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Judicial Review of Arbitration Awards on the Ground of Public Policy under the Law of Thailand: An Excessive Judicial Intervention?

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Abstract

This article explores how the Supreme Court and the Supreme Administrative Court have interpreted and applied the concept of public policy for the setting aside or non-enforcement of arbitration awards. It is found that the courts' approach to the interpretation of the public policy defence appears to be broader than the approach that courts in foreign jurisdictions use in the context of international commercial arbitrations. The current approach seems to be that Thai courts will draw the line between questions of fact and questions of law, whereby only questions of fact are not subject to judicial review. This means that any errors made by arbitral tribunals in deciding questions of law may result in the arbitration awards being set aside or refused for enforcement by the courts on the ground of public policy. The author then concludes that this broad ambit of the public policy defence can be seen as an excessive judicial intervention in arbitration which may undermine the fundamental objectives of arbitration as a dispute resolution mechanism.

Keywords: Arbitration — Arbitration Awards — New York Convention – Public Policy

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I. INTRODUCTION[1]

At the time of writing, it has been more than three decades since the Parliament of Thailand enacted the Arbitration Act 1987.[2] It has, however, not been uncommon over these decades for the domestic courts of Thailand to set aside or refuse enforcement of arbitration awards. As a matter of fact, one of the grounds that are most often cited for seeking to have arbitration awards set aside by Thai courts is that the enforcement of the award would be contrary to public policy.[3]

For a domestic court to rely upon public policy to set aside or not give effect to arbitral awards is not entirely extraordinary. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards[4] (New York Convention) and the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration[5] (UNCITRAL Model Law) both recognise the power of a national court to set aside and/or refuse enforcement of an award if the enforcement of that award would be contrary to public policy.[6] Nevertheless, perhaps due to its vagueness, public policy has long attracted considerable attention from Thai scholars and practitioners, especially with respect to the extent to which it may apply.[7]

This article explores how Thai courts have interpreted the public policy ground for the setting aside or non-enforcement of arbitration awards, and analyses whether such an approach to interpretation can be seen as an excessive judicial intervention in arbitration. By way of background, Part II begins with the Thai legislative scheme relevant to the public policy defence. Part III discusses the concept of public policy in different contexts within the Thai legal system ranging across the regimes of juristic

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[1] All English translations in this article are provided by the author unless otherwise indicated.

[2] พระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2530, ราชกิจจานุเบกษา เล่ม 104 ตอนที่ 156 หน้า 1 (12 สิงหาคม 2530) [Arbitration Act 1987, Government Gazette vol 104 pt 156 p 1 (12 August 1987)] (Thai).

[3] สถาบันอนุญาโตตุลาการ, รายงานสถานการณ์อนุญาโตตุลาการ ประจำปี 2563 (2563) [Thailand Arbitration Center, Annual Report of Arbitration Situations 2020 (2020)] (Thai) 9. See also Veena Anusornsena, "Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: The United States, Europe, Africa, Middle East and Asia" (SJD diss, Golden Gate University, 2012) 193.

[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (Thailand's accession in 1959).

[5] UNCITRAL Model Law on International Commercial Arbitration, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (21 June 1985) Annex I, as amended by UN GAOR, 61st sess, Supp No 17, UN Doc A/61/17 (7 July 2006) Annex I.

[6] New York Convention (n 4), art V(2)(b); UNCITRAL Model Law (n 5), art 34(2)(b)(ii) and art 36(1)(b)(ii).

[7] See, for example, Ratima Nirunpornputta, "Judging State International Commercial Arbitration Law in Thailand: A Comparative Study with Singapore" *Thai Arbitration Institute* (2019) <tai.coj.go.th/en/content/article/detail/id/78/iid/165490>; ธวัชชัย สุวรรณพานิช, "ความสงบเรียบร้อยและศีลธรรมอันดีของประชาชนและการอนุญาโตตุลาการ: คำพิพากษาศาลปกครองกลาง คดีหมายเลขแดงที่ 1659–1660/2555" (2012) วารสารกฎหมายทรัพย์สินทางปัญญาและการค้าระหว่างประเทศ 460 [Thawatchai Suvanpanich, "The Public Policy and the Good Morals of the People: The Judgment of the Central Administrative Court Red Case No. 1659–1660/2555" (2012) Intellectual Property and International Trade Forum 460] (Thai). For early discussions of this topic, see วิชัย อริยะนันทกะ และคณะ, "พรหมแดนของความสงบเรียบร้อยและศีลธรรมอันดีของประชาชนในการบังคับตามคำชี้ขาดของอนุญาโตตุลาการอยู่ที่ใด" (2007) วารสารอนุญาโตตุลาการ 10 [Vichai Ariyanuntaka and others, "Where are the Boundaries of Public Policy for Enforcement of Arbitration Awards?" (2007) Journal of Arbitration 10] (Thai).

acts, conflict of laws, and arbitration. Part IV then delves into some prevailing judgments in which the two apex courts of Thailand, namely the Supreme Court and the Supreme Administrative Court, interpreted and applied the public policy ground.[8] Part V provides the author's analysis on whether the current courts' approach may be seen as an excessive judicial intervention in arbitration. Part VI provides concluding remarks.

II. LEGISLATIVE SCHEME

A. Arbitration Act 1987

On 21 December 1959, Thailand became a contracting state to the New York Convention. However, it was not until 1987 that Thailand incorporated the Convention into domestic law by the enactment of the Arbitration Act 1987.

The Arbitration Act 1987 makes a distinction between a domestic award and a foreign award.[9] As for domestic awards, the court may refuse to enforce an award if the court finds that the award is contrary to the law governing the dispute, is made as a result of an unjustified act or procedure, or is made outside the scope of the binding arbitration agreement or the relief sought by the parties.[10]

However, the grounds for non-enforcement of a foreign award are found in Sections 32 to 35 of the Arbitration Act 1987. Sections 32 and 33 apply to awards under the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention), while Sections 34 and 35 apply to awards under the New York Convention. Section 34 provides that an application for the enforcement of a foreign arbitral award under the New York Convention may be refused if the party against whom it is invoked can prove the existence of any of the circumstances listed under the subparagraphs (1) - (6) thereof. Section 35 further provides that a court may refuse to enforce an award if the court finds that the subject matter of the dispute is not capable of settlement by arbitration or that *the recognition or enforcement of the award would be contrary to the public policy or good morals or the principle of reciprocity between countries*.[11]

[8] Not all the decisions of the Supreme Court and Supreme Administrative Court are made available to the public, therefore the discussions in this article will be confined to the decisions that are publicly available at the time of writing.

[9] ibid 14–16. See also Supreme Court Decision 1505/2547, in which the Court ruled that the provisions applicable to domestic arbitration shall not apply when it comes to the issue of enforcement of a foreign arbitration award.

[10] ibid s 24.

[11] Arbitration Act 1987 (n 1), s 35.

B. Arbitration Act 2002

On 29 April 2002, the Parliament of Thailand enacted the Arbitration Act 2002[12] to replace the Arbitration Act 1987. The rationale for this enactment, as specified in the Arbitration Act 2002, is that the Arbitration Act 1987 was no longer suitable for the economic and social conditions and was not consistent with the arbitration laws of other countries. Hence, the Parliament deemed it appropriate to amend the law based on the UNCITRAL Model Law, so as to achieve the same standard as other nations.[13]

Unlike the Arbitration Act 1987, the Arbitration Act 2002 provides that an arbitration award, irrespective of the country in which it was made, shall be recognised as binding on the parties and, upon petition to the court, shall be enforced.[14] By this, it means that the Arbitration Act 2002 no longer makes a distinction between domestic awards and foreign awards, and it can be suggested that both types of arbitration awards are subject to the same rules for judicial review.

The grounds for non-enforcement of the arbitral awards are found in two provisions of the Arbitration Act 2002, namely Sections 43 and 44. Section 43 of the Arbitration Act 2002 lists the grounds based on which the courts may refuse to enforce an award, provided that any of these grounds can be proved by the party against whom the award is invoked.

On the other hand, Section 44, based on Article 36(1)(b) of the UNCITRAL Model Law, provides as follows:

> The Court has the power to issue an order refusing enforcement of an arbitral award under Section 43 if it is apparent to the Court that the award deals with the subject-matter which is not capable of settlement by arbitration under the law or the enforcement of the award is contrary to the public policy or good morals.[15]

Noteworthily, unlike the Arbitration Act 1987 which has no provisions on setting aside arbitral awards, Section 40 of the Arbitration Act 2002 empowers the court to set aside an award under certain circumstances, including the public policy ground under Section 40(2)(b), namely where "the recognition or enforcement of the award is contrary to the public policy or good morals."[16]

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[12] พระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2545, ราชกิจจานุเบกษา เล่ม 119 ตอนที่ 39 ก หน้า 1 (29 เมษายน 2545) [Arbitration Act 2002, Government Gazette vol 119 pt 39 Gor p 1 (29 April 2002)] (Thai).

