be the same: a narrow standard.[8] Notwithstanding, the French arbitration law and the Swiss courts do obviously not give up their sovereign exclusive rights.[9] For the French arbitration law, the public policy exception as a ground to set aside domestic arbitral awards is '*ordre public*'.[10] On the contrary, the public policy exception as a

[7] Ibid 5 [22].
[8] *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UN GAOR, 18th sess, UN Doc A/CN.9/264 (25 March 1985) 73 [12]; See also *China Minmetals Materials Imp. and Exp. Co. Ltd. v Chi Mei Corp*., 334 F 3d 274, 283 (3rd Cir, 2003); *Jorf Lasfar Energy Company, S.C.A. (Morocco) v AMCI Export Corporation (US)* (WD Pa, Civil Action No 2:05-cv-00423-GLL, 5 May 2006).
[9] It is noted that France and Switzerland do not adopt the *Model Law*, but their arbitration laws contain the public policy exception both as a ground to set aside arbitral awards and a ground to refuse the recognition and enforcement of foreign arbitral awards.
[10] Article 1492.

ground to set aside international arbitral awards made in France[11] and a ground to refuse the recognition and enforcement of arbitral awards made abroad or in international arbitration specifies the standard of '*ordre public international*'.[12] For Switzerland, the public policy exception as a ground to annul international arbitral awards[13] and as a ground to refuse the recognition and enforcement of foreign arbitral awards appears to be the same as that of the *New York Convention*. However, the Swiss courts stated that a narrower standard would be applied to foreign arbitral awards than international arbitral awards, made in Switzerland.[14] Although both France and Switzerland have applied a different standard of the public policy exception to setting aside arbitral awards and refusing the recognition and enforcement of foreign arbitral awards, they clearly fulfil their obligations under the *New York Convention*. Regarding Germany, Singapore, the United Kingdom, and the United States, the public policy exceptions appear to follow the text of the *New York Convention*. Nevertheless, there is no obvious identification that the public policy exception as a ground to set aside arbitral awards and as a ground to refuse the recognition and enforcement of foreign arbitral awards are applied under the same standard.

Considering the Thai cases in Chapter III, Thailand does not seem ready to give up its sovereign exclusive right. If Thailand, like France and Switzerland, withholds the power to set its own standard of the public policy exception as a ground to set aside arbitral awards, Thailand will not violate its obligations under the *New York Convention*.

In addition, it has been clear under the *New York Convention* that only the courts at the place of arbitration or of the State of procedural applicable law can set aside arbitral awards.[15] The *Model Law* and the arbitration law of the main selected countries in Chapter IV appear to further clarify and limit the possible competent authorities with the power of setting aside arbitral awards. The latest trend is that only the courts at the place of arbitration may set aside arbitral awards as shown in the following table:

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[11] Article 1520.
[12] Article 1514.
[13] It is noted that, under the *Swiss Arbitration Law*, Switzerland must be the place of arbitration. Therefore, international arbitral awards under the Swiss arbitration law are supposed to be made in the territory of Switzerland.
[14] Cour De Justice (First Section), Canton de Geneva [Court of Appeal of the Canton of Geneva], 17 September 1976, cited in Pieter Sanders (ed), *Yearbook Commercial Arbitration 1979* (Kluwer Law International, vol IV, 1979) 311; See also Camera di Esecuzione e Fallimenti, Canton Tessin [Court of Appeal of the Canton of Ticino, Execution and Bankruptcy Chamber], 19 June 1990, cited in van den Berg, Albert Jan (ed), *Yearbook Commercial Arbitration 1995,* (Kluwer Law International, vol XX, 1995) 762.
[15] Article V(1)(e).

Table 5.1: The Power of National Courts in Setting Aside Arbitral Awards under the Selected States' Legislation

State	Courts at the State of Origin Have the Power to Set Aside Arbitral Awards		Containing the Public Policy Exception as a Ground to Set Aside Arbitral Awards
	Courts at the Place of Arbitration	Courts at the State of Applicable Law	
France	/	-	/
Germany	/	-	/
Singapore	/	-	/
Switzerland	/	-	/
Thailand	The *2002 Thai Arbitration Act* does not specify whether only the national courts at the State of origin have the power to set aside arbitral awards.		/
The United Kingdom	/	-	/
The United States	/	-	-

Based on the *French Code of Civil Procedure*, the *German Code of Civil Procedure*, the *Singaporean International Arbitration Act*, the *Singaporean Arbitration Act 2001*, the *Swiss Civil Procedure Code: Part 3 Arbitration*, the *Swiss Private International Law Statute: Chapter 12 International Arbitration*, *the Thai Arbitration Act B.E. 2545 (2002)*, the *English Arbitration Act 1996*, and the *American Federal Arbitration Act*

Thus, Thailand, as a Contracting State of the *New York Convention*, should at least follow the principle as it is bound. However, it would be best if Thailand adopts the recent trend which aligns with the *2002 Thai Arbitration Act* drafters' intention: adopting the *Model Law* framework. One possible means is that the Thai arbitration law contains a provision indicating the precise scope of application of the Act to cover arbitration conducted in Thailand. Since the Thai arbitration law usually has no effect in other jurisdictions, doing so would clarify the application of the law including the power of Thai courts to set aside arbitral awards.

2 *The Distinction between Domestic and Foreign Arbitral Awards*

Even though Thailand adopted the single framework from the *Model Law*, the *2002 Thai Arbitration Act* does not retain the scope of application provision. Thus, the 2002 Act governs

all kinds of arbitration matters in Thailand whereas the *Model Law* governs only international commercial arbitration matters. As mentioned in Chapter II, the scope of application under the *Model Law* is different from that of the *New York Convention*. To clarify, the Contracting States of the *New York Convention* have the obligation to recognise and enforce foreign arbitral awards within the scope of the Convention, and it is narrower than the definition of international arbitral awards under the *Model Law*. As a result, States adopting the *Model Law*, like Germany and Singapore, recognise at least the distinction between domestic and foreign arbitral awards. Other States such as France, Switzerland, the United Kingdom, and the United States also recognise such distinction as shown in the following table:

Table 5.2: The Distinction between Domestic and Foreign Arbitral Awards under the Selected States' Legislation

States	Distinguishing the Types of Arbitral Award	Non-distinction Between Types of Arbitral Awards	Containing the Public Policy Exception		
			As a Ground to Set Aside Arbitral Awards	As a Ground to Refuse the Enforcement of Domestic Arbitral Awards	As a Ground to Refuse the Enforcement of Foreign Arbitral Awards
France	/		/ - The term '*ordre public*' is used for domestic awards. (art 1492) - The term '*ordre public international*' is used for international awards made in France. (art 1520)	/	/ - The term '*ordre public international*' is used for awards made abroad or in international arbitration. (art 1514)
Germany	/		/	/	/
Singapore	/		/	-	/
Switzerland	/		/	-	/

Thailand		/	/	The public policy exception is a ground to refuse the enforcement of all arbitral awards. (s 44)	
The United Kingdom	/		/	-	/
The United States	/		-	-	/

Based on the *French Code of Civil Procedure*, the *German Code of Civil Procedure*, the *Singaporean International Arbitration Act*, the *Singaporean Arbitration Act 2001*, the *Swiss Civil Procedure Code: Part 3 Arbitration*, the *Swiss Private International Law Statute: Chapter 12 International Arbitration*, *the Thai Arbitration Act B.E. 2545 (2002)*, the *English Arbitration Act 1996*, and the *American Federal Arbitration Act*

It is obvious that each State would like to protect their sovereign exclusive rights as much as they possibly can. At the same time, they tend to promote the use of arbitration and the finality of arbitral awards to facilitate international trade as a whole.

