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Public Policy Issues in International Commercial Arbitration. A Comparative Analysis
Between Ireland, Singapore, India and the United States of America

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Abstract

In this dissertation, it was proven that there are issues that exist in international commercial arbitration under the ground of public policy which may be used to set aside or refuse enforcement of an arbitral award. Throughout analysing the differences of contracting States to either the UNCITRAL Model Law or the New York Convention it has been demonstrated that discrepancies between national and international legislation on the public policy ground can be detrimental to the independence of the arbitral tribunal and finality of the arbitral award. As Conventions aimed to harmonise and provide a uniform text that can be applied to both national and international Legislation on arbitration, the public policy ground remains subjective and inconsistent in areas such as the threshold and scope applied. It is clear that court intervention is disadvantageous to arbitration and the need for limitations is evident. Used as a means to allow court involvement in Countries with a weaker judicial system with regards to arbitration, public policy is used excessively to set aside or refuse enforcement of an arbitral award and in some cases decide on the merits. It will be shown that to successfully apply the New York Convention and the Model Law to arbitration, the grounds of public policy and arbitrability should be narrowly construed in accordance with the aim to harmonise and unify international commercial arbitration. By deviating from this aim, this dissertation demonstrated the issues that arise from this by way of broad interpretations and uncertain outcomes of awards.

Chapter 1

Introduction

1.1 Introduction to International Conventions and Public Policy

There are two main international Conventions striving for the harmonisation and unification of international commercial arbitration. These include the United Nations Commission on International Trade Law's 'Model Law' and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 'New York Convention'. These Conventions play a key role in protecting the future development of international commercial arbitration. Set out with the objective to harmonise and unify international arbitration legislation, the grounds for setting aside or refusing enforcement are limited through both Conventions. Within these strict grounds are included the grounds of public policy and arbitrability. Instruments available to States of the New York Convention and the Model Law include history, including case law on its interpretation and application, which provide essential information that States should utilise to keep to international standards of commercial arbitration. The ground of public policy remains widely interpreted in contracting States of the Model Law and New York Convention. For the successful application of the Model Law and the New York Convention's principles to international arbitration, judicial review and interference should be minimal and the independence and finality of the arbitral award upheld.

1.2 Objectives of Research and Analysis

In this dissertation, I will deploy a comparative analysis between Ireland, Singapore, India and the United States. By comparing these States who are party to either conventions, it will be shown that public policy is understood in widely diverging ways in different states. With the wording similar in both the Model Law and the New York Convention in relation to the ground of public policy which is covered under Article 34 of the Model Law to set aside an arbitral award and Article 36 of the Model Law/Article V of the New York Convention a clear analysis can be made on the outcome of interpretation in the chosen States. This will provide a useful analysis as a means to determine the issues that occur in employing the ground of public policy in international arbitral proceedings. Distinctly optimising the limitations of judicial review and involvement, pro-arbitration States demonstrate a willingness to uphold the finality of an arbitral award, while States which recognise a broad discretion to set aside or otherwise interfere with awards show the opposite tendency. The subjectivity and diversity are evident in

the States that will be analysed and the lack of clarification or definition in both the arbitrability and public policy ground will demonstrate a wide range of discrepancies in the threshold of the grounds. For States who have successfully adopted the Model Law and/or the New York Convention, a pro-arbitration outlook will be demonstrated with this understanding extending to the States judicial system. By limiting the ground of public policy and non-arbitrable matters, a high threshold is implied, and a limit is placed on judicial interference in international arbitration. Similarly, by demonstrating a limited approach to non-arbitrable matters, the State will uphold the independence of arbitration. Differences of interpretation are evident in both grounds for setting aside and refusal of enforcement.

1.3 Structure

To understand the ground of public policy as a means to set aside or refuse enforcement of an arbitral award, this dissertation will be divided into chapters to assess the substance behind the ground of public policy. The second chapter aims to understand and analyse the threshold that is applied to the public policy in each of the States. The differences in these States gives a wide variety in the threshold of international public policy. The adoption of the Model Law demonstrates a general pro-arbitration stance of contracting States however it is clear that there are some discrepancies in the threshold of what will satisfy the ground of public policy in international arbitration. Varieties in the threshold applied prove substandard and detrimental to arbitration. Although the ground is subjective to national legislation, it is apparent that manifest deviations should be limited.

In the third chapter, I will assess the relationship between the concept of public policy and issues of arbitrator bias, the principle of proportionality, and issues that arise from court involvement in deciding on the merits of a case. This analysis will show that although these issues may satisfy the public policy of a State, it may not be compatible to apply such an approach to international public policy in the Model Law and the New York Convention.

In chapter four, I will aim to identify the sources of international public policy. Within this chapter I will focus on identifying the differences between national and international public policy. It is evident that differences in national and international public policy may result in a broad interpretation of the ground. Specifically, in the States that have adopted the Model Law to national arbitration legislation and international arbitration, the result of limiting the ground of public policy can be substandard. It is interesting to see the differences between the way in which different States understand and apply public policy in arbitral proceedings. It is apparent

that a strong pro-arbitration judicial system is necessary to apply these changes to the national and international public policy ground.

Chapter five will establish the relationship between the arbitrability and public policy ground in international arbitration. The correlation between both is evident in international arbitral proceedings. This dissertation will show the public policy to be a more extreme issue than arbitrability but that the two grounds exist symbiotically. The arbitrability ground exists as a part of public policy in that, it will be demonstrated that some non-arbitrable disputes are contrary to that of public policy. The States analysed will demonstrate how each interpret both grounds together as neither public policy or non-arbitrable matters are limited through the Model Law or the New York Convention. This will further differentiate pro-arbitration States from those that employ a broad approach to arbitration, allowing for excessive jurisdiction. A pro-arbitration State will be shown to adopt a limited approach to non-arbitrable matters to promote arbitration as a means to dispute resolution. Principles in the Model Law also promote arbitrability, these principles include the Doctrine of Separability and the Kompetenz-Kompetenz principle.