[13] This rationale was from time to time cited by the Supreme Court in several cases as a support to interpret the Arbitration Act 2002 with reference to the provisions of the UNCITRAL Model Law, see Supreme Court Decision 9476/2558; Supreme Court Decision 8359/2560; Supreme Court Decision 3281/2562.

[14] Arbitration Act 2002 (n 12), s 41.

[15] ibid s 44.

[16] ibid s 40.

III. THE CONCEPT OF PUBLIC POLICY

The concept of public policy has existed in the Thai legal system since long before the enactment of the Arbitration Act 1987. In addition to the context of setting aside or non-enforcement of arbitration awards, public policy is also used as a limit to party autonomy in the context of juristic acts and as a limit to the application of foreign law in Thailand in the context of the conflict of laws regime. This Part will discuss the concept of public policy in the contexts of juristic acts, conflict of laws, and arbitration, respectively.

A. Public Policy in the Context of Juristic Acts

The Thai legal system recognises the principles of freedom of contract and *pacta sunt servanda*.[17] However, since giving individuals unlimited liberty to determine their own legal relations can, in many circumstances, have an impact on the interests of the public beyond the interests of the private parties, it is necessary for the court to review the extent to which the principles of freedom of contract and *pacta sunt servanda* can be relied upon. As in other jurisdictions, one of the most powerful safeguards that Thai courts use for restricting party autonomy is the concept of public policy, as provided in Sections 150 and 151 of the Civil and Commercial Code[18] (CCC). These provisions provide respectively as follows:

> Any act is void if the objective of which is expressly prohibited by law, is impossible to be accomplished, or is contrary to the public policy or good morals.[19]

And:

> An act is not void on account of its differing from a provision of any law if such law does not relate to the public policy or good morals.[20]

Here, it can be seen that public policy, in the context of Sections 150 and 151 of the CCC, is used as a limit to party autonomy. Individuals can rely upon the principles of freedom of contract and *pacta sunt servanda* only to the extent that their affairs do not violate public policy, and any agreements between them may not be valid in the eyes of the law if the court determines those agreements to be contrary to public policy.[21] As such, the underlying objective of having the concept of public policy in this

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[17] See Saranwan Chotinimitkul, "Remark on Supreme Court Decision 3647/2549" (Thai) <http://deka.supremecourt.or.th/>.

[18] ประมวลกฎหมายแพ่งและพาณิชย์ [Civil and Commercial Code] (Thai).

[19] ibid s 150.

[20] ibid s 151.

[21] See, for example, Supreme Court Decision 12620/2558; Supreme Court Decision 7333/2558.

context is quite clear: to override party autonomy in order to preserve the greater good of the public.[22]

The concept of public policy in this context has a very powerful reach, and perhaps is the most powerful when compared to the other two contexts. The CCC does not contain any definition of the term "public policy," so the issue of whether a juristic act is contrary to public policy or whether a provision of law is based on public policy is left to be decided by the court.[23] As Honorary Professor Chitti Tingsabadh pointed out, there is no law that defines or even describes the concept of public policy, and public policy is a matter which the court must decide upon, having regard to the contemporary circumstances.[24]

Noticeably, in addition to the term "public policy", the term "good morals" is also found in the texts of Sections 150 and 151 of the CCC. However, in practice, Thai courts usually decide at once whether any matter is contrary to public policy or good morals without distinguishing between public policy and good morals.[25] As Professor Jeed Sethaputra observed, any acts which are contrary to good morals will usually be contrary to public policy.[26] Therefore, it is submitted that good morals can be considered part of public policy under Thai law,[27] and based on this submission, in this article the author will not discuss the term "good morals" separately from the concept of public policy.

B. Public Policy in the Context of Conflict of Laws

Outside the context of Sections 150 and 151 of the CCC, the concept of public policy is also used in the field of private international law (conflict of laws). Section 5 of the Conflict of Laws Act 1938[28] provides as follows:

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[22] See เสนีย์ ปราโมช, นิติกรรมและหนี้ (มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง 2477) [Seni Pramoj, *Juristic Act and Obligation* (University of Moral and Political Sciences 1934)] (Thai) 130–131.

[23] อภิสิทธิ์ ไต้ระหันต์, "ความสงบเรียบร้อยของประชาชน" (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต, มหาวิทยาลัยธรรมศาสตร์ 2559) [Aphisit Teirahunt, "Public Order" (LLM Thesis, Thammasat University, 2013)] (Thai) 31.

[24] จิตติ ติงศภัทิย์, "หมายเหตุท้ายฎีกาที่ 297/2501" ในรวมผลงานวิชาการของศาสตราจารย์จิตติ ติงศภัทิย์ เล่มที่ 2 (สำนักงานศาลยุติธรรม 2562) [Chitti Tingsabadh, "Comments on Supreme Court Decision 297/2501" in *Collection of Academic Works of Professor Chitti Tingsabadh No. 2* (Office of Court of Justice 2019)] (Thai) 191.

[25] See ปาลีรัฐ ศรีวรรณพฤกษ์, "ศาลปกครองกับการฟ้องร้องขอให้เพิกถอนคำชี้ขาดของอนุญาโตตุลาการ: ศึกษาเปรียบเทียบกฎหมายไทยและกฎหมายฝรั่งเศส" (2561) 18(3) วารสารวิชาการศาลปกครอง 192 [Paleerat Sriwannapruek, "The Administrative Court and the Petition for Setting Aside an Arbitral Award: Comparative Study Between Thai Law and French Law" (2018) 18(3) Administrative Court Journal 192] (Thai); อภิสิทธิ์ ไต้ระหันต์, "ความสงบเรียบร้อยของประชาชน" (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต, มหาวิทยาลัยธรรมศาสตร์ 2559) [Aphisit Teirahunt, "Public Order" (LLM Thesis, Thammasat University, 2013)] (Thai) 109.

[26] จี๊ด เศรษฐบุตร, หลักกฎหมายแพ่งลักษณะนิติกรรมและหนี้ (พิมพ์ครั้งที่ 2, โรงพิมพ์เอราวัณการพิมพ์ 2522) [Jeed Sethaputra, *The Legal Principles of Juristic Acts and Obligations* (2nd edn, Erawan 1979) 18.

[27] Aphisit, "Public Order" (n 23) 109.

[28] พระราชบัญญัติว่าด้วยการขัดกันแห่งกฎหมาย พ.ศ. 2481, ราชกิจจานุเบกษา เล่ม 55 หน้า 1021 (20 มีนาคม 2481) [Conflict of Laws Act 1938, Government Gazette vol 55 p 1021 (20 March 1938)] (Thai).

> Whenever a law of a foreign country is to apply, it shall apply in so far as it is not contrary to the public policy or good morals of Thailand.[29]

Section 5 of the Conflict of Laws Act is one of the pre-conditions which must be satisfied before a Thai court can apply a foreign law, namely that the application of the foreign law must not offend the public policy of Thailand. In other words, when the court finds that applying any foreign law would be contrary to the public policy of Thailand, the court may refuse to apply the foreign law and apply Thai law instead. Like the CCC, the Conflict of Laws Act does not provide a definition of the term "public policy" so the decision as to whether the application of a foreign law would be contrary to public policy in a particular case is left up to the court.[30]

However, it does not follow that the public policy in the context of Sections 150 and 151 of the CCC, on one hand, and the public policy in the context of Section 5 of the Conflict of Laws Act, on the other hand, are always identical. It seems arguable, at least in theory, that they are designed to serve different purposes. As discussed above, the concept of public policy is used under Sections 150 and 151 of the CCC as a limit to party autonomy to preserve the greater good of the public. Nonetheless, when it comes to the conflict of laws regime, public policy is used as a safeguard of the forum's legal system against the application of a foreign law which may produce intolerable results.[31] As the conflict of laws rules apply when a foreign element arises in a case, the function of public policy in this context, which is to avoid the application of the foreign law, is perhaps why Section 5 of the Conflict of Laws Act specifically refers to the public policy or good morals "of Thailand" while Sections 150 and 151 of the CCC do not make use of such language.