Thailand, as a State in international affairs, should balance the protectionist perspective and the promotion of the finality of arbitral awards into consideration. Apparently, Thailand intended to favour arbitration by adopting the *Model Law*. However, when the disadvantage of the State is involved, the shield to protect the State from any harm is activated. One significant shield in the area of international commercial arbitration law is the public policy exception. The fact that the unruly horse, public policy, 'may lead [Thailand] from the sound law'[16] would impliedly apply a broad domestic standard to all arbitral awards in Thailand. To avoid that difficulty, the Thai arbitration law should distinguish between domestic and foreign arbitral awards and treat foreign arbitral awards in accordance with the international standard under the *New York Convention*.

3 *The Narrow Application and Interpretation of the Public Policy Exception in Arbitration Matters*

As mentioned in Chapter II, it has been accepted widely that the narrow standard of international public policy is the standard of the public policy exception under the *New York*

[16] *Richardson v Mellish* [1824] 2 Bing 229, 252; 130 ER 294.

Convention. Further, the ILA categorised 'international public policy' into three categories: fundamental principles, public policy rules or *lois de police*, and international obligations.[17]

(a) Fundamental Principles

The ILA final report states clearly that it is the enforcing State's fundamental principles either substantive or procedural that should be considered when applying the public policy exception.[18] Notably, the international nature of the matter and the connection of the case to the judicial system of the forum should be taken into consideration. Moreover, the ILA committee also concluded that 'where a party could have relied on a fundamental principle before the tribunal but failed to do so, it should not be entitled to raise [the] said fundamental principle as a ground for refusing [the] recognition or enforcement of the award.'[19] However, there is an exception for raising a fundamental principle applied only in the enforcing State or in a few States.

(b) Public Policy Rules or Lois de Police

The ILA further restricts the power of an enforcing court in refusing the recognition and enforcement of arbitral awards via *lois de police* to be only when: 'the scope of [the] said rule is intended to encompass the situation under consideration, and [the] recognition or enforcement of the award would manifestly disrupt the essential political, social or economic interests protected by the rule.'[20] Notwithstanding, unless the violation of a public policy rule does appear on the face of the arbitral award, the enforcing court 'should undertake the reassessment of the facts only when there is a strong *prima facie* argument of violation of international public policy.'[21]

(c) International Obligations

International obligations may bar the recognition and enforcement of arbitral awards only when it 'constitute[s] a manifest infringement by the forum State of its obligations towards other States or international organisations.'[22]

[17] International Council for Commercial Arbitration, above n 1, 6.
[18] Ibid 8-9.
[19] Ibid 9.
[20] Ibid 10.
[21] Ibid 11 [52].
[22] Ibid 11.

Accordingly, France, Germany, Singapore, Switzerland, the United Kingdom, and the United States accept and apply the narrow standard of public policy exception as they are bound to the *New York Convention*. Although the courts of these countries do not apply the public policy exception in exactly the same way, they all have applied the public policy exception in accordance with the guideline provided by the International Law Association. Interestingly, the national courts in the selected countries simply applied what they considered the appropriate narrow standard of the public policy exception to all enforcing foreign arbitral awards matters regardless of the three categories mentioned in the ILA final report. Perhaps doing so is more practical because some grounds might fall into more than one category.[23] Moreover, these countries even further clarify how national courts shall apply the public policy exception as a ground to refuse the recognition and enforcement of foreign arbitral awards, mentioned in Chapter IV, ie,

- The enforcing court should not review the merits of the case.
- Mistakes in facts or in law by arbitrators do not establish the public policy exception.
- The burden of proof is placed on the party resisting the enforcement of an arbitral award.
- The *prima facie* approach should be taken in dealing with the public policy exception.

For Thailand, the *2002 Thai Arbitration Act*, adopting the single framework, intended to apply the international standard. However, the application and interpretation of the public policy exception of the Thai courts does not seem to align with the 2002 Act drafters' intention as mentioned in Chapter III. Even though Thai courts have lately elevated their standard of application of the public policy exception in arbitration matters to be closer to the international standard, there is no guarantee about the consistency of such application by the courts. Therefore, the Thai arbitration law reform will be one effective means to set the standard of the courts' application of the public policy exception.

Moreover, since Thailand is bound to the provisions in the *New York Convention*, the obligation of Thailand under the Convention should be emphasised. Also, other jurisdictions'

[23] Ibid 7 [32].

courts decisions and scholars' opinions should be taken into consideration because the Thai arbitration law is an area of law concerning international arbitration and international trade. If Thailand has a precise provision on the public policy exception and a clear scope of the public policy exception interpretation, the inconsistency of its application and interpretation will rarely happen. Additionally, a guideline to the interpretation of the public policy exception provisions should be provided to the judges, and the ILA final report can be referred to as a guideline to how the public policy exception should be applied and interpreted. Nevertheless, it can be argued that most States in the world follow the general term 'public policy' as appears in the *New York Convention* without any interpretation difficulty. Why does Thailand need a more precise public policy exception? The question will be answered later in this Chapter.

4 *Reducing the Cultural Impediments Influencing the Application and Interpretation of the Public Policy Exception*

It has been observed that 'the notion of public policy in Thailand was interpreted based on the culture and economy situation'.[24] Thus, in order to make the Thai arbitration system efficient, such cultural impediments need to be reduced. The cultural impediments have already been identified in Chapter III: the black letter law interpretation, sovereign immunity, and political intervention on arbitration matters. Then, the comparative analysis has been conducted in Chapter IV. It is time to propose practical solutions to reduce or eliminate the cultural impediments.

(a) The Black Letter Law Interpretation

To answer the question left open above, the black letter law interpretation is the principal reason. As mentioned in Chapter III, Thai legal practitioners apply and interpret the law literally as it is written. In addition, recently, the French strict public law principles have significantly influenced the Thai courts' interpretation. With respect to the public policy exception, the fact that the *2002 Thai Arbitration Act* does not explicitly specify what type of public policy should be applied under the Act can cause some confusion. Thus, a precise provision concerning the public policy exception is needed in the Thai arbitration law. Although it has been admitted that the term 'public policy' cannot be defined precisely because it is a matter of place and time, there would be a way to limit the scope of application

[24] Veena Anusornsena, 'Public Policy as a Ground for Setting Aside an Arbitral Award in Thailand: Relevant Laws and Current Situation ' (2010) 2(1) *UTCC Law Journal* 102, 114.

of the public policy exception. Some civil law countries made efforts to limit such scope by indicating the narrow standard of 'international public policy' in their arbitration laws.[25] In that case, it would be very clear in the black letter law that the public policy exception should be applied and interpreted narrowly.

Even though the term 'international public policy' has been generally referred to in the area of international commercial arbitration law, the said term has never been referred to in any Thai courts' decisions. Therefore, it is doubtful whether the term 'international public policy' and its principle are recognised in Thailand. However, Saiyud Sang-Uthai, a well-known Thai legal scholar, did recognise 'Lois d'ordre public international' in his book when referring to a French law.[26] Additionally, he also laid down the principle concerning the public policy in private international law to be interpreted narrowly and not to be invoked extravagantly.[27] Moreover, as noted in Chapter III, the Thai courts' decisions during the enforcing period of the *1987 Thai Arbitration Act* applied the narrow standard of the public policy exception as a ground to refuse the enforcement of foreign arbitral awards. Thus, it can be concluded that the existence of 'international public policy' has been recognised in Thailand though it is not a well-known term. Perhaps the term is particularly used in the area of private international law and is basically applied only to matters with international elements, but not national law and cases. Thus, the significant reasons to clearly identify the type of public policy in a national law are to set the standard that a State is obliged to apply and to distinguish the differences between the public policy exceptions if there are any.