Chapter 2

The Threshold for Setting Aside or Refusing to Recognise an Arbitral Award on the Ground of Public Policy

Arbitration as a mechanism for dispute resolution is widely accredited internationally. By providing benefits of such as independence, discretion, transparency, cost, and time efficiency in the resolution of international commercial disputes. Issues may arise from international arbitration such as that of public policy and arbitrability, rendering it necessary for court involvement and determination in setting aside an arbitral award and the refusal of recognition/enforcement of an award. Although public policy begins at a national level, the need for guidance in interpretation is necessary to protect the integrity of arbitration. Difficulties arise in international arbitral proceedings in the issue of public policy due to differences in National legislation and determining what constitutes public policy. As will be demonstrated, issues in public policy differ in international arbitration from State to State. Arbitration is increasingly chosen in international commercial contracts for dispute resolution. Due to variations in National legislation, the United Nations established United Nations Commission on International Trade Law (UNCITRAL) 'Model Law' (here in after 'Model Law') which is a developed instrument for States which unifies the arbitral process. As Ireland has adopted the Model Law in national and international arbitration, the advantage of internationally established principles demonstrates harmonization in commercial arbitration, rendering Ireland an efficient choice of seat for international arbitral proceedings. As international commercial arbitration grows, the necessity for a clear and unified approach for the grounds for setting aside/refusal of recognition of an arbitral award is evident, specifically under public policy and arbitrability.

2.1 The Model Law and the New York Convention

An interesting aspect of the ground of public policy is the threshold of public policy to set aside an arbitral award or refusal of enforcement as public policy is not defined or limited under the New York Convention or Model Law. Without this assistance in interpretation, national jurisdiction prevails when a party is applying to set aside an award on this ground. According to Model Law, it is the jurisdiction of the State Court to determine the grounds of public policy and arbitrability. As Stated under Model Law, an award may be set aside (or refused enforcement under Article 36) on the following grounds,

‘if the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the recognition or enforcement of the award would be contrary to the public policy of this State’.¹

Similarly, the Model Law provides that the issue of arbitrability is a concept left to national legislation, subject to the provision that “this Law shall not affect any other law of the State by virtue of certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this law”.² In general, the threshold of public policy in international arbitration is stipulated by the United Nations as “cover[ing] fundamental principles of law and justice in substantive as well as procedural respects... corruption, bribery and fraud and similar serious cases”.³

Public policy is defined at a national level and variations in interpretation are evident from country to country. Generally, public policy definitions involve or include the “fundamental notions of justice, honesty and fairness... corruption, fraud or lack of integrity in the process could be considered a violation of public policy”.⁴ For assistance in interpretation on the threshold of public policy, Model Law case law provides that the standards of review allows the Court to satisfy the ground of public policy,

‘only if: (1) a fundamental principle of the law or morality or justice was violated, (2) the award fundamentally offended the most basic and explicit principles of justice and fairness or showed intolerable ignorance or corruption on part of the arbitral tribunal or (3) the award was in conflict with a principle concerned with the very foundations of public and economic life’.⁵

This ultimately allows for a wide interpretation of what constitutes public policy.

2.2 The International Threshold of the Public Policy Ground

To understand the international threshold of the public policy ground, I will analyse case law under the public policy ground covered in the Model Law and the New York Convention.

¹ Article 34 (2)(b) UNCITRAL Model Law on Commercial Arbitration 1985 with Amendments as Adopted in 2006.

² Article 1(5) UNCITRAL Model Law on Commercial Arbitration 1985 with Amendments as Adopted in 2006.

³ Hiroo H Advani, ‘Public Policy’ (2009) 21 (2) National Law School of India Review 55.

⁴ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration: Third Edition* (3rd edn Cambridge University Press 2017) 219.

⁵ UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 160.

2.2.1 Ireland

As stated by Kelly J, public policy ‘extends only to a breach of the most basic notions of morality and justice’.⁶ *Brostrom Tankers* is the leading case of public policy issues in arbitration in Ireland. The plaintiff was a Swedish company and the defendant a Spanish Company as such the international agreement to the two parties decided to refer the dispute to arbitration in Norway. The defendant made an application to refuse recognition of the award on the ground of public policy under Article V of the New York Convention.⁷ In support of the objective of the New York Convention, the Irish Court in this case have stipulated the narrow interpretation of public policy considerations to refuse recognition of an award under the Convention. As stated, if the award was refused enforcement on the grounds of public policy would extend the scope of this narrow interpretation. As determined in the case ‘a broad interpretation... would defeat the Convention’s purpose of permitting parties to international transactions to promote neutral dispute resolution’.⁸ The High Court also made reference to the use of public policy in the application to refuse recognition and enforcement as a last resort ‘it is never argued at all but where other points fail’.⁹ To satisfy the public policy ground in the interpretation of the New York Convention, there must be a serious and clear illegality demonstrated. The case established the pro-enforcement stance in Ireland, which is upheld through the adoption of the New York Convention. The case comments that this stance should be unified in States party to the New York Convention. Kelly J concluded that the case does not satisfy the ground of public policy and therefore the award cannot be refused on the basis of not qualifying the ground. This interpretation and pro-enforcement nature will be analyzed in comparison to the public policy ground in other Countries. Within this comparison, we will be able to determine the various approaches to the public policy ground in international commercial arbitration.