In this regard, Honorary Professor Yut Saenguthai put it:

> With regard to the question what provision of a foreign law would be contrary to the public policy or good morals, the court must exercise great caution. . . . [E]ven if the law of a foreign country may contain a provision which is contrary to any mandatory provisions under Thai law (which are those which the parties are unable to agree otherwise), merely this reason is not enough to conclude that the application of such foreign law would be contrary to the public policy or good morals [of Thailand]. . . .

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[29] ibid s 5.

[30] Associate Professor Prakob Prapannetivuth observed that "Thai courts will be required to first consider whether or not the application of such foreign law falls under the restriction, which does not permit such foreign law from being applied, under Section 5 of the Conflict of Laws Act . . . [and] as to the question of which cases would be contrary to the public policy or good morals, the Thai courts must consider it on a case-by-case basis," see ประกอบ ประพันธ์เนติวุฒิ, กฎหมายระหว่างประเทศแผนกคดีบุคคลและคดีอาญา (พิมพ์ครั้งที่ 7, มหาวิทยาลัยรามคำแหง 2541) [Prakob Prapannetivuth, Private and Criminal International Laws (7th edn, R. Ramkhamhaeng 1998)] (Thai) 76–77.

[31] See Alexei Nikolaevich Zhiltsov, "Mandatory and Public Policy Rules in International Commercial Arbitration" (1995) 42 Netherlands International Law Review 81, 95.

> The court must consider on a case-by-case basis whether the application of such foreign law is, clearly, contrary to the public policy.[32]

The author, then, submits that the scope of public policy in the context of Section 5 of the Conflict of Laws Act should be narrower than its counterpart in the context of Sections 150 and 151 of the CCC.[33] This proposition can also draw support from the Supreme Court Decision 45/2524. In that case, the Supreme Court ruled that a marriage between a ten-year-old male and a twelve-year-old female made under Chinese law, which at that time did not regulate the minimum age for marriage, was not contrary to the public policy of Thailand, despite Section 1448 of the CCC requiring that under Thai law, for a marriage to be lawful, the spouses must be at least seventeen years of age.[34] In this regard, because Section 1448 of the CCC is the provision of law relating to public policy which the parties cannot agree otherwise,[35] this decision of the Supreme Court ruling that the marriage made under Chinese law was not required to comply with Section 1448 of the CCC thus supports the proposition that the public policy concept under Section 5 of the Conflict of Laws Act is narrower than the public policy concept in the context of Sections 150 and 151 of the CCC.

C. Public Policy in the Context of Setting Aside or Non-Enforcement of Arbitration Awards

As discussed above in Part II, the Arbitration Act 2002 was not entirely invented by the Thai Parliament but was modelled after the UNCITRAL Model Law and, by extension, the New York Convention. It therefore seems reasonable for the author to consider the concept of public policy in the context of the Arbitration Act 2002 in light of the objectives of the public policy defence in international commercial arbitration under Article V(2)(b) of the New York Convention.

As to the historical background of this Article V(2)(b), Garry Born put it:

> In the context of the recognition of arbitral awards, [the] public policy exceptions derive in part from historic treatment of foreign judgments. . . . [M]ost private international law conventions and domestic private international law legislation contain "public policy" exceptions to otherwise uniform rules. These various public policy exceptions in different private international law contexts provide escape devices designed to protect the fundamental, mandatory policies of national legal regimes.[36]

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[32] สายหยุด แสงอุทัย, การขัดกันแห่งกฎหมาย: หลักทั่วไปของกฎหมายระหว่างประเทศแผนกคดีบุคคลและคำอธิบายพระราชบัญญัติว่าด้วยการขัดกัน แห่งกฎหมาย พุทธศักราช 2481 เรียงมาตรา (สยามพาณิชยการ 2482) [Saiyut Saenguthai, *Conflict of Laws: General Principles of Private International Law and Clause-by-Clause Commentary on the Conflict of Laws Act B.E. 2481* (Siampanichayakarn 1939)] (Thai) 178–180.

[33] See อรรัมภา ไวยมุกข์, "ปัญหาการคุ้มครองคู่สัญญาที่อ่อนแอกว่าในหลักกฎหมายขัดกันไทย" (2560) 10(1) วารสารนิติศาสตร์มหาวิทยาลัยนเรศวร 63 [Awnrumpa Waiyamuk, "Problems Concerning the Protection of Weaker Contracting Parties in Thai Conflict-of-Laws Rules" (2017) 10(1) Naresuan University Law Journal 63] (Thai).

[34] See CCC (n 18) s 1448.

[35] See the Constitutional Court Decision 20/2564.

[36] Garry B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 4001 (citations omitted).

Born then further pointed out that the concept of public policy under Article V(2)(b) of the New York Convention is intended to serve the same function as the concept of public policy in the field of private international law.[37] In this author's view, this should also be true of the case of public policy under Sections 40 and 44 of the Arbitration Act 2002. By this, it means that the public policy concept under these two provisions should serve as the basis on which the Thai court may set aside or refuse to enforce an award when the enforcement of the award would produce intolerable results in the Thai legal system. For this reason, it can logically follow that *the public policy concept in the context of Sections 40 and 44 of the Arbitration Act 2002 should have a narrower scope of application than the public policy in the context of Sections 150 and 151 of the CCC.*

However, based on some previous decisions of the Supreme Court and the Supreme Administrative Court, the line between the public policy concept in the context of juristic acts and in this context of arbitration may not be concrete, as the author submits. On the contrary, it seems that the two highest courts in the country have taken the position that public policy would generally refer to any matter related to the common interests of the people beyond the interests of the private parties.

For instance, in the Supreme Court Decision 5560-5563/2562,[38] the Supreme Court observed that:

> The term public policy . . . has neither definition nor legal explanation in the law so it is the matter which the court shall decide at its discretion having regard to the circumstances of the case and the contemporary social values. In doing so, the court shall consider *the need to protect the public interest, the public services, and the common interest of the people which are beyond the interest of the parties to a case at hand*. . . . Therefore, the scope of the public policy [exception] . . . to the recognition or enforcement of an arbitral award . . . must be decided based on the nature of the dispute . . . on a case-by-case basis.[39]

In the author's view, this position makes it very difficult to draw the line between the public policy concept in the context of arbitration and public policy in the context of Sections 150 and 151 of the CCC. This is perhaps because the court may be of the position that public policy in the context of Sections 40 and 44 of the Arbitration Act 2002 refers to the domestic public policy of Thailand rather than international or transnational public policy, implying that public policy should have the same meaning in both contexts. The language of the relevant provision of Article V(2)(b) of the New York Convention, "[t]he recognition or enforcement would be contrary to the public

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[37] ibid 4013–4014 (citations omitted).

[38] Supreme Administrative Court decided similarly, see Supreme Administrative Court Order no. 48/2555; Supreme Administrative Court Decision Aor. 1127/2558; and Supreme Administrative Court Decision 558/2560.

[39] Supreme Court Decision 5560–5563/2562 (emphasis added).

policy of that country",[40] seems to support this position.[41] At this point, a question arises as to how one can reconcile the public policy of Thailand, as suggested by the language of Article V(2)(b) of the New York Convention, with the need to draw the line between the meaning of public policy in these two contexts.

In this regard, it can be submitted that public policy in this context of Article V(2)(b) of the New York Convention may not refer to the domestic public policy of a particular country, but rather to international public policy.[42] While at first glance, this interpretation can be seen as irreconcilable with the text of Article V(2)(b) of the New York Convention, this may no longer be the case if one interprets the term 'international public policy' to refer not to the public policy which most countries have in common, but to the public policy of each member country which is suitable for application in an international setting. In other words, the public policy on which a domestic court may rely in this context is still the public policy of its own jurisdiction, but would be limited to only those aspects which are suitable for application in the context of international arbitration. As George Bermann observed:

> [I]nternational public policy may be construed as designating norms that, according to any given jurisdiction, are especially suited for application in international as distinct from domestic settings. This approach to giving meaning to international public policy seems to have won the widest support. . . . [It is] domestic law [which] determines where the line between public policy and international public policy is to be drawn.[43]

So, if public policy in the international arbitration context refers to international public policy, another question which may arise with respect to domestic arbitration in Thailand is: Does it follow that public policy in the context of Sections 40 and 44 of the Arbitration Act 2002 has different meanings when applied to domestic arbitration and to international arbitration? In response to this question, the author submits that, while it makes sense that a state may wish to regulate and supervise purely domestic arbitrations in a more stringent manner than international arbitrations, as many countries have done,[44] this should not be the case for Thailand. It is clear that the Arbitration Act 2002 does not make a distinction between domestic and international arbitrations, as well as between domestic and foreign awards. This therefore implies that the setting aside or non-enforcement of both domestic and foreign awards should be subject to the same rules for judicial review. Also, the Explanatory Note by the UNCITRAL Secretariat expressly mentions that the

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[40] New York Convention (n 4) art V(2)(b).