In addition, as mentioned in Chapter III, the public policy exception under the *2002 Thai Arbitration Act*, uses the term 'public order or good morals'. Differently, the *New York Convention* uses the term 'public policy' in English and '*ordre public*' in French, and the *Model Law* uses the term 'public policy'. Nevertheless, there are a few countries using the term 'public order or good morals' to represent the concept of public policy like Japan[28] and Taiwan,[29] and there seems to be no problem applying the narrow standard of the public policy

[25] France, Portugal, Lebanon, Algeria, and Tunisia.
[26] Saiyud Sang-Uthai, 'Ordre Public' in *Conflict of Laws* (1939) 94, 96.
[27] Ibid 86-87.
[28] *Arbitration Law* (Japan) No 138 of 2003 entered into force 1 March 2004, arts 44 (1) (viii) and 45 (2) (ix).
[29] *The Republic of China Arbitration Law* (Taiwan) 1998, art 49 (1). It is significant to note that Taiwan is not a Contracting State of the *New York Convention* since it is not a member of the United Nations, but it does follow the principles of the *Convention* and adopted the *Model Law*; See Tiffany Huang and Amber Hsu, 'Taiwan' in *The Baker & McKenzie International Arbitration Yearbook 2010-2011* (JurisNet, LLC, 2011) 113, 126; Minn Naing Oo, 'A Survey of National Laws and Practices on Enforcement of Foreign Arbitral Awards in South and

exception.[30] It should also be noted that the term 'public order or good morals', which in practice means public policy, has been used in a number of Japanese, Thai, and Taiwanese laws. It is possible that the term 'good morals' causes vagueness, but basically the term 'public order or good morals' has been maintained in the legislation to ensure the conformity of the expression. Although none of the arbitration laws of the main selected countries mentioned in this thesis entails 'good morals', using 'public order or good morals' in order to conform to all other laws in this particular aspect does not seem to be harmful.

Therefore, specifying 'international public policy', '*ordre public international*', or 'international public order or good morals' as the standard to be applied to the refusal of the recognition and enforcement of foreign arbitral awards in the Thai arbitration law should be appropriate. Such an explicit provision will prevent the Thai courts from interpreting the public policy exception broadly since it is clear in the black letter law.

(b) The Restrictive Sovereign Immunity

It has been accepted that there are two types of sovereign immunity: immunity from jurisdiction and immunity from execution. Even though an arbitration agreement is the implied waiver of the immunity from jurisdiction,[31] it does not automatically create the waiver of the immunity from execution. Thus, there is no certainty on the finality of an arbitral award when a party is a State or a State entity. Since the sovereign immunity is not a specific ground in art V of the *New York Convention*, the only possible ground on which the sovereign immunity can be invoked is through the public policy exception. Consequently, the invocation of the sovereign immunity in international commercial arbitration matters should be limited only to sovereign acts, namely, the restrictive sovereign immunity.

The restrictive sovereign immunity is such a balance between the absolute sovereign immunity and the implied waiver of both types of sovereign immunity at the same time. Thus, a mere arbitration agreement does not automatically waive the sovereign immunity from execution. There must be an express waiver of the immunity from execution when the

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South East Asia' in Albert Jan van den Berg (ed), *International Arbitration: The Coming of a New Age?, ICCA Congress Series* (Kluwer Law International, 2013) vol 17, 235, 247.

[30] Yasuhei Taniguchi and Tatsuya Nakamura, 'National Report for Japan (2010)' in Jan Paulsson and Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International, 2010) 1, 35; See also Angela Y Lin and Nigel N T Li, 'Arbitration in Taiwan, the Republic of China' in Shahla F Ali and Tom Ginsburg (eds), *International Commercial Arbitration in Asia* (JurisNet, LLC, 3rd ed, 2013) 503, 533.

[31] Sompong Sucharitkul, *Sixth Report on Jurisdictional Immunities of States and Their Property*, UN GAOR, Agenda Item 3, UN Doc A/CN.4/376 and Add.1 and 2 (31 January and 18 April 1984) [255].

affair is considered a sovereign act. Notably, the narrow interpretation of sovereign immunity, namely the restrictive sovereign immunity, seems to align with the narrow standard of international public policy.

(c) The Strict Political Intervention on Arbitration Matters

Generally, a State government is the policymaker and holds the executive power in the State. Therefore, it is within the power of the Thai government to issue the policy limiting the use of arbitration in the contracts between a government entity and a private party, also known as administrative contracts. However, Thailand is bound to international commitments like bilateral treaties or international conventions. To fulfil its obligations, the Thai government needs to be aware of such obligations and issue the policies as Thailand is bound.

Since Thailand made no reservation under the *New York Convention*, the Thai government should issue the policies accordingly. Thai arbitration law cannot limit the use of arbitration under the reciprocity or the commercial reservation. In other words, the Thai arbitration law cannot refuse to cover arbitral awards made in the territory of the non-Contracting States of the *New York Convention* or to cover arbitral awards arising from transactions other than commercial transactions. Moreover, Thailand signed but has not yet ratified the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (also known as the '*Washington Convention*').[32] Hence, investment and any other kinds of out-of-court arbitration will be treated under the same standard in Thailand: the sole standard under the *2002 Thai Arbitration Act*.[33] Notably, the *Washington Convention* does not contain any public policy exception, so it is not relevant to this thesis.

Furthermore, the Thai government should fulfil the obligations by refraining from intervening into the parties' freedom of contract regarding international arbitration agreements. The fact that an arbitration clause in an administrative contract needs to be approved by the cabinet on a case by case basis may result in the refusal of continuing to include such clauses in administrative contracts. In particular, it is widely known that it is a national court's duty to decide whether an act is contrary the public order or good morals. Then, the question appears to be whether the Thai government would like to shape which possible disputes would be contrary to the public policy or non-arbitrability beforehand. If this is the case, such policy

[32] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (*Washington Convention)*.
[33] It should be noted that, in some agreements made by Thailand, the ICSID arbitration which is the arbitration proceedings under the *Washington Convention* is specified as the dispute resolution method.

might influence the application and interpretation of the public policy exception of Thai courts. Also, it would significantly impede the development of the Thai arbitration system and economy. Although there is no solid evidence on this point, it is questionable.

In conclusion, the government should not intervene in the formulation of what will be contrary to the public order or good morals of Thailand. Regarding the recognition and enforcement of foreign arbitral awards, it is the enforcing court's duty to decide if the recognition and enforcement of the awards is against the public order or good morals of Thailand under the standard of the *New York Convention*.