Similarly, the threshold is determined in the case of *Snoddy*. In keeping with the Irish standard and outlook on public policy as a ground for setting aside an arbitral award, where the Irish Court refused to set aside on the basis that it had no “jurisdiction to second-guess the

⁶ *Brostrom Tankers v Factorias Vulcano SA* [2004] IEHC 198, [2004] IR 191

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

construction of an agreement by the arbitrator”.¹⁰ The decision of *Snoddy* is directly quoted and referred to, demonstrating unity in the interpretation of Model Law and the limitation of the ground of public policy. Although the case is a national arbitration case, the stance remains the same as Model Law is adopted into national legislation as provided by the Arbitration Act 2010.

Case law on arbitration in Ireland demonstrates the pro-arbitration manner of Irish Courts. In relevant case law, it is evident that the Courts are reluctant to interfere with an arbitral award on the ground that it is contrary to public policy. Through the narrow interpretation of the Model Law, case law has established that the Court will only exercise its jurisdiction to set aside if the application fulfils one of the grounds under Article 34 of the Model Law.

2.2.2 United States

The United States, similar to Ireland, consistently upholds the values of international commercial arbitration by narrowly interpreting the concept of public policy. The US has three main sources of arbitration legislation found in the Federal Arbitration Act (FAA) for national arbitration, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (here in after the ‘New York Convention’) and the Inter-American Convention on International Commercial Arbitration (here in after the ‘Panama Convention’).¹¹ Similar to the Irish approach the US refers to cases to determine the threshold for public policy ground in arbitration. This case law provides the US as a pro-arbitration State, such as the judgement in *Parsons*, where the Court stated the threshold for the ground of public policy “should be construed narrowly... only when enforcement would violate the forum state’s most basic notions of morality and justice”.¹² The case law in the US provides that the ground of public policy may only be satisfied when fundamental violations of law are demonstrated. The case of *Laminoirs-Trefileries-Cables de Lens* demonstrated the ground of public policy was satisfied. This instance involved excessive interest rates and this part of the award was refused enforcement.¹³ In disagreement as to whether the apparent excessive interest rates formed part of public policy, the court enforced part of the award, while refusing to apply an additional 5%

¹⁰ Dermot McEvoy, “Ireland” in James H Carter (ed), *The International Arbitration Review* (8th edn, Law Business Research 2017) 242.

¹¹ Alwyn Sebastian, ‘The Public Policy Concern in Enforcing Arbitration Awards: A Comparative Analysis between India and the United States of America’ (2014) 8 NUALS Law Journal 127.

¹² *Ibid.*

¹³ *Laminoirs-Trefileries-Cables de Lens, SA v Southwire Co* [1980] 484 F.Supp 1063.

interest rate.¹⁴ This demonstrates the limited nature applied by the US courts to the ground of public policy, even though the award was partially set aside, it was not without some limitations. As a pro-arbitration State, the US has limited case law where a defendant has adequately demonstrated and reached the threshold of public policy, providing for a narrow interpretation with a limited success rate. In describing the US approach to applying the New York Convention, Donovan remarks,

‘The New York Convention thereby promotes party autonomy while limiting the judicial function to the enforcement of arbitral agreements and arbitral awards, subject to review not on the merits, as with an appeal from a judicial ruling, but only for departures from basic norms of fair process’.¹⁵

2.2.3 India

Although India has applied the Model Law to international arbitration, the State adopts a broad interpretation of public policy in arbitration cases. It will be argued that this approach permits an excessive degree of judicial intervention which is contrary to the aim of the Model Law. Moreover, the precise threshold which must be satisfied under Indian law is unclear, which makes it difficult to determine whether a public policy argument will succeed or fail in particular circumstances. In adopting the Model Law, States sought to establish a uniform threshold for the interpretation of public policy. The Arbitration and Conciliation (Amendment) Act 2019 for national arbitration in India is based on the principles of the Model Law. However, the case of *Saw Pipes* brought much criticism in relation to the threshold of public policy in India, which detrimentally affected the aim of establishing uniform standards in international arbitration.¹⁶ The judgment of the Supreme Court in the case sought to broaden the scope and terms of public policy as a ground to set aside an award. The Supreme Court categorised the threshold of public policy as “contrary to the fundamental policy of Indian Law, contrary to the interests of India or contrary to justice or morality, or patently illegal”.¹⁷ The question posed in *Saw Pipes* was whether the court had jurisdiction to overturn an award if held that the award was “patently illegal” and contrary to public policy in India. The supreme court held that an award would be patently illegal and therefore satisfy the ground of public

¹⁴ *Laminoirs-Trefileries-Cables de Lens SA v Southwire Co* [1980] 484 F Supp 1063.

¹⁵ Donald Francis Donovan, 'International Commercial Arbitration and Public Policy' (1995) 27 NYU J Int'l L & Pol 645.

¹⁶ *Oil and Natural Gas Ltd v SAW Pipes Ltd* [2003] 5 SCC 705.