[41] Sorawit Limparangsri, "Remark on Supreme Court Decision 9658/2542" (Thai) <http://deka.supremecourt.or.th/>.

[42] See Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law and Taxation 1981) 360–362.

[43] George Bermann, *International Arbitration and Private International Law* (Hague Academy of International Law 2017) 577–578 (citations omitted).

[44] For example, Australia has separate regimes of arbitration law for domestic and international arbitrations whereby a domestic arbitration award can be appealed to a court on a question of law subject to certain conditions, see John Arthur, "The Legislative Context for International and Domestic Commercial Arbitration in Australia" (2014) Australian Alternative Dispute Resolution Law Bulletin July, 47.

UNCITRAL Model Law "offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration [so] States may thus consider extending their enactment of the Model Law to also cover domestic disputes, as a number of enacting States already have."[45] Therefore, since the Thai Parliament decided to model the Arbitration Act 2002 after the UNCITRAL Model Law without establishing different regimes for domestic and international arbitrations, it is submitted that there should be only one applicable standard of public policy irrespective of whether the award is a product of domestic or international arbitrations.

In the author's view, such a standard should be international public policy,[46] namely *the public policy of Thailand which is suitable for application in an international setting, as distinct from the public policy in the contexts of Sections 150 and 151 of the CCC.*

IV. THAI COURTS' APPROACH TO INTERPRETING THE PUBLIC POLICY GROUND

In this Part, the author will explore some prevailing decisions of the Supreme Court and the Supreme Administrative Court in which the courts relied upon the public policy ground as the basis for the setting aside or non-enforcement of arbitration awards. However, it may be necessary to first point out that, based on Sections 41, 43, and 44 of the Arbitration Act 2002, the rule for judicial review of an arbitration award is that the award, irrespective of the country where it was made, will be final and binding unless there is otherwise a basis under the law upon which the courts are permitted to review it. As affirmed by the Supreme Court and the Supreme Administrative Court in several judgments, it follows from this rule that, when the decision of an arbitral tribunal is purely an exercise of discretion by the arbitral tribunal, such as the determination of a factual question or the weighing of evidence, the court cannot intervene in that decision on the basis of public policy.[47] For instance, in the Supreme Court Decision 6411/2560, involving a dispute related to a promise to lease land, the Court ruled that:

> The appeal of the respondent is the appeal in which [the respondent] raised statements of facts to challenge the decision of the arbitral tribunal . . . to persuade the Supreme Court to decide on the factual question that the applicant was in breach of the agreement, . . . albeit it is already within the power of the arbitral tribunal to determine the admissibility and weight of any evidence. Even if [the respondent] argued that how

[45] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with Amendments as Adopted in 2006* (United Nations 2008) 25.

[46] See Vichai and others, "Boundaries of Public Policy" (n 7) 14 (Sorawit Limparangsri).

[47] See, for example, Supreme Court Decision 10668/2553; Supreme Court Decision 9857/2559; Supreme Court Decision 6411/2560; Supreme Administrative Court Decision Aor 1287/2560; Supreme Administrative Court Decision Aor 307/2561; Supreme Administrative Court Decision Aor 44/2561; Supreme Administrative Court Decision Aor 183/2559.

> the arbitral tribunal determined the weight of evidence in such a manner . . . is contrary to the public policy and good morals of Thailand, it does not appear that the arbitral tribunal had exercised its discretion in bad faith and had behaved unlawfully. An intervention by the court to review [the award] and to re-decide the dispute between the applicant and the respondent would thus be inconsistent with the objective of the settlement of disputes by arbitration.[48]

Similarly, in the Supreme Court Decision 4750-4751/2561, the Court held that:

> Considering the heart of the arbitration law, the Court must not intervene in the arbitration and review the exercise of the discretion by the arbitrators or amend or set aside arbitral awards except in the limited circumstances in which the law expressly permits that the Court shall have such power. . . . [T]he Court is therefore bound to interpret the matter of public policy . . . narrowly, otherwise the system of arbitration would not have achieved its objectives as the law so intends.[49]

On the other hand, the Supreme Administrative Court has also adopted a similar approach, namely that arbitrators' decisions on factual questions are not subject to judicial review on the basis of public policy.[50] However, as some scholars observed, the Administrative Court is more inclined to review arbitration awards on the public policy ground as compared to the Court of Justice, given that generally the nature of the disputes heard before the Administrative Court is more related to public interest.[51]

Considering these decisions as a whole, a conclusion can be drawn that the courts recognise and acknowledge the need to construe the public policy ground restrictively to prevent its application from frustrating the objectives of arbitration. However, there are still several other cases where the courts have invoked public policy to intervene in the finality of the arbitration awards in several different circumstances. In the author's view, these circumstances can be distinguished into five categories of cases, albeit sometimes overlapping, each of which will now be discussed in turn.

A. Arbitrator's Lack of Impartiality or Independence

Impartiality and independence are two essential qualifications of all arbitrators, given that they are safeguards against unfair treatment in any arbitral proceedings.[52] Where

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[48] Supreme Court Decision 6411/2560.

[49] Supreme Court Decision 4750–4751/2561.

[50] มยุรา อินสมตัว กมลชัย รัตนสกาววงศ์ และสิริพันธ์ พลรบ, "ปัญหาการปรับใช้ข้อกฎหมายอันเกี่ยวด้วยความสงบเรียบร้อยของประชาชนในคดีศาลปกครอง" (2563) 13(2) วารสารกระบวนการยุติธรรม 53 [Mayura Insomtua, Kamolchai Rattanasakalwong, and Siriphan Polrob, "Problems on the Application of Law Concerning Public Order by the Administrative Court" (2020) 13(2) Journal of Thai Justice System 53] (Thai) 72.

[51] ibid 72–73.

[52] See Christopher Koch, "Standards and Procedures for Disqualifying Arbitrators" (2003) 20(4) Journal of International Arbitration 325. See also Leonardo Valladares Pacheco de Oliveira, "To What Degree Should Access to Justice Be Secured in Arbitration?" in Leonardo Valladares Pacheco de Oliveira and Sara Hourani (eds), *Access to Justice in Arbitration: Concept, Context and Practice* (Kluwer Law International 2020) 12.

Thai arbitration law is concerned, Section 19 of the Arbitration Act 2002 requires an arbitrator to be impartial and independent and, for this reason, the arbitrator is imposed with the duty to disclose to the parties any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. If such circumstances exist, Section 20 of the Arbitration Act 2002 allows a party to challenge the arbitrator before the arbitral tribunal and, subsequently, if the challenge made to the tribunal turns out to be unsuccessful, before the court.

Impartiality and independence, therefore, form part of procedural public policy and, when the circumstances demonstrate that the arbitrator lacks impartiality or independence, the court may intervene to set aside or refuse to enforce the award on the public policy ground. This was affirmed in the Supreme Court Decision 3542/2561 which involves a domestic award related to a dispute over insurance claims between insurance holders (the applicants) and an insurance company (the respondent) following the fire incident that occurred during the 2010 political protests in Bangkok. The relevant facts of the case are that the chairperson of the arbitral tribunal, who was appointed by the other two arbitrators nominated by each party, was a former counsel of another insurance company (not the respondent) and had represented that insurance company in the court to defend another insurance claim in connection with the same fire incident. The chairperson did not disclose this background to the parties, hence there was no challenge made by the applicants against him. Then, after the tribunal rendered the award in favour of the respondent, the applicants requested the court to set aside the award based on the public policy ground, citing the lack of impartiality and independence of the chairperson and his failure to disclose the circumstances likely to give rise to justifiable doubts as to his impartiality or independence, as required by Section 19 of the Arbitration Act 2002. On this occasion, the Supreme Court held that:

> The duty of the arbitrator to disclose the required circumstance is the fundamental principle of arbitration which promotes transparency and trustworthy environment. . . . The respondent could have expected [the chairperson] to be of the legal opinion similar to his opinion in that [previous] case, which would be advantageous to the respondent. The fact that [the chairperson] failed to disclose such factual circumstance . . . pursuant to Section 19 . . . therefore rendered the recognition or enforcement of the award contrary to the public policy.[53]

B. Serious Breach of Due Process in Arbitral Proceedings

In the field of international arbitrations, it is not uncommon for a national court of a forum to decide to not give effect to an award if the procedure followed in the arbitral proceedings violates the public policy of the forum.[54] Under Thai law, apart from the issues of impartiality and independence which the author previously discussed, a

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[53] Supreme Court Decision 3542/2561.