All in all, after identifying the problematic issues in the current Thai arbitration law, it is necessary for Thailand to reform its arbitration law in order to fulfil the obligations concerning the public policy exception under the *New York Convention*. Accordingly, the comparative analysis has already been conducted in order to ascertain what might be the best option for Thailand. Notwithstanding, the balance between the pro-enforcement bias and the public order or good morals of Thailand needs to be taken into account. The proposal for the Thai arbitration law reform is as follows:

Table 5.3: The Proposal for the Thai Arbitration Law Reform

The Current Provisions under the *2002 Thai Arbitration Act*	**The Proposed Provisions**
Chapter VII Recognition and Enforcement of Award (ss 41-45)	Chapter VII Recognition and Enforcement of Award (ss 41-45/1) - Part 1 Domestic Award (ss 43-43/1) - Part 2 Foreign Award (ss 44-44/1) - Part 3 Appeal (ss 45-45/1)
-	**s 4(1)** The provisions of this Act apply only if the place of arbitration is in the territory of Thailand, except ss 44, 44/1, and 45/1.
s 41 Subject to Section 42, Section 43 and Section 44, an arbitral award, irrespective of the country in which it was made, shall be	**s 41** Subject to Sections 42, 43, 43/1, 44, and 44/1, an arbitral award, irrespective of the country in which it was made, shall be

recognized as binding and, upon application to the competent Court, shall be enforced. In the case where an award made in a foreign country, the competent Court shall enforce such award only if it is governed by a treaty, convention or international agreement to which Thailand is a party, and it shall have effect only to the extent that Thailand agrees to be bound.	recognized as binding and, upon application to the competent Court, shall be enforced. In the case where an award made in a foreign country, the competent Court shall enforce such award only if it is governed by a treaty, convention or international agreement to which Thailand is a party, and it shall have effect only to the extent that Thailand agrees to be bound.
s 43 The Court may refuse to enforce the arbitral award, irrespective of the country in which it was made, if the party against whom the enforcement is invoked can prove that: (1) a party to the arbitration agreement is incapacity under the law applicable to that party; (2) the arbitration agreement is not legally binding under the law to which the parties have agreed upon or, in the case where there is no such agreement, under the law of the country where the award was made; (3) the enforced party was not given advance notice of the appointment of the arbitral tribunal or of the hearings of the arbitral tribunal or was otherwise unable to present his or her case; (4) the award deals with a dispute not falling within the scope of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on	**Part 1 Domestic Award** **s 43** The Court may refuse to enforce the domestic arbitral award, if the party against whom the enforcement is invoked can prove that: (1) a party to the arbitration agreement is incapacity under the law applicable to that party; (2) the arbitration agreement is not legally binding under the law to which the parties have agreed upon or, in the case where there is no such agreement, under the law of the country where the award was made; (3) the enforced party was not given advance notice of the appointment of the arbitral tribunal or of the hearings of the arbitral tribunal or was otherwise unable to present his or her case; (4) the award deals with a dispute not falling within the scope of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on

matters submitted to arbitration may be enforced by the Court; (5) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement made by the parties or, in the case where there is no such agreement, was not in accordance with the law of the country where the award was made; or (6) the award has not yet become binding upon the parties, or it has been set aside or suspended by a competent Court or by the law of the country where it was made, except where the application for setting aside or suspension of the award has been made to the competent Court and the trial is pending, the Court may suspend the proceedings to enforce the award as it thinks fit. If so requested by the party who apply for enforcement of award, the Court may order the enforced party to give security in an amount as it thinks fit.	matters submitted to arbitration may be enforced by the Court; (5) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement made by the parties or, in the case where there is no such agreement, was not in accordance with the law of the country where the award was made; or (6) the award has not yet become binding upon the parties, or it has been set aside or suspended by a competent Court or by the law of the country where it was made, except where the application for setting aside or suspension of the award has been made to the competent Court and the trial is pending, the Court may suspend the proceedings to enforce the award as it thinks fit. If so requested by the party who apply for enforcement of award, the Court may order the enforced party to give security in an amount as it thinks fit.
s 44 The Court shall have the power to refuse the application to enforce the award under Section 43 if it appears that the award deals with the dispute which shall not be settled by arbitration under the law or the enforcement of award is contrary to public order or good morals.	**s 43(1)** The Court shall have the power to refuse the application to enforce the domestic arbitral award under Section 43 if it appears that the award deals with the dispute which shall not be settled by arbitration under the law or the enforcement of award is contrary to public order or good morals.
-	**Part 2 Foreign Award** **s 44** The provision of Section 43 shall apply *mutatis mutandis* to the refusal of the enforcement of foreign arbitral awards.
-	**s 44(1)** The Court shall have the power to refuse the application to enforce the foreign arbitral award under Section 44 if it appears

	that the award deals with the dispute which shall not be settled by arbitration under the law or the enforcement of award is contrary to international public order or good morals.
s 45 An order or judgment of the Court under this Act shall not be appealed, except where: (1) the recognition or enforcement of the award is contrary to public order or good morals; (2) the order or judgment is contrary to the provisions of law relating to public order or good morals; (3) the order or judgment is not in accordance with the arbitral award; (4) the judge who has tried the case gave a dissenting opinion in the judgment; or (5) it is an order on provisional measure under Section 16. An appeal against an order or judgment under this Act shall be made to the Supreme Court or the Supreme Administrative Court, as the case may be.	**Part 3 Appeal** **s 45** An order or judgment of the Court concerning domestic awards under this Act shall not be appealed, except where: (1) the recognition or enforcement of the award is contrary to public order or good morals; (2) the order or judgment is contrary to the provisions of law relating to public order or good morals; (3) the order or judgment is not in accordance with the arbitral award; (4) the judge who has tried the case gave a dissenting opinion in the judgment; or (5) it is an order on provisional measure under Section 16. An appeal against an order or judgment concerning domestic arbitral awards under this Act shall be made to the Supreme Court or the Supreme Administrative Court, as the case may be.
-	**s 45(1)** An order or judgment of the Court concerning foreign arbitral awards under this Act shall not be appealed, except where: (1) the recognition or enforcement of the award is contrary to international public order or good morals; (2) the order or judgment is manifestly contrary to the provisions of law

	relating to international public order or good morals; (3) the order or judgment is not in accordance with the arbitral award; (4) the judge who has tried the case gave a dissenting opinion in the judgment; or An appeal against an order or judgment concerning foreign awards under this Act shall be made to the Supreme Court or the Supreme Administrative Court, as the case may be.

D *The Barriers to Thai Arbitration Law Reform*

There are a number of possible barriers to any recommendations for law reform in Thailand. For instance, currently the country is experiencing an unstable political situation. There are also other possible barriers: delays in the legislative process; the ill-prepared state of government sectors; corruption; and political policy. These obstacles have the potential to slow down or even stop the legislative process in some situations. Therefore, it is important to be aware that any recommendations made may not be implemented immediately.

1 *The Unstable Political Situation*

Thailand has been a democratic State for eighty-three years. However, the Thai political climate has never been stable for long, and that obviously affects the Thai legislative process. Until now, Thailand has enacted nineteen constitutions, and the twentieth will probably be passed within a few years. Since the supreme law of the land is undergoing constant change, it is assumed that any proposed changes to other regulations will be interrupted.[34]

2 *Delays in the Legislative Process*

Since Thailand is a civil law country, court decisions are only legal norms. The only way to amend or change the law is through the legislative process. When a law is already outdated, it

[34] Borwornsak Uwanno, *Thai Legal Structure in the Future*, Mae Fah Luang University <http://www.mfu.ac.th/school/law/admin/uploadCMS/upload/xJThu10859.pdf>.

needs to be amended as soon as possible in order for it to effectively and efficiently regulate society[35] and reduce the likelihood of harm.[36]

Thailand, during the period of democratic government, has experienced delays in the legislative process as shown in the following table:

Table 5.4: The Comparison between the Draft-Bills Submitted to the Thai Cabinet and the Laws Enacted

Year	The Bills Submitted to the Thai Cabinet	The Laws Enacted
2008	516	111
2009	73	20
2010	159	29
2011	121	27
2012	116	18
2013	129	36

Sources: New Law Collection B.E. 2551 (2008),[37] New Law Collection B.E. 2552 (2009),[38] New Law Collection B.E. 2553 (2010),[39] New Law Collection B.E. 2554 (2011),[40] New Law Collection B.E. 2555 (2012),41 New Law Collection B.E. 2556 (2013),42 and the Secretariat of the Cabinet Website[43]