¹⁷ Shardul Thacker, 'India' in James H Carter, *The International Arbitration Review* (Law Business Research 8th edn 2017) 214.

policy if it was contrary to substantive provisions of law or breached procedural rules. By allowing a wide and ambiguous approach to public policy, the aim of independence of the arbitral process is adversely affected. This broad scope allows for excessive Court intervention, under the ground of public policy. The case of *McDermott International* attempted to revise the threshold for public policy in India, narrowing Court jurisdiction in public policy.¹⁸ In *Renusagar*, the court held that an award may be set aside under the ground of public policy if the award was contrary to “the fundamental policy of Indian law, the interests of India or justice or morality”.¹⁹

2.2.4 Singapore

The courts of Singapore adopt an approach to public policy in arbitration which closely reflects that of the Irish Courts, in that it is deferential to, and seeks to uphold the autonomy of, the arbitral process. Within this is a reluctance to set aside an arbitral award unless narrowly construed within the ground set out under the Model Law, thus upholding the finality of the arbitral award where possible. This is specifically evident in the determining the threshold of public policy as a ground to set aside/refuse enforcement under the Model Law. As stated by the Court of Appeal in Singapore, the public policy ground should only be invoked and approved if ‘the upholding of an arbitral award would shock the conscience’.²⁰ Overall, the view upheld by the Courts in Singapore is that of a pro-arbitration. The restriction of public policy and high threshold allows for the independence of the arbitral process and the finality intended of arbitral awards. Singapore is a popular choice of seat in international arbitration for these reasons, with a strong pro-arbitration stance, the jurisprudence of the ground of public policy in international arbitration demonstrates this, along with the narrow threshold for public policy to set aside an arbitral award or the refusal of recognition upholds the objective of the Model Law. This also offers parties to international arbitration efficiency in resolution via arbitration with minimal Court interference. The ‘underlying philosophy of the Model Law’ is referred to and focused on throughout international arbitral proceedings in Singapore and in applying the grounds for refusal or setting aside an award.²¹

¹⁸ *McDermott International Inc v Burn Standard Co Ltd* [2006] 11 SCC 181.

¹⁹ *Renusagar Power Co v General Electrical* [1984] SCC (4)679.

²⁰ Hiroo H Advani, ‘Public Policy’ (2009) 21 (2) National Law School of India Review 55.

²¹ Paul Tan and Alessa Pang, ‘Singapore’ in James H Carter, *The International Arbitration Review* (Law Business Research 8th edn 2017) 404.

2.3 Additional Grounds for Setting Aside an Arbitral Award in Both National and International Arbitration

These grounds are set out in the Arbitration Act and International Arbitration Act in Singapore. These grounds are set out in *PT Asuransi Jasa Indonesia (Persero)* in which the Court of Appeal noted two further grounds for the threshold of public policy which include if “the award was induced or affected by fraud or corruption” and the second is “a breach of natural justice... which the rights of any party have been prepartly have been prejudiced”.²² While Singapore has adopted these further principles under the ground of public policy, the Courts reiterate that the grounds for setting aside, specifically the threshold for public policy is to be narrowly construed. Even if such grounds are met, it is the discretion of the Courts to determine whether the award will be set aside – “may be” according to the Model Law.²³ The Courts in Singapore have determined the threshold of public policy as “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”.²⁴

In providing for this high and narrow threshold for public policy in Singapore, there is limited case law demonstrating a successful application to set aside an arbitral award. This is shown in the case of *AJT v AJU*. In dispute of the case was the “validity and enforceability of a settlement agreement”.²⁵ The case is the first in Singapore where the Court accepted the ground of public policy in international arbitration. With caution this decision has been widely used for comparison and interpretation of the threshold for public policy and the extent of Court involvement in Singapore while recalling the importance to uphold the arbitral award and the narrow threshold of public policy. The determination for the ground of public policy to set aside an award is welcomed as public policy may change and develop per State. This ground is covered under the National Arbitration Act (hereinafter AA) and International Arbitration Act in Singapore, which is read in conjunction with the Model Law. The High Court in *AJT v AJU* approached the threshold of public policy in citing that of the judgement in *PT Asuransi Jasa Indonesia (Persero)*. AJT began Court proceedings as an application to set aside the award claiming it to be contrary to public policy stating that the award “sought to stifle the prosecution of a non-compoundable offence; (ii) was illegal and unenforceable in Thailand; and (iii) when

²² Ibid.

²³ Article 34 UNCITRAL Model Law on Commercial Arbitration 1985 with Amendments as Adopted in 2006.

²⁴ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 3 SLR(R) 86.

²⁵ Nicholas Poon, ‘Striking a Balance Between Public Policy and Arbitration Policy in International Commercial Arbitration *AJU v AJT*’ (2012) Singapore Journal of Legal Studies 185.

performed, resulted in the bribery and/or corruption of a public authority”.²⁶ The point of merits of the case are reiterated that an ‘error’ does not qualify under the ground of public policy of the Model Law and IAA respectively. In *PT Asuransi Jasa Indonesia (Persero)*, the Court of Appeal stated that “errors of law or fact, do not engage the public policy of Singapore”.²⁷ This is observed again in *AJT v AJU*. These narrow limitations are intermittently reinforced in case law, as successful harmonisation of the threshold for public policy in international arbitration in Singapore. In *AJT v AJU* the High Court held that the threshold of public policy is that of a narrow ground and to successfully set aside the award, the award would have to clearly demonstrate that the enforcement would be contrary to the public policy of Singapore. The High Court held that the Agreement was in fact illegal in both Thai Law and under the Law in Singapore and would be set aside as it was contrary to public policy in Singapore.²⁸ Although the Court overturned the decision of legality of the Agreement of the arbitral tribunal, it is important to note the Court’s unwillingness to overturn the awards of the arbitral tribunal unless a clear violation has occurred. *AJU* argued that “two related companies of *AJT* were involved in fraud, forgery and the use of a forged document”.²⁹ *AJT* then counter-challenged on the basis that Agreement was invalid and contrary to public policy on the basis of “duress, undue influence and illegality”.³⁰

This shows the distinction missed in the High Court in determination between the issue of illegality and public policy under the Model Law and the International Arbitration Act. The case was subsequently referred to the Court of Appeal in Singapore, where the Court sought to continue its commitment in Singapore to the overall views in a pro-arbitral manner. The Singapore Court of appeal noted that the public policy ground to set aside an award relied on ‘findings of law made by an arbitral tribunal – to the exclusion of findings of fact’.³¹ The Court of Appeal, describing that of the arbitral tribunal’s decision on the legality of the Agreement, stressed that the High Court should not have determined the merits of the case decided by the Tribunal in relation to the legality of the Agreement.³² Extremely minimal ‘review’ is to be

²⁶ Nicholas Poon Guokun, 'A Welcome Clarification on the Use of Public Policy and Extent of Curial Intervention in the Setting Aside of an Arbitration Award - *AJT v. AJU*' (2010) 3 Contemporary Asia Arbitration Journal 315.

