

Public Policy Exception in International Commercial Arbitration: A Southeast Asian Perspective

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Abstract

There have been many changes brought in the international business community since globalization took place around the globe. In the Southeast Asian region, the legislative framework has been made to extend their trade relationship with their neighboring countries in a cooperative manner. In order to gain international recognition in the global market and to improve their economy, it is essential that the courts should apply public policy ground appropriately in order to promote international trade practices.

Keywords: *International Commercial Arbitration, New York Convention, Public Policy, Southeast Asia, UNCITRAL Model Law*

1. Introduction

In this competitive world today we see that there have been significant changes in the global market after globalization and liberalization. There are some countries at present, which are making their best effort to stand and gain international recognition in the business community. Among them are the Southeast Asian countries, which are focusing on protecting their nation's interest, as well as improving the flow of their economy with time. It is important to note that in order to gain recognition, it is essential that the nations around the world should follow international standards. Keeping this perspective in mind, the lawmakers in such countries are emphasizing on laws which are beneficial in governing domestic as well as international trade properly. At present, it is essential that these countries should attain international acceptance in the commercial sector. Countries like Vietnam, Malaysia, Singapore, Indonesia, and the Philippines are part of this region and they are party to international conventions such as New York Convention as well as UNCITRAL Model Law, which are encouraging these countries to maintain a cooperative and friendly atmosphere for conducting trade and commerce activities.

Unfortunately, there has been a rapid increase in the number of commercial disputes between the parties at the international level. In order to improve such a situation, it is essential that the countries should rely on international principles, which govern the commercial sector in order to improve their current situation. Public policy notion is one of the international principles, which is followed while performing commercial activities worldwide in order to maintain harmony in the business sector. The public policy has been appreciated as a defence under the New York Convention where it has provided that the competent authority would refuse award's recognition as well as enforcement when such award which is violating the country's public policy.[1] Also, the UNCITRAL Model Law has supported this aspect and

has observed that in order to improve participation in international commercial activities it is important for the nations to keep in mind the guidelines of the international conventions. Moreover, the Model Law has illustrated that the state has the authority to refuse an arbitral award on the same ground as prescribed under the New York Convention.[2] In addition, the court can set aside an arbitral award on the ground of public policy.[3]

It is significant to note that the New York Convention has not elaborated on the grounds of public policy. The convention has simply mentioned the word ‘public policy’ under its provision. Due to the absence of a definition, it has created difficulty for the courts to interpret the grounds of public policy. The way of interpreting public policy has differed from time to time, which has drawn the attention of the author to focus on the necessity to have public policy exception in order to resolve the disputes and safeguard countries interest.

2. Economy- Southeast Asian region

Since this article will highlight on the manner the public policy notion has been interpreted by the courts in Southeast Asian countries the author would prior elaborate on the economic conditions of these countries in order to understand the need to have public policy as a defence in the international market.

In order to improve the condition of these Southeast Asian economies, it is necessary that their legal system should promote investment participation at domestic and international level. For instance, Vietnam had approximately 6.9 percent of Gross Domestic Product (GDP) growth rate in 2018, which is expected to reach nearly 6.8 percent in 2019.[4] Its contribution to the world economy is 0.36 percent.[5] On the other hand, it is expected that in 2019 Malaysia’s GDP will rise by 4.8. In Singapore, there will be slow growth in GDP in 2019 by 2.9 percent as compared to Indonesia where it is estimated that it will increase by 5.3 percent. In the Philippines, it is has been observed that GDP will increase by 6.7 in 2019.[6] At the international level, the Foreign Direct Investment (FDI) flow in Vietnam has arrived at 19. 10 USB Billion in 2018.[7] The data shows that Malaysian FDI participation has reached to MYR 32. 65 Billion.[8] Further, in Singapore, the FDI flow in the third quarter of this year has raised by 32853.80 SGD Million.[9] Whereas in the fourth quarter of the same year in Indonesia FDI has shot up by 99 IDR Trillion.[10] However, in the Philippines, the inflow of FDI has fallen and has reached to USD 9. 8 billion.[11] In order to improve these countries economy and FDI participation, it is essential that their legal system should support protecting their nation’s interest as well as encourage international principles as well as policies, which could be beneficial in improving their standards.