From the statistics, it is clear that the legislative process usually takes a long time. Less than one-third of the Bills submitted to the Thai cabinet are passed each year. Therefore, it is

[35] Pakorn Nilprapan, *The Reform of Subordinate Legislation: Concrete Reform* (5 January 2015) <http://lawdrafter.blogspot.com.au/2015/01/blog-post.html>.
[36] Legal Research Institute Foundation, 'Complete Study Report: the Modification of Legislative Process of Thailand' (April 2006) 58; See also Meechai Ruchuphan, *Legislative process and its problems in Thailand*, Thai Law Reform Commission, Office of the Council of State <intranet.senate.go.th/download/law/DATA/groups/KM/draf/index/b6.doc> 5.
[37] The Secretariat of the House of Representatives of Thailand, *New Law Collection B.E. 2551 (2008)* (2010).
[38] The Secretariat of the House of Representatives of Thailand, *New Law Collection B.E. 2552 (2009)* (2009).
[39] The Secretariat of the House of Representatives of Thailand, *New Law Collection B.E. 2553 (2010)* (2011).
[40] The Secretariat of the House of Representatives of Thailand, *New Law Collection B.E. 2554 (2011)* (2012).
[41] The Secretariat of the House of Representatives of Thailand, *New Law Collection B.E. 2555 (2012)* (2013).
[42] *The Secretariat of the House of Representatives of Thailand, New Law Collection B.E. 2556 (2013)* (2014).
[43] *Draft-Bill Submitted to the Thai Cabinet*, The Secretariat of the Cabinet of Thailand Website <http://www.soc.soc.go.th/draft-bill_mati.htm>.

possible that some inadequate laws are still to be enforced due to delays on the legislative process.

Interestingly, after the 2014 coup d'état in Thailand, the legislative process is much quicker. From 8 August 2014 to 7 August 2015, the National Legislative Assembly of Thailand passed one hundred and eight laws from one hundred and thirty-three draft-Bills submitted to them.[44] This seems to benefit the Thai society since the speed of the legislative process is much quicker. However, the lack of transparency could be problematic. The question appears to be why a democratic parliament took a long time to pass a small number of laws while the National Legislative Assembly took much less time to pass a lot of them. Notwithstanding, this might be beneficial to Thai arbitration law reform in terms of timing.

3 *The ill-prepared state of Government Sectors*

The ill-prepared state of government sectors can hinder efforts to reform Thai law at two stages: drafting and enforcing the law. In many government sectors in Thailand, law departments are auxiliary agents. Any talented or experienced law officers quit and apply for better jobs;[45] for example, in a line agency, a well-known law firm, or a famous company. When government departments lose skilled workers, those who are tasked to draft legislation lack the legal expertise[46] and have to request the assistance of the Office of the Council of State. However, the Office of the Council of State does not have enough officers to attend and assist each government sector in every meeting.[47] Consequently, this causes delays in proposing the draft legislation to the minister and the cabinet respectively.

The loss of expertise from government departments also has an effect on law enforcement. The officers in the related government sectors need the preparation and training so that they thoroughly understand the rationale of the law and enforce it accordingly.[48] In addition, if the enforcement of the law requires more officers or materials, then these requirements need to be fulfilled prior to the law coming into force to avoid a waste of time and budget.

Nevertheless, there is an independent organisation namely the Law Reform Commission of Thailand (LRCT), established in 2010. The LRCT, which consists of 11 experts, aims to

[44] *National Legislative Assembly Watch One Year Report* <http://ilaw.or.th/node/3800>.
[45] Legal Research Institute Foundation, above n 36, 60.
[46] *Legislative Drafting Manual* <http://www.parliament.go.th/ewtadmin/ewt/elaw_parcy/download/article/article_20120924170043.doc.>.
[47] Legal Research Institute Foundation, above n 36, 61.
[48] Office of the Council of State, *Legislative Drafting Manual* (2008) 654-655.

'impartially revise and develop the entire legal system'.[49] Therefore, the LRCT may be used to help revising arbitration law in Thailand in order to eliminate the barrier concerning the ill-prepared state of government sectors.

4 *Corruption*

Law reform can affect sectors of the community – either positively or negatively. For example, the proposed law increasing the age of tobacco purchasers from eighteen to twenty years old has been delayed. The Bill aims to discourage young people from starting smoking, and it has been suspected that Philip Morris International, a huge American tobacco company, is behind it.[50] Or, the controversial first-car tax rebate policy,[51] which was opposed by many politicians and people; however, the policy was issued.[52] A lot of Thai people decided to buy their first car during the scheme. This policy is obviously beneficial to car companies resulting the increase of private car sales, but it would eventually leave a number of the buyers worse off: being indebted holding onto an unaffordable car maintenance and gasoline.[53] Such conflict of interest can cause the rush, delay or dismissal of the enactment if the influential people are the ones gaining or losing benefits. Consequently, it may be that those who are the most influential or who have the means to purchase the support legislators are able to have regulation passed that serves their interests.[54] This kind of practice, known as 'policy corruption', usually occurs by the act of corrupted politicians or government officers.[55]

Moreover, Thailand recently scored thirty-eight points out of a hundred[56] in the Corruption Perceptions Index conducted by the Transparency International.[57] This shows the high degree

[49] Law Reform Commission of Thailand, *Vision* <http://www.lrct.go.th/en/?page_id=224>.
[50] 'Anti-smoking Activists Fear Philip Morris Threat Is Delaying New Law', *The Phuket News* (online), 4 May 2015 <http://www.thephuketnews.com/anti-smoking-activists-fear-philip-morris-threat-is-delaying-new-law-52153.php>.
[51] *Thailand's Auto Boost, Thailand Broad of Investment* (October 2011) <http://www.boi.go.th/tir/issue/201110_21_10/174.htm>.
[52] Pairoj Wongwipanon, 'The First Car: An Economics Perspective', *Matichon* (online), 30 January 2013 <http://www.matichon.co.th/news_detail.php?newsid=1359529553>.
[53] Arno Maierbrugger, 'Thailand's First-Car Buyer Incentive Scheme A Failure', *Investvine* (online), 2 August 2013 <http://investvine.com/thailands-first-car-buyer-incentive-scheme-collapsed/>.
[54] Office of the Permanent Secretary for Defence, *Consensual Framework for Reforming Thailand in Regard to Law and Judicial Administration* (2014) <library2.parliament.go.th/giventake/content_nrcinf/nrc2557-issue3-reform01.pdf> 1.
[55] Jaruwan Sukumarnpong, *The Trend of Corruption in Thailand* (The Secretariat of the House of Representatives of Thailand, 2013) 2-3.
[56] The score indicates the perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean).

to which corruption is perceived to exist in Thailand's public sector. In response to this issue, there should be a public opinion survey or a canvass seeking comments from related sectors of the community on the draft-bill being proposed. Calling for public comments would make the legislation process more transparent. In addition, the enforcement and the impact of the laws on society should be assessed and followed up in order to evaluate the efficiency of the laws, to see whether there are any gaps or unintended consequences flowing from the legislation, and to investigate whether there has been any corrupt behaviour during the enforcement processes of the laws.

5 *Political Policy*

As mentioned in Chapter III, there were a number of resolutions passed by the Thai governments expressing the anti-arbitration policy; especially for arbitration agreements concerning a contract between a private sector and a government entity. Thus, this might be an obstacle to the Thai arbitration law reform which would limit the sovereign exclusive rights of Thailand. Nevertheless, the Thai government needs to be aware of Thailand's obligations under the *New York Convention*.