²⁷ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 3 SLR(R) 86.

²⁸ *AJT v AJU* [2010] SGHC 201.

²⁹ Nicholas Poon Guokun, 'A Welcome Clarification on the Use of Public Policy and Extent of Curial Intervention in the Setting Aside of an Arbitration Award - *AJT v. AJU*' (2010) 3 Contemporary Asia Arbitration Journal 315.

³⁰ *Ibid.*

³¹ *AJU v AJT* [2011] SGCA 41.

³² *Ibid.*

applied by way of Court Jurisdiction and this should not extend to review the merits of the arbitral jurisdiction if arbitration is to uphold its independence and the finality of the arbitral award. This example provides a clear threshold for Court involvement in international arbitral proceedings in Singapore. By overturning the decision made by the High Court, the Court of Appeal preserves the independence of arbitration and the jurisdiction of the arbitral tribunal.

Conclusion

There is a seemingly 'high' threshold in the above States in accordance with the guidance and objectives of the Model Law. By adding additional grounds and widening the scope and threshold of public policy, we risk the independence of arbitration. Although States such as Singapore have additional grounds, the threshold to satisfy the ground remains high with a narrow interpretation applied. This is easily demonstrated by the case law for international arbitration in Singapore in which an extremely high threshold has been recognised for setting aside an award on the grounds of public policy.

As seen in India, it is a less popular venue for international commercial arbitral proceedings. States such as Singapore are a much more popular choice of venue due to reliability in the interpretation of the Model Law and a high threshold to satisfy the ground of public policy. This upholds the independence of arbitration. The unwillingness of the Singapore Courts to overturn an award on the basis of public policy demonstrates the pro-arbitration stance welcomed by the Model Law. The extent of judicial intervention is directly linked to the threshold which must be reached for the Court to set aside or refuse enforcement of an arbitral award. In Singapore, it is clear from the decision in *AJU v AJT* that a restrictive approach to public policy as a ground to set aside an award has been adopted.

As public policy is left undefined, the threshold is subjective to each State. By allowing this subjectivity among States of the Model Law, the aim becomes blurred in the intervention of Courts in determining public policy. If a broad approach is taken in the threshold of such, arbitral awards are set aside and refused enforcement for the benefit of State Judiciary. With this approach, arbitration lacks dependency. Such States would see a decline in arbitral proceedings as international commercial contracts show preference to be referred to the law of a State which guarantees efficiency in arbitral proceedings and the independence of arbitration. By opting for a State which has adopted the Model Law, the unity that the law provides in international arbitration, we would assume a unified set of principles, including that of the

interpretation and threshold of the ground of public policy. It is clear that an exhaustive list for the threshold of public policy in an international context cannot exist. However, the guidance for interpreting the ground of public policy may need to be re-examined for the States that have adopted the Model Law in international commercial arbitration. Although many States have adopted a narrow approach and restrictive threshold to the ground, the overall aim of independence of arbitration and the finality of awards should be refocused.

Chapter 3

Arbitrator Bias and Other Grounds Encompassed Under Public Policy

As previously discussed, the grounds to set aside or refuse enforcement of an award are set out under the Model Law and the New York Convention, respectively. These grounds are to be narrowly interpreted and a high threshold must be satisfied in order to have an award set aside on the grounds of public policy, specifically in States with a pro-arbitration stance. In determining public policy, various themes of arbitrator bias are claimed under this ground of public policy. Article 12 of the Model Law provides the following:

‘An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made’.³³

The words ‘only if’ in this provision demonstrate that these are the only challenges available to be made to the arbitrator under the Model Law with further discretion retained by the Courts to apply. This limitation is important in upholding the independence of arbitration and the jurisdiction of the Arbitral Tribunal. In some States party to Model Law and the New York Convention, part of public policy will comprise bias and corruption of the Arbitral Tribunal or the arbitral award. While public policy can extend to these issues, a narrow interpretation should be given and to constitute public policy the award must constitute a violation of the “core values of a legal system”.³⁴ To uphold the standard applied through the Model law in international arbitration, States should apply a narrow scope under the umbrella of issues constituting public policy. Under Article 5 of the Model Law, the jurisdiction of the Court ‘[i]n matters governed by this Law, no court shall intervene except where so provided in this Law’.³⁵ In 2002, it was stated by Mayar & Sheppard that “public policy remains the most significant aspect of the Convention in respect of which ... discrepancies might still exist”.³⁶ Issues of corruption are contrary to international public policy, the difficulty arises when the Courts may require to challenge the arbitrator. States such as Singapore and India have adopted a further

³³ Article 12 (2) UNCITRAL Model Law on Commercial Arbitration 1985 with Amendments as Adopted in 2006.

³⁴ UNCITRAL Guide on Model Law.

³⁵ Article 5 UNCITRAL Model Law on Commercial Arbitration 1985 with Amendments as Adopted in 2006.