[54] See Julian Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitral Awards* (Oceana Publications 1978) 59.

serious breach of the due process in the arbitration may also amount to circumstances in which the court may invoke the public policy ground to refuse to uphold the finality of an arbitration award. There are three prevailing judgments of the Supreme Court which can be discussed here, viz, the Supreme Court Decisions 9658/2542, 11102/2551, and 4896/2557.

The Supreme Court Decision 9658/2542 involves an international commercial dispute under a sale contract between a Chinese buyer (the applicant) and a Thai seller (the respondent). There arose a dispute related to the quality of products supplied by the respondent to the applicant. The applicant then submitted the dispute to arbitration in mainland China pursuant to the arbitration clause under the contract. Despite being notified that the arbitral proceedings had already commenced, the respondent did not participate in the arbitration. The tribunal then conducted the proceedings in the absence of the respondent and subsequently decided the dispute in favour of the applicant. Later, the applicant then sought to enforce the award in Thailand. Unfortunately for the applicant, the Supreme Court refused to enforce the award merely based on the fact that the applicant failed to prove that a copy of the award had already been served to the respondent.

In this connection, Judge Sorawit Limparangsri, who was not one of the presiding judges in the case, commented regarding this decision that it is questionable whether the Supreme Court was able to refuse the enforcement of the award based on the aforementioned ground, given that the lack of proper evidence that a copy of the award had been served to the respondent is not one of the exceptions to enforcement under the New York Convention.[55] His Honour further pointed out that the issue that could have been decided by the Supreme Court could be the issue of public policy, namely whether the failure to serve the copy of the award to the respondent was serious enough to amount to a violation of the public policy.[56] To be precise, His Honour observed that:

> The circumstances in which the Court may invoke the public policy ground should be limited to the events that the occurrence of which would undermine the impartiality in the arbitral proceedings resulting in an unfair arbitral award being rendered. If it is the case that the respondent was already given with the opportunity to defend the case but decided not to participate in the proceedings, it should be the circumstance where the respondent waived its rights. If there is any [irregular] circumstance which occurs after the time of rendering the award, that circumstance should be serious enough to result in the severe infringement to the right of the respondent. . . . It seems questionable whether the matter related to the delivery of the copy of the award would be of that degree of seriousness, given that the arbitral proceedings had been conducted lawfully until the time of rendering the award.[57]

Secondly, the Supreme Court Decision 11102/2551 involves a dispute under a revenue sharing contract between Bangkok Expressway and Metro Plc (the applicant) and the Expressway Authority of Thailand (the respondent). In that case, the arbitral

[55] Sorawit, "Supreme Court Decision 9658/2542" (n 41).
[56] ibid.
[57] ibid.

tribunal first decided in favour of the respondent. However, the applicant subsequently commenced new arbitral proceedings with another arbitral tribunal. The new tribunal decided in favour of the applicant despite the argument raised by the respondent that the issue had already been decided by the former arbitral tribunal. The applicant then sought to enforce the award. In this case, the Supreme Court ruled that the commencement of the new proceedings by the applicant was unlawful because the award previously rendered by the former arbitral tribunal was still binding on the parties. The Supreme Court therefore refused to enforce the award on the public policy ground.

The third judgment to be considered is the Supreme Court Decision 4896/2557. In that case, the respondent raised the public policy defence by arguing that the arbitral tribunal rendered the award after the expiry of the time frame required under the arbitration rules. The Supreme Court overruled this argument. The Court reasoned that the failure of the tribunal to render the award within the time frame under the arbitration rules was *not serious enough to result in the arbitral proceedings being unlawful*.

Considering altogether the Supreme Court Decision 11102/2551, the Supreme Court Decision 4896/2557, and Judge Limparangsri's comments on Supreme Court Decision 9658/2542, it can be observed that a breach of due process or a procedural defect in the arbitral proceedings, if it is serious enough to result in the arbitral proceedings being unlawful, may amount to the enforcement of the award being contrary to public policy. One clear example is the case that there is a violation of the doctrine of *res judicata* which was decided in the Supreme Court Decision 11102/2551 as discussed.

C. Illegality of Underlying Contract

Section 150 of the CCC, as mentioned above, provides that any juristic act in which the objective is contrary to the law or public policy will be invalid. Based on this provision, any contract concluded between the parties which arises from or is otherwise associated with any illegal conduct will be void and thus unenforceable. For this reason, when the court finds that the right of the party to enforce an award in fact arose from an underlying contract which was associated with any illegal conduct, the court may decide to set aside or not enforce the award on the ground of public policy.

An example of such a situation can be seen in the Supreme Court Decision 7277/2549.[58] This case involves a dispute between private contractors (the applicants) and a Thai government agency (the respondent) following the termination of a construction contract by the respondent. The dispute was submitted to arbitration and the arbitral tribunal decided in favour of the applicants, ruling that the termination of the contract by the respondent was unlawful, and ordering the respondent to be liable for damages to the applicants. The applicants then sought to enforce the award. The Supreme Court refused the enforcement, deciding that the factual circumstances

[58] See also Supreme Court Decision 6025/2561.

indicated that there were corrupt involvements between the applicants and several former high-ranking officials of the respondent during the course of contract negotiations. Therefore, the court held that the underlying contract was illegal and void under Section 150 of the CCC, and as a result, the enforcement of the award would be contrary to the public policy.

D. Errors of Arbitral Tribunals in Deciding Questions of Law

As discussed earlier, the court cannot rely upon the public policy defence to intervene in a determination of factual questions by an arbitral tribunal. Nonetheless, when it comes to a question of law, there are several judgments in which the Supreme Court and the Supreme Administrative Court set aside or refused to enforce arbitral awards on the public policy ground upon finding that the arbitral tribunals had failed to decide the disputes in accordance with the law or had erred in applying or interpreting the law.

As explained by the Supreme Administrative Court, the failure of an arbitral tribunal to apply the relevant law or to interpret the law correctly is a violation of the arbitration law.[59] In consequence, the enforcement of an award as a result of that misapplication or misinterpretation of the law would be contrary to the public policy. As for reasonings, generally speaking, in any jurisdiction, arbitrators are imposed with obligations under the applicable law of arbitration *(lex arbitri*) which also include the requirements on decision-making. When the Arbitration Act 2002 is the *lex arbitri*, the arbitrators must decide the dispute in accordance with Section 34 of the Arbitration Act 2002, modelled after Article 28 of the UNCITRAL Model Law. In a nutshell, Section 34 provides that the arbitral tribunal must decide the dispute in accordance with the applicable law unless the parties agree that the arbitral tribunal shall determine the dispute based on equity and conscience (*ex aequo et bono*), and also must decide the dispute in accordance with the terms of the contract, taking into account the relevant trade usage.

In this connection, when the court finds that an arbitral tribunal failed to comply with Section 34 of the Arbitration Act 2002 in deciding a dispute, the court may deem that failure a violation of the Arbitration Act 2002, which is the law relating to public policy and, for this reason, may decide that the enforcement of the award would be contrary to public policy.

A notable example is the Supreme Administrative Court Decision Aor 25-26/2559. This case involves a dispute over a construction contract between the Port Authority of Thailand (the applicant) and its private contractors (the respondents). The arbitral tribunal previously decided that the applicant was in breach of the contract and ordered the applicant to pay damages to the respondents. The applicant then requested the court to have the award set aside based on the public policy ground. The Supreme Administrative Court ruled that the arbitral tribunal had failed to apply the relevant provision of the CCC in awarding damages to the respondents, so part of the award was set aside by the Court. In doing so, the Court reasoned:

[59] See, for example, Supreme Administrative Court Decision Aor 25–26/2559.