As mentioned above, there are quite a number of barriers to Thai arbitration law reform. When there is a plan for a law reform in Thailand, these barriers should be taken into account. It can be observed that some barriers like delays in legislative process and the ill-prepared state of government sectors share some features. In response to these barriers, legal officers in government sectors should be given more opportunities for professional advancement so that they keep developing their expertise. Consequently, the legislative process would be faster because there will be less errors in the draft-Bill. With respect to corruption, a more transparent legislative process that can be easily monitored and assessed by the people would help. Also, knowledge about the rationale of the law and an open channel for discussion should be widely and constantly provided, so the people will realise the importance of it to their lives and get involved.[58]

E *Conclusion*

The working group on the preparation of reform for returning happiness to the people already admitted that some of the Thai legislation is outdated, and that has been one of the causes of

[57] *Transparency International, Table of Results: Corruption Perceptions Index 2015*, Transparency International <http://www.transparency.org/cpi2015#results-table>.
[58] Sukumarnpong, above n 55, 2-22.

the inadequate law enforcement.[59] The laws concerning alternative dispute resolution including that relating to arbitration law are also on the list.[60] Apparently, it has been recognised that the Thai arbitration law needs to be improved to allow Thailand to be prepared for its economic cooperation between the ASEAN countries within the ASEAN Economic Community (AEC).

The public policy exception considered as a loophole of the *New York Convention*[61] is also a loophole of the *2002 Thai Arbitration Act*. After analysing the 2002 Act, the four problematic issues concerning the public policy exception were identified and compared with the arbitration laws and practices of the selected States to determine their ability to deal with such problems. Consequently, the proposal for the Thai arbitration law is the product derived from the prior analysis in this thesis.

In summary, the proposed recommendations for the Thai arbitration law reform are proposed as follows:

- The explicit power of Thai courts to review arbitral awards should be clearly stated in the law.
- There should be a distinction between domestic and foreign arbitral awards.
- The public policy exception as a ground to refuse the recognition and enforcement of foreign arbitral awards should be specified as the narrow standard of international public policy (international public order or good morals).
- Guidelines for the application and interpretation of the international public policy (international public order or good morals) should be provided to the judges. For example, a merits review should not be allowed, mistakes in fact or in law by arbitrators should not establish the public policy exception, the burden of proof should be placed on the party resisting the enforcement of the arbitral award, and

[59] Office of the Permanent Secretary for Defence, above n 54, 3.
[60] Ibid 5.
[61] Loukas A Mistelis, Julian D M Lew and Stefan Michael Kroll, 'Chapter 26 Recognition and Enforcement of Foreign Arbitral Awards' in Julian D M Lew, Loukas A Mistelis and Stefan Kroll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 687, 721.
See also Richard Kreindler and Anna G Tevini, 'Chapter 9 The Impact of Public Policy Considerations' in Thomas D Halket (ed), *Arbitration of International Intellectual Property Disputes* (Juris Pubishing, 2012) 472; May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England' (2006) 23(3) *Arizona Journal of International & Comparative Law* 748, 774.

the restrictive sovereign immunity, immunity attached to only sovereign acts of State, should be applied when a party invokes.

- Other jurisdictions' courts decisions and practice should be taken into consideration in the enforcement of foreign arbitral awards proceedings.

CHAPTER VI CONCLUSION

A *Introduction*

Thailand, as a Contracting State, is bound by the provisions of the *New York Convention*. Thus, Thailand is obliged to apply the narrow standard of the public policy exception, namely international public policy, as a bar to the recognition and enforcement of foreign arbitral awards which is accepted as the international standard under the *New York Convention*.1 This was discussed in Chapter II. However, as explained in Chapter III, the international standard of the public policy exception is not applied by Thai courts. The Thai courts apply and interpret the public policy exception very broadly. Further, it is important to note that the *2002 Thai Arbitration Act*, the current Thai arbitration law, provides that the same standard of the public policy exception should be applied to all arbitral awards at both the setting aside and enforcement stages. This phenomenon has caused traders and investors to question whether they wish to conduct business, arbitrate disputes, and seek to enforce arbitral awards in Thailand. In effect, the fact that Thai courts are failing to adhere to the obligations of the *New York Convention* has the potential to detrimentally affect Thailand's economic development.

While this thesis does discuss the setting aside of arbitral awards, it focuses predominantly on the public policy exception as a bar to the recognition and enforcement of foreign arbitral awards as this is what is required by the *New York Convention*. Therefore, this thesis examined the *2002 Thai Arbitration Act* in detail, identifying issues relating to the application of the public policy exception that are causing problems. These issues are as follows:

1 The ambiguity of the 2002 Thai Arbitration Act in relation to the court's power to review arbitral awards;

2 The failure of the legislation to distinguish between domestic and foreign arbitral awards;

[1] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011); See also Committee on International Commercial Arbitration, International Law Association, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (New Delhi, 2-6 April 2002); *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'industrie du Papier (RAKTA)*, 508 F 2d 969, (2nd Cir, 1974); Loukas A Mistelis, Julian D M Lew and Stefan Michael Kroll, 'Chapter 26 Recognition and Enforcement of Foreign Arbitral Awards' in Julian D M Lew, Loukas A Mistelis and Stefan Kroll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 687, 723; Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 623.

3 The broad interpretation adopted by Thai courts in deciding arbitration cases where the public policy exception may apply; and

4 Cultural impediments influencing the application and interpretation of the public policy exception: the black letter law interpretation, sovereign immunity, the political intervention on arbitration matters.

Hence, it is important to look for practical and appropriate recommendations which, if implemented, will solve the problems. Therefore, the legislation and the decisions of national courts in other jurisdictions dealing with the identified issues were examined in Chapter IV. The jurisdictions selected for comparison purposes are those that are currently the most popular places of arbitration, ie, France, Germany, Singapore, Switzerland, the United Kingdom, and the United States.[2]

The thesis then, in Chapter V, analysed the information from the previous Chapters in order to formulate a suggested model for the reform of Thailand's arbitration law ie, a model that the author suggests will eliminate the problems raised in this thesis. However, this Chapter also highlighted that there are potential barriers that may impede efforts to reform of the arbitration law of Thailand.

Much has been achieved through conducting this research. As noted below, the research findings have provided answers to the core research questions, as outlined in Chapter I. In turn, these responses form the basis of the recommendations suggested to resolve the difficulties relating to the application of the public policy exception and enforcement of foreign arbitral awards in Thailand, and potentially creating an efficient and effective arbitration law framework that will engender confidence in those who are considering trading and investing in Thailand. The following section will respond to those questions. Then, research outcomes, and suggestions for future research will be described.

B *Responses and Recommendations Relating to the Core Research Questions*

The following provides responses to the research questions which were set out in Chapter I.

1 *Does the New York Convention provide a precise definition of the public policy exception that should be applied to foreign arbitral awards? And, to what extent has the New York*

[2] Simon Greenberg, Jason Fry and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (International Chamber of Commerce (ICC), 2012) 199-201.

Convention achieved its goal of providing a uniform standard to guide national courts and limit their discretion in refusing the recognition and enforcement of foreign arbitral awards on the public policy ground?

This thesis studied the public policy exception as a bar to the recognition and enforcement of foreign arbitral awards. It noted that the *New York Convention* governs the recognition and enforcement of foreign arbitral awards, and therefore it is this Convention that informs the research in terms of the standard to be applied in relation to public policy matters.