³⁶ Christopher S Gibson, 'Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law' (2009) 113 Penn St L Rev 1227.

approach of public policy nationally as to explicitly include that of corruption and partiality. It has also been suggested by the Singapore Law Reform Committee that such provisions should be instated in international proceedings. There is a possibility that these issues if implemented, could fall under public policy. In part 1 of this chapter, we shall address issues in claims of arbitrator bias under the public policy ground.

3.1 Arbitrator Bias and Public Policy

Under Article 12 of Model Law reads ‘An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence’.³⁷ Allegations of arbitrator bias form part of the procedural law governing international arbitration. Allegations under article 12 of Model law require parties to the arbitral agreement to bring forward the claims of arbitrator bias during the arbitral proceedings in the first instance, not after the award has been made. The finality of awards is upheld in this procedural aspect. However, if a party chose to claim issues in arbitrator bias after the award has been made, from relevant case law, this can be claimed under the ground of public policy. The aim of effective international arbitration is that the award will not be set aside nor refused enforcement.

In the case of *Fitzroy Engineering Ltd*, the plaintiff argued that the award should be refused enforcement on the basis of arbitrator issues under public policy.³⁸ The dispute arose as to the partiality of the arbitrator which lead to the defendant “not appearing in front of the arbitrator”.³⁹ The court in the us applied a two step approach to satisfy that there is significant cause to consider setting aside the arbitral award. In this case Flame could not satisfy the grounds and as such, the court refused to set aside the award.

In the Singapore case of *AJT v AJU*, it was determined that “fraud, breach of natural justice or some other recognised vitiating factor” would satisfy the ground of public policy.⁴⁰ A test for arbitrator bias is established in Singapore in the case of *Turner*.⁴¹ In *Turner*, the Supreme Court applied the test for arbitrator bias which was a “reasonable suspicion test” and this would

³⁷ Article 12 (1) UNCITRAL Model Law on Commercial Arbitration 1985 with Amendments as Adopted in 2006.

³⁸ *Fitzroy Engineering Ltd v Flame Engineering* [1994] 949 F Supp 1333.

³⁹ May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England' (2006) 23 *Ariz J Int'l & Comp L* 747.

⁴⁰ *AJT v AJU* [2010] SGHC 201.

⁴¹ *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd e&r Anor* (No 2) [1988] 2 *MLJ* 502.

suffice to contribute as part of the law of Singapore.⁴² The test would be invoked on the application for the removal for apparent bias in the arbitration dispute. However, this would not be compatible with the present pro-arbitral stance of Singapore. Through employing this stance and limiting the ground of public policy, although not applied through the ground of public policy through the Model Law in international proceedings it has been suggested by Luttrell, that a strict approach would be taken through a “reasonable apprehension” of arbitrator bias.⁴³

3.2 The Principle of Proportionality Under Public Policy

Under the umbrella of public policy, there have been numerous cases that do not demonstrate an unambiguous illegality that allows for Court intervention and determination under the scope of Model Law and the New York Convention. With regards to costs and awards, and the differences in the threshold of public policy internationally, the broad scope may allow for claimants to set aside and refuse enforcement under the guise of public policy.

3.2.1 Proportionality Under Public Policy in Singapore

The case of *V.V and Another v V.W* provided welcome clarification on the scope of the ground of public policy to set aside and refuse recognition of an arbitral award.⁴⁴ As discussed, the threshold of public policy in Singapore is high and the narrow interpretation of the courts of Singapore is demonstrated. The award rendered by the arbitral tribunal was applied to be set aside on the ground of public policy. The plaintiff invoked public policy and sought to have the arbitral award set aside on the basis that it was ‘completely out of proportion to the amount of time spent in the arbitration proceeding, the issues that were submitted for the decision of the Arbitrator and the amount involved’.⁴⁵ The decision of the High Court was that the essential question posed was whether the principle of proportionality should be considered to form part of public policy as the ground set out by the Model Law.

Interestingly, the case brought forward a claim of a breach of natural justice by way of a breach of the principle of proportionality. This is interpreted to be included in the broader sense of public policy in order to set aside or refuse enforcement of an arbitral award. The Courts in the

⁴² S R Luttrell, 'Go Back to Gough: The Need for the Real Danger' Test for Arbitrator Bias in the Common Law Seats of the Asia Pacific' (2008) 16 Asia Pac L Rev 157.

⁴³ Ibid.

⁴⁴ *V.V and Another v V.W* [2008] SGHC 11.

⁴⁵ Ibid.

case referenced that of *John Holland Pty*.⁴⁶In that case, in determining the threshold of public policy. Prakash J, explained that the party who wishes to apply the ground of public policy must identify and bring forward the exact issue of public policy which the award would be contrary to if implemented/recognised and enforced.⁴⁷ In applying the narrow scope of public policy, the decision in *PT Asuransi Jasa Indonesia* was also analysed.⁴⁸ This is important in keeping with the high threshold for intervention on the grounds of public policy and the overall unification of international arbitration law. The Court stated that “a party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and then must show which part of the award conflicts with that public policy”.⁴⁹ In employing a restrictive approach to the ground, the Court analysed the principle of proportionality and its link to public policy. Another interesting aspect of proportionality in public policy is that the determination of a Court to overturn an award due to the principle of proportionality may result in the Court determining the merits of a case, which has been widely regarded as unacceptable and has been criticised. The jurisdiction of the arbitral tribunal is final and Court jurisdiction is to be applied only on the grounds specified under the Model Law or the New York Convention (for States who have adopted either or both). It is submitted that an arbitrator is not bound by the principle of proportionality and that breaching the principle of proportionality does not suffice to establish a breach of public policy. The Court ultimately held in *John Holland Pty*, that the applicant did not fulfil the ground of public policy under the principle of proportionality or a breach of natural justice. In concluding, Prakash J stated that, “any mistake made by the Arbitrator would be a mistake of fact and would have no impact on this application as it is not an appeal and the Costs Award cannot be set aside on that ground”.⁵⁰ In holding this view, the Court determined that there is no public interest in fees deemed by the arbitrators. Appeals of mistakes of fact result in the merits or reasoning of the Arbitral Tribunal being questioned. Is this a breach of natural law or does this require Court intervention on the merits of a case?