3. Role of Public Policy Exception- Southeast Asian Perspective

To begin with, the word ‘public policy’ means these are the unwritten principles in most of the circumstances and it is helpful in making social laws.[12] On legal context, it is considered to be the policies, which are made by the government, and has their impact on its population completely.[13] Moreover, they are the policies formed by the state for their people. This provides them the authority to limit the participation of the public in specific matters in order to safeguard public interest and results in public good as well as it is not confined to any particular policy.[14] There is a need is to understand the manner public policy has been

understood in the field of international commercial arbitration in order to strengthen economies worldwide.

In order to regulate commercial activities under Vietnamese arbitration law, it has been made clear that an award would be set aside when it is in conflict with the basic principles prevailing in Vietnam. The Act follows the Model Law but it has not mentioned the word 'public policy' under its provisions. The Act has specified that the award would be refused when it is contrary to fundamental principles of Vietnam's legal system. [15]

Under the Malaysian scenario, their arbitration law concerning public policy ground has given preference to aspects such as morality and justice. In addition, when there is any harm to public good this will lead to a violation of public policy. The Act has mentioned the grounds, which includes when the award is induced and affected by fraud, corruption, as well as contrary to principles of natural justice at the time of proceedings and award making it would result in violation of country's public policy in Malaysia.[16] The significance is given to the belief that there should be practice based on comity of the countries and should have uniformity. The court have recently given importance to follow a narrow view of this exception.[17]

In Singapore, the laws have emphasized on grounds of morality as well as justice, which are their prime basic norms. If there is any act, which is against these norms, it would amount to a violation of their nation's public policy.[18] The court has the power to refuse the award's enforcement on bases of this defence. It has been observed that the courts have provided a narrower view and has stated that enforcement would not take place when it shocks the forum's conscience or morality.[19] Although only in rare situations any harm, which is caused to the public good that, would also be considered. The Act highlights that when an application is made to solve the matter by arbitration as prescribed under their agreement it should not be contrary to public policy.[20]

Indonesian Act has mentioned the word 'public order' instead of 'public policy' while addressing ground for refusing award's enforcement. It is possible if it is contrary to public order.[21] The Act has defined the word 'public order' and has elaborated that it would comprise of three elements. Firstly, it should not be contrary to their legal system and societal system. Also, it should not be against the laws and regulations of their country. In addition, it should not be opposed to their state and their legal sovereignty. From this, we can understand that public policy ground has been broadly followed. On the other hand, in domestic arbitration focus is made on local policies, which are fundamentally important, and principles, which are in relation to their domestic law.[22] It has been observed that public policy is vaguely considered and the Act is silent under Section 66, therefore, the courts have followed a loose view at the time of interpreting this concept.[23]

The public policy ground under Philippine's law is recognized under the Alternative Dispute Resolution Act.[24] Also, Special ADR Rules has stated that RTC would refuse the recognition as well as enforcement of foreign award on this ground.[25] The courts play a significant role to refuse such awards on this ground.[26] However, the RTC has the power to deny but it doesn't have power for vacating or setting aside a foreign award.[27] For instance, once it was held by the court that enforcement of the award would not take place as it was

contrary to Philippine's public policy on the ground that it was not applying the Philippine laws as per directed under the contract which has resulted in unjust enrichment.[28] A broader perspective is given to this defence under the Philippine's scenario by their courts.[29]

4. Conclusion

Nowadays the laws should be arbitration friendly, which would encourage the countries in having cost as well as the time-saving mechanism to settle the matters between the parties. It is essential that Southeast Asian countries should encourage international standards by obeying international instruments like the New York Convention and UNCITRAL Model Law to have fair practice. The term 'public policy' has not been intentionally defined under the New York Convention, which has given the liberty to the court to interpret and define this defence.[30] There is a need to maintain transparency for which it is essential to maintain uniformity while applying international conventions in order to achieve certain results. The investor's involvement in such activities would increase and the parties will be equally treated which will have a healthy impact on their business transactions.

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