Yet, in answer to the first question posed, the Convention does not provide a specific definition. Instead it defers the question of how the public policy is defined to the States. There are, in fact, two public policy goals of the *New York Convention*, the pro-enforcement bias and the public policy of the enforcing State, with respect to the public policy exception, need to be weighed against each other. With respect to the public policy exception as a ground for a competent authority to refuse the recognition and enforcement of foreign arbitral awards, art V(2)(b) of the *New York Convention* uses the general term 'public policy'. Since a treaty should be read in accordance with its intention, the narrow standard of 'international public policy' has widely been suggested and accepted. International public policy, public policy of the enforcing State construed narrowly, seems to be a reasonable compromise. It has been observed through an examination of case law in Chapter IV that most national courts applied and interpreted the public policy exception narrowly. However, there was also some evidence indicating that national courts in some jurisdictions did not follow the suggested standard of the public policy exception. The national courts of these countries seem to take a protectionist viewpoint, especially in protecting local economic interests.

This thesis, therefore, found that although there is a generally accepted uniform standard of the public policy exception, ie, the international public policy, the *New York Convention* is not entirely successful in having all Contracting States operating according to that standard in terms of refusing the recognition and enforcement of foreign arbitral awards.

2 *Thailand is a Contracting State of the New York Convention which refers to the public policy exception as a ground to refuse the recognition and enforcement of foreign arbitral awards. Is the standard of the public policy exception applied in Thailand compatible to that of the New York Convention?*

As a Contracting State, Thailand is bound to apply and interpret the public policy exception in accordance with the *New York Convention*. As mentioned above, the narrow standard of international public policy is considered the standard of the public policy exception under the *New York Convention*. Therefore, Thai courts should apply and interpret the public policy exception accordingly. However, the cases mentioned in Chapter III show that Thai courts do not follow the international standard,[3] thus the practice of Thai courts with respect to the public policy exception is incompatible with the standard under the *New York Convention*. This thesis found that there were four main problematic issues causing the incompatibility which are:

First, the *2002 Thai Arbitration Act* in terms of the court's power to review arbitral awards is vague. The ambiguous language of the Act allows Thai courts to set aside all arbitral awards. Since the public policy exception is both a ground to set aside and to refuse the recognition and enforcement of arbitral awards, the sole standard of the public policy exception is applied to both cases. As noted, Thailand is bound to apply the public policy exception narrowly as a Contracting State of the *New York Convention* while such obligation does not apply to setting aside matters because the *New York Convention* does not cover setting aside arbitral awards. Therefore, setting aside of an arbitral award pertains to the exclusive jurisdiction of the courts in the country of origin, namely the country in which or under the law of which, the arbitral award was made.[4] It should be noted, however, that an arbitral award that has been set aside in the country of origin is a ground for refusal of the enforcement of that arbitral award under art V(1)(e) of the *New York Convention*.

Second, the *2002 Thai Arbitration Act* fails to distinguish between domestic and foreign arbitral awards. The *New York Convention* covers only foreign and non-domestic arbitral awards, so Thailand should apply the narrow standard of the public policy exception to those cases. It is understandable that a State would like to reserve its sovereign executive rights as long as it does not violate its obligations under a bilateral, regional, or international treaty. The failure to make the distinction between domestic and foreign arbitral awards has put the pressure on Thai courts when the matter is a domestic one, and they believe it should be treated by a different standard.

[3] It is important to note that, under the *Arbitration Act 2002* (Thailand), all public policy exceptions are impliedly to be applied under the same standard.
[4] Recently, the trend has changed to that only the place of arbitration is the country of origin which acquires the power to set aside an arbitral award.

Third, Thai courts applied the broad standard of the public policy exception to arbitration matters as demonstrated in Chapter III. Since the *2002 Thai Arbitration Act* governs all arbitral awards, the broad standard is impliedly applied to all arbitral awards including foreign arbitral awards. As a result, the Thai courts' application and interpretation of the public policy exception is incompatible to the standard of the *New York Convention*.

Last, there are some cultural impediments that influence the broad application and interpretation of the public policy exception such as the black letter law interpretation, sovereign immunity, and political intervention. These particular cultures, as discussed in Chapter III, express the protectionist view of Thailand, and that seems to impact the application of the public policy exception.

In conclusion, these problematic issues impact the application and interpretation of the public policy exception in Thailand which does not follow the international standard under the *New York Convention* whereas Thailand is a Contracting State.

3 *What should be an appropriate uniform standard for striking the balance between the public policy exception as a bar to the enforcement of foreign arbitral awards and the pro-enforcement bias under the New York Convention?*

As mentioned earlier, the pro-enforcement bias under the *New York Convention* and the public policy of the enforcing State are important and need to be balanced. That is obviously the reason why art V of the *New York Convention* indicates 'the public policy of that country' in the public policy exception. As a result, 'international public policy' was introduced as the standard meant to be applied by national courts, and that the public policy exception should only be applied in exceptional circumstances.

Even though the *Model Law*, a non-binding document, aims to enhance the effectiveness of the *New York Convention*, only a handful of countries have adopted it wholly or in part.[5] The fact that the *Model Law* covers international arbitral awards which is broader than the scope of application under the *New York Convention* might be one of the reasons. Since the *Model Law* is not binding, the Contracting States of the *New York Convention* would not be willing to give up their sovereign executive rights more than they need to. It can be observed from the main selected countries' laws that most of them still distinguish between domestic and

[5] United Nations Commission on International Trade Law, *Status UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006,* UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

foreign arbitral awards. Thus, the standard of the public policy exception applied to domestic and foreign arbitral awards can be different.

Like the general term 'public policy', the term 'international public policy' is not precisely definable. However, the ILA has specifically categorised a range of grounds to be considered as parts of international public policy such as mandatory law/*lois de police*, fundamental principles of law, contrary to good morals/public order, national interests/foreign relations, fraud/corrupt arbitrator, breach of national justice/due process, lack of impartiality, lack of reasons, manifest disregard of the law, manifest disregard of the facts, *res judicata*, and annulment at the place of arbitration.[6] In addition, the ILA provide a uniform guideline of how national courts should apply the public policy exception as mentioned in Chapter V. Notwithstanding, national courts in some of the main selected countries applied the public policy exception even more narrowly than what is stated in the ILA guideline. For example, mistakes of facts or of law do not establish the public policy ground in France, Germany, Singapore, the United Kingdom, and the United States.

Thus, it has been widely accepted that the appropriate uniform standard of the public policy exception under the *New York Convention* is the narrow standard of international public policy. Although the public policy of each country varies, the uniform guideline provided by the ILA and the courts' decisions in many jurisdictions have shaped how the application and interpretation of the public policy exception should be. Therefore, in the cases concerning an international treaty, international guidelines and courts' decisions in other jurisdictions should be taken into consideration.

4 *Are there any differences between the common law and civil law approaches to the concept of 'public policy' based on the public policy exception under the New York Convention?*

As pointed out in Chapter I, the terms 'public policy' used in common law countries and '*ordre public*' used in civil law countries have been held to be interchangeable by the ILA and in fact this is evident when examining both the English and French version of the *New York Convention*, this thesis argues that they are not the same. The differences of these terms were already discussed in Chapter II. It has been found that, basically, the English term

[6] Committee on International Commercial Arbitration, *Interim Report on Public Policy as a bar to Enforcement of International Arbitral Awards* (International Law Association, 2000) <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=15&ved=0CEMQFjAEOAo&url=http%3A%2F%2Fwww.ila-hq.org%2Fdownload.cfm%2Fdocid%2FE723662E-053C-415A-A4C7822577AE6B4F&ei=IIPTUaXeLIGCkwWS04CABQ&usg=AFQjCNFHXadopA03NVuxeHqmmHH1eRNOzw&bvm=bv.48705608,d.dGI&cad=rja> 17-30.

'public policy' covers only substantive issues while the French term '*ordre public*' covers both substantive and procedural issues. Hence, it has already been clarified that the public policy exception, using either term, under the *New York Convention* and the *Model Law* covers both substantive and procedural issues.