The difficulty under the ground of public policy is the wide range of issues which the ground covers. As discussed, the threshold of the ground is generally implied to cover substantive and procedural issues in serious cases. Although the scope of public policy is not clearly defined,

⁴⁶ *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262.

⁴⁷ *V.V and Another v V.W* [2008] SGHC 11.

⁴⁸ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 3 SLR(R) 86.

⁴⁹ *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262.

⁵⁰ *Ibid.*

States are advised to adapt a narrow approach. While variations occur, States such as Singapore, in a pro-arbitration manner demonstrate a fixed high threshold in what constitutes public policy and the extent that the ground may be used.

Similarly, the U.S case of *Laminions-Trefileries-Cableries de Lens* involved excess interest rates amounted to satisfy the public policy ground to refuse enforcement under the New York Convention.⁵¹

3.3 Other Illegalities Under the Ground of Public Policy

As a leading State in international commercial arbitration, the United States (U.S) have had many arbitration cases that raise various other apparent illegalities under the guise of public policy.

Bribery and corruption may exist in arbitral proceedings, although this is limited, it may exist. As the jurisdiction of the arbitral tribunal is given under the Model Law it may prove necessary for the courts to intervene where it has been established that an award is vitiated by bribery. Allegations of such behaviours are referred to the courts. However, as required in international commercial arbitration, the courts must exercise limitations on intervention and deem the illegality absolute in nature. The protection of the public policy of a State is given importance in international arbitration but it is at the discretion of that State to determine issues such as bribery and corruption under public policy. Pavic states that Court intervention in allegations such as bribery which are in most instances covered by the ground of public policy in Model Law or the New York Convention should be limited in nature.⁵² There is fine line between determining and assessing allegations of corruption and bribery and assessing the merits of an award under the public policy ground.

3.4 Determining the Merits of a Case under the Ground of Public Policy

Under the pretence of public policy as a last resort claimed in Ireland, case law identifies several cases in which public policy has been invoked by the applicants in order to set aside an award on the basis of issues with an arbitrator. This is what happened in *Patrick Ryan and Ann Ryan v Kevin O'Leary (Clonmel) Limited and General Motors*.⁵³ The case involved a claim

⁵¹ *Laminoirs-Trefileries-Cables de Lens, SA v Southwire Co* [1980] 484 F Supp 1063.

⁵² Vladimir Pavic, 'Bribery and International Commercial Arbitration - The Role of Mandatory Rules and Public Policy' (2012) 43 Victoria University of Wellington Law Review 661.

⁵³ [2018] IEHC 660.

from the applicants, Mr and Mrs Ryan, who sought to have the award from the arbitral process set aside on a number of grounds, one of which was an application to set aside an award under the ground of public policy held under Article 34(2)(b) of the Model Law. Mrs. Ryan specifically stated in the submission to the High Court that the award was in conflict of public policy as it “was irrational and contrary to generally accepted principles of law. She further asserted that the arbitrator failed to take into account the evidence before him and breached the Ryan’s right to natural and constitutional justice”.⁵⁴ In the application for the award to be set aside on the grounds of public policy, the applicants claimed that the arbitrator, did not address the claims put forward by them.

Barniville J commented on the scope of involvement of the Courts, in particular on the jurisdiction of the Court to set aside the award on the basis of the grounds covered under Article 34 of Model Law.⁵⁵ In disputing the case under the ground of public policy, the applicants claimed that the “award was irrational”.⁵⁶ To dispute the award as the applicants have put forward is to ask the Courts to determine the merits of the case which the Irish Courts will not intervene in. By claiming that the award is “irrational” and that the facts of the case were incorrectly interpreted by the arbitrator is to assume some procedural issues or inaccuracy on the part of the Arbitral Tribunal. The Court stressed with reference to case law of similar proceedings that it would not assess the ‘correctness’ of the arbitrator or the facts of law relied upon when making the award. Although the issue of merits is continually rejected by the Courts, specifically in Irish case law on the matter, there are parties which rely on the ground of public policy if they are unhappy with the result of the arbitration.

In assessing the scope of jurisdiction by the Court quoted in relation to the merits of the case and jurisdiction of the Arbitral Tribunal “the Court (should) ignore this limitation on its decision making powers and usurp the arbitrator’s role”.⁵⁷ This stance is clarified by Barniville J to reiterate that the courts should not usurp the role of the arbitral tribunal. In assessing the claims put forward by the applicants as to assume some ‘illegality’ of the arbitral tribunal under the ground of public policy, the Court firmly rejects these claims and Barniville J, goes so far as to label these allegations ‘unfair and inappropriate’.⁵⁸ It was reiterated also that the Court will not accept any invitation to assess the merits of the arbitrator’s decision.