> As [the parties] did not agree that the arbitral tribunal shall determine the dispute ex aequo et bono, the arbitral tribunal was therefore under the obligation to decide the dispute in accordance with the law of Thailand as required by Section 34, first paragraph, second paragraph, and third paragraph, of the Arbitration Act B.E. 2545. In this regard, the law which the arbitral tribunal should have applied when deciding the dispute is the [CCC]. . . . As the damages in question are not liquidated damages . . . , the respondent was therefore required to discharge the burden of proof [relating to the damages incurred] pursuant to Section 380, second paragraph, of the [CCC] . . . [and] because the respondent failed to submit any evidence proving such damages, this part of the arbitral award . . . therefore violates Section 380, second paragraph, of the [CCC].[60]

This decision is similar to the Supreme Administrative Court Decision Aor 676/2554, involving a construction dispute between the Department of Alternative Energy Development and Efficiency (the applicant) and its private construction contractor (the respondent). In that case, the applicant failed to pay the contract sum to the respondent, so the respondent terminated the contract and sought to recover damages from the applicant. The dispute was then submitted to arbitration and the arbitral tribunal decided that the termination of the contract by the respondent was lawful pursuant to Section 387 of the CCC, given that it permits a party to terminate a contract if the other party is in default.[61] The defendant sought to have the award set aside, citing the public policy defence. The Supreme Administrative Court ruled that the tribunal erred in deciding the dispute because the tribunal failed to apply the principle of administrative law to the case. The Supreme Administrative Court observed that:

> [A]s a matter of practice of administration contract, priority must be given to the responsibility of the administrative agency to provide public services in order to respond to the demand of the people. The protection of the public benefit or the common benefit [of the people] shall therefore prevail over the benefit of the private parties. . . . We find that the respondent was unable to terminate the contract based on the failure of the applicant to make payment . . . therefore . . . the enforcement of the award would be contrary to the public policy.[62]

Likewise, the Supreme Court decided similarly in the Supreme Court Decision 10624/2554 which involved a dispute between two insurance companies related to the priority of insurance coverage between them.[63] In that case, an insurance holder purchased insurance from one insurance company (the respondent) before purchasing another insurance policy from another insurance company (the applicant). When the

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[60] Thai Administrative Court Decision Aor 25–26/2559.

[61] Section 387 of the CCC provides that "[i]f one party does not perform the obligation, the other party may fix a reasonable period and notify the former party to perform within that period. If the former party does not perform within that period, the other party may terminate the contract."

[62] Supreme Administrative Court Decision Aor 676/2554.

[63] See also Supreme Court Decision 732/2559; Supreme Court Decision 840/2561.

insurance holder claimed for damages, the applicant, without being aware of the insurance between the insurance holder and the respondent, paid the compensation for damage to the insurance holder in full. Later, the applicant demanded that the respondent reimburse the applicant for the amount the applicant had already paid to the insurance holder. Both parties agreed to refer the dispute to arbitration. The arbitral tribunal decided in favour of the respondent, ruling that there was no law which required the respondent to pay the demanded amount to the applicant. The applicant then requested the court to set aside the award. The Supreme Court held that the award was in violation of the priority of liability between insurers under Section 870 of the CCC[64] and the other legal provision of undue enrichment under the CCC. Therefore, the Court ruled that the enforcement of the award would be contrary to public policy.

Apart from this, there are several other judgments in which the Supreme Court found that the arbitral tribunal incorrectly interpreted the law, and decided to set aside or refuse to enforce an award on the ground of public policy. These judgments include, for example, instances where the arbitral tribunal had erred in calculating a limitation period[65] or had erred in granting the default interest at a rate to which the party was not otherwise entitled under the law.[66]

Furthermore, in addition to the requirement to decide the dispute in accordance with the law, Section 34 of the Arbitration Act 2002 also requires an arbitration tribunal to decide the dispute in accordance with the terms of the contract, taking into account the applicable trade usage. Likewise, when the court finds that the arbitral tribunal did not decide the dispute in accordance with the relevant terms of an underlying contract, the court may invoke the public policy ground to set aside or refuse to enforce the award.

An example can be observed in the Supreme Court Decision 1730-1731/2555,[67] which related to a domestic trade dispute between the Telephone Organisation of Thailand (the applicant) and Phone Point (Thailand) Company Limited (the respondent) following the termination of a telephone service contract by the applicant. The arbitral tribunal decided that the respondent was in breach of the contract, so the termination of the contract by the applicant was lawful. However, with regards to the effects following the termination, the tribunal ordered the respondent to return all the telephone equipment to the applicant, though only under the condition that the applicant must pay the value of such equipment to the respondent based on a clause of the contract. The applicant then requested the court to enforce the award and, simultaneously, to set aside the part of the award that required the applicant to pay the price of the telephone equipment to the respondent. The Supreme Court found that the contract in question provided clearly that upon the termination of the contract in

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[64] Section 870 para 3 of the CCC provides that "[i]f two or more insurance contracts are made successively, the first insurer is the first to be liable for the loss. If the amount paid by the first insurer is not sufficient to cover the loss, the subsequent insurer shall be liable for the shortfall and, so on, until the loss is covered."

[65] See, for example, Supreme Court Decision 13570/2556; Supreme Court Decision 6741/2562.

[66] See, for example, Supreme Court Decision 8265/2559.

[67] See also Supreme Court Decision 2560/2539; Supreme Administrative Court Decision Aor 25–26/2559.

the event of a breach of the contract by the respondent, the respondent must return all the equipment in good condition to the applicant and the applicant shall not be bound to make any payment to the respondent. Therefore, the Court decided that the arbitral tribunal had applied the wrong clause in the contract and ordered this part of the award to be set aside on the public policy ground.

However, when the Supreme Court later considered a similar issue of contract interpretation in the Supreme Court Decision 544-545/2562, the Court made the opposite decision. This case involved a domestic trade dispute under the contract for the supply of construction materials. In that case, the arbitral tribunal decided to interpret the contract by deviating from the language of the contract due to the circumstances, which indicated that the parties waived their obligations relating to the specifications of the materials to be supplied. The tribunal therefore ruled that the supplier of the materials (the applicant) was not in breach of the contract for supplying materials not matching the specifications under the contract, and that the buyer (the first respondent) was bound to buy the materials from the applicant. The first respondent then moved to have the award set aside on the public policy ground, arguing that the tribunal had failed to decide the dispute in accordance with the contract. The Supreme Court overruled this argument, ruling that:

> The first respondent argued that the tribunal did not decide the dispute in accordance with the contract. Whilst this argument is a question of law, however, in determining this question of law, it is necessary to decide on the question of fact first. However, [the Arbitration Act 2002], Section 43, does not permit the person whom the award is invoked to make objection to the exercise of the discretion of the arbitral tribunal in deciding the question of fact . . . , so the enforcement of the award would not be contrary to the public policy or good morals under [the Arbitration Act 2002], Section 44.[68]

At this point, a question may arise as to whether this Supreme Court Decision 544-545/2562 in fact contradicts the Supreme Court Decision 1730-1731/2555. Although the Supreme Court reached different outcomes in these two cases, the author is of the view that they are not contradictory to each other. In the Supreme Court Decision 544-545/2562, the Court drew the line between a question of fact and a question of law and reasoned that the arbitral tribunal reached its conclusion based on the factual circumstances of the case, so the Court was not permitted to review the determination of fact. In contrast, in the Supreme Court Decision 1730-1731/2555, the issue that led to the finding that the award was contrary to the public policy was purely a question of law, which was whether the consequence following the termination of the arbitral tribunal was in accordance with the terms of the contract. In that case, the Court did not review the issues as to which party was in breach of the contract and whether the contract was terminated, which are factual issues. Rather, the Court invoked the public policy ground upon finding that the tribunal had applied the wrong clause in deciding the dispute. As such, what we have learned from comparing these two judgments is a reminder that the facts determined by an arbitral tribunal will

[68] Supreme Court Decision 544–545/2562.

always be final, but when it comes to questions of law, the public policy ground can be used by the court as a basis of judicial review.

E. Conflict with Mandatory Law

This category concerns cases where a dispute is governed by foreign law and consequently, in practice, the court would not be able to review whether the arbitral tribunal decided the question of law correctly. However, if the court nevertheless finds that an award decided in accordance with foreign law would violate any mandatory provisions under Thai law, the court may decide to set aside or refuse to enforce the award on the ground of public policy.

An example can be observed in the Supreme Court Decision 2611/2562, which involved a dispute under an international sale of goods contract in which a Thai company (the respondent) agreed to sell raw cotton to a Japanese company (the applicant). The contract was governed by English law and contained an agreement that a dispute between the parties would be settled by arbitration in Liverpool in accordance with the arbitration rules of the International Cotton Association (ICA). When there arose a dispute over the products delivered by the respondent, the applicant exercised the right under the contract to return the products and demanded the respondent to refund the price pursuant to the terms of the contract. The dispute was referred to arbitration. The arbitral tribunal rendered the award in favour of the applicant, ruling that the respondent was in breach of the contract and ordering the respondent to refund the applicant. The applicant then requested the Thai court to enforce the award. The Supreme Court ordered the award to be enforced except for the part related to the payment of interest. As for that part, the Court held that compound interest during default is strictly prohibited under Section 224 second paragraph of the CCC,[69] so the enforcement of that part of the award would be contrary to the public policy.