Furthermore, the main selected countries discussed in Chapter IV, either common law countries or civil law countries, apply and interpret the public policy exception in the same way. They all apply the narrow standard of international public policy to enforcing foreign arbitral awards matters. Therefore, there seems to be no different approach applied in common law and civil law countries. However, there is another interesting point which is the specifically identified public policy exception. Some civil law countries clearly specify 'international public policy' to be applied to foreign arbitral awards in their legislation while no common law country states that specifically in the law.

5 *What are appropriate proposals for reforming the Thai arbitration legislation in order to make the Thai judicial practice compatible with a balanced restrictive approach to the public policy exception with a view to promoting the finality and enforceability of arbitral awards?*

The recommended model for the Thai arbitration law reform with respect to the public policy exception was outlined in Chapter V. This model was drawn from the *New York Convention*, the *Model Law*, the arbitration laws and courts' decisions of the main selected countries, guidelines from international organisations, and Thai cultures were taken into account. The amendments to the law that this thesis suggests will solve the problematic issues identified in Chapter III. They are as follows:

First, the Thai arbitration law needs a clear scope of application in order to avoid the confusion about the reviewing power of the courts in arbitration matters. Thus, like the selected countries discussed, Thailand should have a provision clarifying that the competent courts in Thailand have the power to set aside only arbitral awards rendered by arbitration tribunals in which Thailand is the place of arbitration. Thus, Thai arbitration law will align with the *New York Convention* and the *Model Law* in this respect, and it will be very unlikely that a foreign arbitral award is set aside by Thai courts. Consequently, for foreign arbitral awards, the public policy exception will not be considered twice in setting aside and enforcement proceedings.

Second, the Thai arbitration law needs to at least distinguish between domestic and foreign arbitral awards. Some of the main selected countries like France, Singapore, and Switzerland differentiate both the types of arbitration and arbitral award while Germany, the United Kingdom, and the United States distinguish only the types of arbitral award. Consequently, these countries apply and interpret the public policy exception to enforcing foreign arbitral awards cases in accordance with the *New York Convention* as they are bound while they still have their full reviewing power over domestic arbitral awards. As noted, France and Switzerland apply different standards of the public policy exception to arbitral awards which has France and Switzerland as the place of arbitration and foreign arbitral awards.

Third, Thai courts should strictly apply and interpret the public policy exception as a ground for refusing the recognition and enforcement of foreign arbitral awards in accordance with the international standard under the *New York Convention*. By doing so, Thailand will fulfil its obligations as a Contracting State of the *New York Convention*. However, to ensure that Thai courts will consistently apply the international standard of the public policy exception to foreign arbitral awards, the black letter law interpretation of statutes generally adopted in judicial practice in Thailand, as discussed in Chapter III, is concerned. Hence, the recommended provision concerning the public policy exception as a bar to the recognition and enforcement of foreign arbitral awards should be drawn from the appropriate provision of the French arbitration law. The provision should state the term 'international public order or good morals' specifically so that it will be applied narrowly. Moreover, since the recognition and enforcement of foreign arbitral awards is an international matter, international guidelines and courts' decisions from other jurisdictions should be taken into consideration.

For the cultural impediments, mentioned in Chapter III as the fourth issue, there was no specific provision concerning this issue. However, it has been considered as a part of all recommendations.

C *Research Outcomes*

The research explored the appropriate standard in applying the public policy exception under the *New York Convention*. As a result, the incompatibility between the standard of the public policy exception under the *New York Convention* and that applied by Thai courts has been identified. Accordingly, the problematic issues that flow from this incompatibility were identified in Chapter III.

By using the doctrinal and comparative research methods, not only the international documents like the *New York Convention* and the *Model Law* but also the relevant materials from the most popular places of arbitration in the world, also bound to the *New York Convention*, were analysed and critiqued. Even though all of the main selected countries apply the narrow standard of international public policy to the public policy exception to recognising and enforcing foreign arbitral awards cases, they somehow use different approaches. How each of the selected countries deals with the identified issues of Thailand was evaluated in order to look for a suitable solution and draw up a recommended model for the Thai arbitration law reform. It should be noted that Thai legal cultures were taken into consideration.

Besides the recommended model for the Thai arbitration law reform, the key obstacles to the law reform were discussed in Chapter V, eg, the unstable political situation, delays in the legislative process, the ill-prepared state of government sectors, corruption, and political policy. From these obstacles which would impact the Thai arbitration law reform, it can be observed that not only legislation and courts' interpretations are problematic, but also there are other factors holding back the development of the arbitration system in Thailand.

In answering the research questions, this thesis seeks to remedy what now seems to be an inefficient and ineffective arbitration law framework. Thailand as a developing country needs more infrastructure and foreign investment in order to drive economic growth. The assurance of an efficient and effective arbitration system that has been recommended in this thesis will help to build the confidence of investors to conduct their business in Thailand and with Thai businesspeople.

Moreover, Thailand, as a Member of the WTO, is also at risk of breaching the fundamental principle of creating a competitive playing field within the WTO because of the broad application and interpretation of the public policy exception by Thai courts. The application of the narrow standard of public policy to the recognition and enforcement of arbitral awards will liberalise both local and international trade.

Further, as Thailand is now a Member of the ASEAN Economic Community (AEC), and arbitration is indicated as the dispute resolution mechanism among its Members, it would be extremely undesirable if Thailand's economic development is hampered by a failure to apply the international standard required by the *New York Convention*. Thus, it is significant that Thailand promotes the finality of arbitral awards so that arbitration proceedings are not

wastefully conducted and so that it fulfils its obligations under the *New York Convention*; especially the public policy exception as a bar to the recognition and enforcement of foreign arbitral awards.

D *Suggestions for Future Research*

By studying the topic of the public policy exception as a bar to the recognition and enforcement of foreign arbitral awards in Thailand, a few questions have been raised which could be the subject for future research. For instance, when should the public policy exception be invoked? and how should the ASEAN Economic Community (AEC) deal with the public policy exception as a bar to the recognition and enforcement of arbitral awards?

With respect to the first question, should the public policy exception be invoked only at the state of the enforcement of an arbitration agreement? It has been observed that the practice of the Contracting States of the *New York Convention* take two different approaches. The Singaporean arbitration law states that an arbitration agreement may be refused enforcement by a court on the public policy ground.[7] Consequently, the dispute in that case will not be referred to an arbitration tribunal. Alternatively, the United States Court of Appeals, Eleventh Circuit stated that the public policy exception could only be raised at the stage of the enforcement of an arbitral award: not the stage of the enforcement of an arbitration agreement.[8]

Next, Thailand is now part of the AEC, and arbitration is indicated as the dispute resolution method among the Members. Since this is an economic concentration, international trading with the least barrier is the key. To promote trading between the AEC Members, an effective and efficient arbitration system is significant. Should there be a uniform arbitration system in ASEAN? Should there be a permanent arbitration institute for ASEAN? And, should there be a regional treaty concerning commercial arbitration for ASEAN?

Nevertheless, this section, basically, provides some ideas for future research. Therefore, it should be noted that the suggestions for future research is outside the scope of the thesis. This thesis only focuses on the public policy exception to the recognition and enforcement of foreign arbitral awards in Thailand.

7 Article 11(1) of the *International Arbitration Act* (Singapore).
8 *Norris Anthony Brown et al. v Royal Caribbean Cruises, Ltd.*, 549 Fed Appx 861 (11th Cir, 2013); See also *Lindo v NCL (Bahamas) Ltd.,* 652 F 3d 1257 (11th Cir, 2011).

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