V. ANALYSIS

Now, let us take a few steps back to consider the public policy ground from a broader perspective.

In 2012, the UNCITRAL published a report that investigated how domestic courts in different jurisdictions interpreted the provisions of the UNCITRAL Model Law. In relation to the public policy ground under Article 36(1)(b)(ii) of the UNCITRAL Model Law, it was noted that:

> Courts which had to define the appropriate standard of review under [the public policy defence] supported a restrictive interpretation of the defence. The public policy defence should be applied only if the arbitral award fundamentally offended the most basic and

[69] Section 224 para 2 of the CCC provides that "[i]nterest for default shall not be paid upon interest."

> explicit principles of justice and fairness in the enforcement State, or evidences intolerable ignorance or corruption on part of the arbitral tribunal.[70]

There are a number of judgments of courts in different jurisdictions which support an adherence to this restrictive interpretation of the public policy ground. For instance, in *Hebei Import and Export Corporation v Polytek Engineering Co. Ltd* ("*Hebei*"), the Court of Final Appeal of Hong Kong held that the public policy defence must be limited only to circumstances where the recognition or enforcement of the award would be "contrary to the fundamental conceptions of morality and justice of the forum."[71] In *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)*, the Federal Court of Australia cited the *Hebei* decision before affirming that the public policies to be applied as the ground for refusal to the non-enforcement of an arbitral award are only those "that go to the fundamental, core questions of morality and justice."[72] In the United States, the Eleventh Circuit of the Court of Appeal, in *Sladjana Cvoro v. Carnival Corporation*, held that "the public-policy defence applies only when confirmation or enforcement of a foreign arbitration award would violate the forum state's most basic notions of morality and justice."[73] Similarly, in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*, the Court of Appeal of Singapore ruled that the public policy ground should operate only when the upholding of an arbitral award would shock the conscience or is clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public, or where it violates the forum's most basic notion of morality and justice.[74]

Although there are some differences between these foreign judgments in terms of the language used, the general tendency that can be noticed here is that the courts of these industrialised economies seem to interpret the public policy ground narrowly in order to place emphasis on the objectives of the New York Convention.[75] In the context of international commercial arbitrations, these foreign courts equate the violation of public policy to *the violation of the basic notion of morality and justice*. Whereas the basic notion of morality and justice at first glance may be abstract and vague, not less than that of public policy, the scope of this term is clearly much narrower than any matters to do with the public interest or the common interest of the people, which is the meaning of public policy that the Thai courts have adopted.[76]

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[70] UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012) 183.

[71] *Hebei Import and Export Corporation v Polytek Engineering Co. Ltd* [1999] HKCFA 16, para 99.

[72] *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276, para 105.

[73] *Sladjana Cvoro v Carnival Corporation, 941 F.3d 487*, para 11 (11th Cir, 2019).

[74] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, para 59.

[75] See Benedikt Pirker, "Proportionality Analysis and International Commercial Arbitration – The Example of Public Policy and Domestic Courts" in J. Jemielniak, L. Nielsen & H. P. Olsen (eds), *Establishing Judicial Authority in International Economic Law* (Cambridge University Press 2016) 305.

[76] See, for example, Supreme Court Decision 5560–5563/2562; Supreme Administrative Court Order no. 48/2555; Supreme Administrative Court Decision Aor. 1127/2558; Supreme Administrative Court Decision 558/2560.

Whilst the public policy of other countries may not be identical to the public policy of Thailand as it should vary from country to country,[77] it is nevertheless quite obvious that the scope of the public policy ground as interpreted by Thai courts is broader than that of the courts in other jurisdictions. As we have already seen in Part IV, the public policy ground under Sections 40 and 44 of the Arbitration Act 2002 does not comprise only procedural public policy, by which the court seeks to ensure that the procedures followed in arbitration are conducted in a fair manner, but also substantive public policy which pertains to the contents of the awards, including the event that an arbitrator failed to decide the dispute in accordance with the law or contract. As for this substantive public policy, Thai courts draw the line between questions of fact, on which the tribunal's decision will be final, and questions of law, which may still be subject to judicial review based on the public policy ground. In the author's view, this is the area where the approaches to interpretation of the public policy defence in Thailand and in other jurisdictions seem to be most disparate or irreconcilable. In most jurisdictions, it is widely accepted that substantive decisions of the arbitrators are not subject to judicial review, and "claiming that the arbitrators misinterpreted the facts or misapplied the law of a case is no ground for refusal of recognition and enforcement."[78]

Therefore, with all due respect, the author disagrees with the position that, under Thai arbitration law, errors of law are subject to judicial review on the ground of public policy. The author fears that if a question of law per se is, and continues to be, part of public policy, the public policy defence may become closer to being the catch-all defence of the last resort available to a party who lost in arbitration. To answer the question as to whether the tribunal applied or interpreted the law or contract correctly, it is inevitable that the court will have to review the merits of a case which had already been decided by an arbitral tribunal; or to put it simply, the court must decide whether it agrees with the decision of the arbitral tribunal. This would be no different from normal court proceedings in which judges in a higher court review whether judges in a lower court have erred in deciding a question of law. In the author's view, this should not be how the public policy ground operates in arbitration. As a matter of principle, a decision of fact or law which is within the jurisdiction of the tribunal should be final and binding.[79] Even in a case where the arbitral tribunal erred in deciding any issues, whether questions of fact or questions of law, the award should still be binding and neither party should have recourse against such an error.[80] The author submits that this principle should be the same in any jurisdiction, and Thailand is no exception. In the author's view, the court would be able to refuse to enforce or set aside the award on account of errors of law only if such a power was explicitly written into the Arbitration Act 2002. In the absence of such explicit power, the author opines that the court should not be able to do so by treating the determination of a question of law as part of public policy.

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[77] See Mingqiang Qian, "Public Policy Defense in International Commercial Arbitration" (Master of Laws Thesis, University of Georgia, 2000) 8.

[78] See Karl-Heinz Böckstiegel, "Public Policy as a Limit to Arbitration and its Enforcement" (2008) 2(1) Dispute Resolution International 123, 129.

[79] See *Betamax Ltd v State Trading Corporation* [2021] UKPC 14, para 48.

[80] See ibid para 39. See also *AJU v AJT* [2011] 4 SLR 739, para 67–69.

In this connection, consider the following statement given by Honorary Professor Tingsabadh after Thailand first enacted the Arbitration Act 1987:

> The justice which the arbitral tribunal see may not be the same as the justice pursuant to the law. . . . [E]ven if the award is contrary to the law, but if it is not in conflict with the mandatory law relating to the public policy, it shall be honoured. This is a benefit of having arbitration. . . . Given that the parties agree to appoint the arbitrators to be the one who decide their disputes, what they had decided must be affirmed.[81]

In light of this statement, the author submits that the court should uphold the finality of the awards and should not intervene in the awards even in the case that the court does not agree with the decision of the arbitral tribunal. It is necessary to distinguish between cases where the arbitral tribunal had erred in applying or interpreting the law, on the one hand, and cases where the arbitral tribunal completely failed to decide the dispute based on the applicable law or contract under Section 34 of the Arbitration Act 2002 and Article 28 of the UNICTRAL Model Law, on the other hand. As for the former type of case, these should not be circumstances which fall under the ambit of the public policy ground, given that they are merely a matter of interpretation and the interpretation of the arbitral tribunal should not be intervened in, "however good, bad or ugly."[82] Otherwise, the court will be permitted to make an intervention every time the court does not agree with the interpretation of the arbitral tribunal. Article 28 of the UNCITRAL Model Law permits a national court only to consider whether the award was based on the governing law or the terms of the contract, but not whether the arbitral tribunal had erred in interpreting the law or the contract.[83] However, in the case that the arbitral tribunal completely failed to decide the dispute based on the law or contract, the author submits that the court may, but should not always, intervene in the finality of the arbitration award. It must still be considered, giving regard to the circumstances which give rise to such a failure. For instance, if the arbitral tribunal has already decided on the issue of conflict of laws, and applied the law of one country to the dispute, and rendered the award, in the absence of other circumstances which may offend justice and due process, such as fraud and corruption, the author submits that the court should not intervene to rule that the arbitral tribunal had erred in deciding the issue of conflict of laws because, after all, it is still a matter which falls within the power of the tribunal. However, if it is the case that the arbitral tribunal apparently ignores the choice of law as agreed in the contract and applies the law of another country without justifiable reasons, the situation may fall under the ambit of the public policy ground.

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[81] จิตติ ติงศภัทิย์, "ความรู้เกี่ยวกับอนุญาโตตุลาการระหว่างประเทศ" ในรวมผลงานวิชาการของศาสตราจารย์จิตติ ติงศภัทย์ เล่มที่ 1 (สำนักงานศาลยุติธรรม 2562) [Chitti Tingsabadh, "Knowledge About International Arbitration" in *Collection of Academic Works of Professor Chitti Tingsabadh No. 1* (Office of Court of Justice 2019)] (Thai) 555, 561.

[82] See Chad R. Yates, "Manifest Disregard in International Commercial Arbitration: Whether Manifest Disregard Holds, However Good, Bad, or Ugly" (2018) 13(2) University of Massachusetts Law Review 336, 347–348.

[83] UNCITRAL, *Digest of Case Law* (n 70) 122.

Another issue that the author wishes to discuss with reference to the abovementioned statement by Honorary Professor Tingsabadh is the issue of mandatory provisions. The author understands that His Honour suggested that the court should still be permitted to intervene in the case that a decision rendered by the arbitral tribunal is contrary to a mandatory provision of Thailand. With regard to this exception, the author entirely agrees for the reason that arbitration can otherwise be used as a device that individuals can employ to escape the application of mandatory provisions within the Thai legal system, such as those that require certain types of contracts to be recorded in writing or to be registered with competent officials.[84] However, the author wishes to further point out that, in deciding the issues related to the conflict with mandatory provisions, the court should also take into consideration the governing law of a contract and the international character of the dispute in question.

Let us consider the previously discussed Supreme Court Decision 2611/2562 as an example. In that case, the Supreme Court ruled, despite the underlying contract being governed by English law, that the part of the award which allowed a payment of compound interest in favour of the applicant (a foreign company) was contrary to the public policy. In arriving at this conclusion, the court did not give any reasoning except that the entitlement to compound interest during default would be contrary to Section 224 second paragraph of the CCC.

In this regard, whilst it is clear that Section 224 of the CCC intends to ease burdens on the debtor upon default, it seems questionable as to why this provision would also apply to an international or cross-border transaction governed by foreign law. In the author's view, if one applies the test of violation of the basic notion of morality and justice to this case, it is questionable whether a violation of the prohibition of compound interest under Section 224 second paragraph of the CCC would be grievous enough to result in the compound interest part of the award being contrary to the public policy of Thailand. It is also worth mentioning that most jurisdictions now permit compound interest where contracting parties have explicitly agreed upon this in a contract.[85] Recalling what Honorary Professor Yut Saenguthai observed in relation to the public policy ground in the context of the conflict of laws regime, the author submits with all due respect that, in any dispute related to international or cross-border transactions governed by foreign law, the court should not decide immediately that the contents of an award which are incompatible with any mandatory provision of Thailand would be contrary to the public policy under Section 40 or 44 of the Arbitration Act 2002. Rather, the court should first consider the nature of the mandatory provision in question, including the essential values that it seeks to preserve and the international character of the case, apart from the fact that the arbitration is seated or the enforcement of the award is sought, in Thailand.

For all the reasons given above, the author submits that, due to the broad approach to interpretation of the public policy ground, *the manner in which Thai*

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[84] See Haytham Besaiso, "How Do International Construction Arbitrators Make Their Decisions? The Status of Substantive Law" (2020) 37 International Construction Law Review 199, 209–210.

[85] See John Yukio Gotanda, "Compound Interest in International Disputes" (2003) 34(2) Law & Policy in International Business 393.

courts invoke the public policy ground can be seen as an excessive judicial intervention in arbitration. If this continues, the consequences can be horrific for both domestic and international arbitrations. As for domestic arbitrations, the more intervention made by the courts, the less confidence citizens may have in arbitration. Citizens may think that, even with an investment of money and time in the arbitration, they will still have to carry the risk that an award may later be set aside or refused to be enforced by the court, so they may doubt why they need arbitration in the first place. Also, for international arbitrations, it can be said that the broad scope of interpretation of the public policy ground may discourage foreign parties from choosing Thailand as the seat of arbitration. This is because, when compared to other arbitration-friendly jurisdictions, there may be a greater risk that the arbitral award may be set aside by a domestic court.[86] The enforceability of arbitration awards is therefore one of the key factors for any country wishing to achieve success as an international arbitration centre. As Sundaresh Menon, the incumbent Chief Justice of Singapore, put it:

> The enforcement gap is a particularly acute concern for business actors. It translates directly to the economic risk they undertake when investing or trading in a country. Commercial people seek predictability in their dealings and to this end, they strive to ensure that their rights and obligations are clearly defined and expect that their contracts will be enforced fairly and effectively. In such circumstances, they are able properly to assess and price their exposure in the market and not be subject to unknown unknowns.
>
> The bridging of the enforcement gap is a task that falls, to a substantial degree, on the courts. The judiciary, as the institution that interprets and applies the law, must do so fairly, timeously, and in a manner that coheres with commercial sensibilities and business common sense. This is a crucial thread which ties the rule of law to economic development. I venture to suggest that Singapore . . . has enjoyed considerable success in this regard.[87]

Nevertheless, the author is by no means arguing that the public policy ground, per se, is a problem. On the contrary, the author opines that the existence of this exception in the Thai arbitration system is unquestionably necessary to maintain checks and balances in the interplay between arbitrators and courts. As several scholars pointed out, in any jurisdiction, arbitration cannot survive without the support of the national court systems, since "arbitral tribunals lack . . . the vital powers held by courts which give the adjudicative process real bite."[88] Therefore, because

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[86] See Ratima, "Judging State of International Commercial Arbitration Law in Thailand" (n 6), in which Dr. Ratima Nirunpornputta pointed out that the manner in which the Thai courts interpret the public policy ground is one of the major issues which causes Thailand not to be chosen by the private parties as the seat of arbitration.

[87] Sundaresh Menon, 'The Rule of Law and the SICC' (2018) Singapore International Chamber of Commerce Distinguished Speaker Series 6, 4–5.

[88] John Templeman, "Towards a Truly International Court of Arbitration" (2013) 30(3) Journal of International Arbitration 197, 200. See also Jacques Werner, "Should the New York Convention Be Revised to Provide for Court Intervention in Arbitral Proceedings?" (1989) 6 Journal of International Arbitration 113; Ramona Elisabeta Cirlig, "The Interplay Between Courts and Tribunals Assures Access

arbitration awards are to be enforced through the court, it is unquestionably necessary for the court to have the public policy ground as a basis to deny upholding the finality of arbitration awards in exceptional circumstances. There are several judgments by Thai courts concerning which this author agrees that the circumstances may justify the application of the public policy ground. Some of these cases are where an arbitrator lacks impartiality and independence,[89] where there is a serious denial of due process in the arbitral proceedings,[90] and where the underlying contract is associated with illegal conduct.[91] Without the public policy ground, there is a substantial degree of risk that individuals, through arbitration, may borrow the hand of the courts to enforce rights and obligations which should not have been enforced at all under the Thai legal system. Therefore, it is finally submitted that the public policy ground must remain, however, given all the reasons pointed out by the author, its scope of application should be narrowed down.

VI. CONCLUDING REMARKS

The author's aims are modest. The author does not intend to claim that the view of the author on the public policy ground reflects a prevailing view. Rather, with all due respect, the author only wishes to point out the problem which the author sees as having persisted for too long in the regime of Thai arbitration law, in the hope that this article will contribute to bringing Thailand onto the path towards being an internationally recognised arbitration-friendly jurisdiction.

In conclusion, the author submits that a broad interpretation of the public policy ground will neither benefit the state nor the private sector in the long run. Whilst in some cases it may grant what the judge sees as justice to the victim of an unfair decision, from the overall perspective it still undermines the fundamental object of arbitration as a dispute resolution mechanism. To end this article, let the author borrow the words of Justice Hayne of the High Court of Australia, albeit written on a different topic: "[let] justice be done without the heavens falling."[92]

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to Justice" in Leonardo Valladares Pacheco de Oliveira and Sara Hourani (eds), *Access to Justice in Arbitration: Concept, Context and Practice* (Kluwer Law International 2020) 87.

[89] Supreme Court Decision 3542/2561.

[90] Supreme Court Decision 11102/2551.

[91] Supreme Court Decision 7277/2549.

[92] Kenneth Hayne, "Letting Justice Be Done Without the Heavens Falling" (2001) 12 Monash University Law Review 12, 12.