⁵⁴ *Patrick Ryan and Ann Ryan v Kevin O’Leary (Clonmel) Limited and General Motors* [2018] IEHC 660.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

In the Irish instance, the Courts have demonstrated a reluctance to apply the ground of public policy unless it is necessary and clear that the award would be contrary to public policy. In the case of the *Ryan's*, it is clear to the Irish Courts that the ground of public policy is used as a last resort in cases where one party is unhappy with the award or procedural aspects of the arbitration after the award is made. In this regard, it is noted that procedural rules are set out under the Model Law and issues with arbitrator bias are covered under Article 12, with the procedure for such claims set out also. Claims brought forward against an arbitrator as set out may still be in progress while the award is made. However, the Courts will exercise discretion while assessing claims of arbitrator bias under the ground of public policy. While it is unclear exactly what encompasses the ground of public policy, it is clear that the Irish Courts will hold public policy to a high standard allowing for only serious and clear breaches to satisfy the ground. Clearly, the Court is dissatisfied with any claims of bias and unfairness of an arbitrator brought forward in the case of setting aside an arbitral award under the ground of public policy.

Conclusion

It is clear that there are substantive and procedural aspects of public policy. The extent of this ground can include corruption and arbitrator bias, which from case law discussion is exercised narrowly. There is some debate through differences in whether challenges of arbitrator bias can fall under the ground of public policy in the reading and interpretation of the relevant articles of the Model Law. While this is covered by some States in the meaning of public policy, States should set a high threshold for judicial intervention in arbitral awards on the grounds of public policy. There is a danger in loosely applying arbitrator bias under the public policy ground, from the point of view of the independence of the arbitral tribunal and the finality of awards. Procedural public policy is necessary for fair and impartial judgements in international arbitration but should be brought under the relevant articles of the Model Law. This crossover between the relevant grounds and public policy deters from the aim of the Model Law. States remain unconvinced that the issue of arbitrator bias can form part of public policy. If arbitrator bias does exist under public policy, the necessity is to prove that this is a breach of the natural law of a State and that the award should not be enforced. Independence and the finality are the cornerstone for international arbitration under the Model Law, issues of corruption and bias serve adversely due to the necessity for court involvement. States should strive to uphold the independence and jurisdiction of the arbitral tribunal; the ground of public policy should be reserved for serious illegalities. There exists a fine line between allowing circumstances such as arbitrator bias and illegalities of procedure of arbitration and the findings of facts and

applying to set aside an award on the basis of asking the courts to determine matters decided on the jurisdiction of the Arbitral Tribunal. Such considerations would require the courts to comment or decide on the merits of a case. Faced with limiting the scope allowed of the grounds of public policy, it seems necessary for a review of the ground of public policy or a refocus on what the ground entails as far as procedural and substantive issues arising under the guise of the ground. Successful limitations have been placed in many States to this ground. Further guidance would be welcomed from UNCITRAL.

Chapter 4

Sources of International Public Policy

Sources of public policy are difficult to determine and define. As discussed, a definition is not given for international public policy in the UNCITRAL Model Law nor the New York Convention. This is partially since each State may interpret public policy differently. The notion that this, covered under Articles 34 and 36 of Model Law and Article V of the New York Convention, allows States to determine what they interpret to be illegal or contrary to the beliefs of the State as they arise may be dangerous for international arbitration, in deterring from the aim of independent dispute resolution. This power as we have seen as an allowable form of Court intervention to set aside or refuse enforcement of an award and may be widely interpreted. If this broad interpretation is given, States may imply a plethora of grounds which are encompassed under public policy. With some States allowing this to be determined on a case by case basis, although the sources of public policy may change over time it would be helpful for each State to understand to assist in keeping with a narrow interpretation of such. While Model Law provides for a unified standard for international arbitration, this can be closely followed and an award rendered, the issues then arises if a party makes an application to set aside an award or refuse enforcement under the ground of public policy. For States who have a broad interpretation, it is free rein to decide whether the argument put forward satisfies the ground of public policy in that State.

States who have adopted Model Law/the New York Convention demonstrate a readiness to adopt an international instrument or set of rules that will harmonise arbitration internationally. With only a number of grounds to set an international award aside or refuse enforcement, the ground of public policy is the most unsettled. While clarifying language leaves little room for interpretational issues for which the Court may set aside/refuse enforcement, ambiguous is the ground of public policy. In this chapter, we will dissect the sources that encompass the ground of public policy. As a highly subjective ground with little guidance in limitation of this through international Conventions – such as the Model Law and the New York Convention. The lack of clarification leaves public policy unmonitored in some ways for Court intervention. Understanding the sources of international public policy will allow for a better understanding of the ground of public policy under the relevant arbitration Conventions. To recognize these sources would assist in limiting the cases brought forward to States to set aside or refuse

enforcement under the ground of public policy. The public policy ground will be the laws of the state in which it sought to be recognised or set aside under Model Law and the New York Convention. Public policy extends to a vast number of international Conventions, international instruments and National Laws. With this expansive approach, it proves difficult to define and clarify each source that would satisfy the public policy ground in international arbitration. For the purposes of this chapter, I will focus on International Law standards that are widely accepted in international commercial arbitration.

4.1 Identifying Sources of International Public Policy

For the purposes of arbitration, National Courts retain power under Model Law and the New York Convention. This feature of public policy is seen in various International Conventions, Alex Mills suggests that the principle of public policy “is a general principle of law which can thus be implied in private international law treaties which are silent on the issue”.⁵⁹ With regards to the interpretation and application of an International Convention, “ordre public must be regarded as a principle of law”.⁶⁰ The ground of public policy has been widely criticised for its (sometimes) broad interpretation and confusion over what the ground entails due to its changing and subjective nature. It is evident that there needs to exist a limitation on this possible excess of power left to Court discretion. Public policy as a basis for overruling an arbitral award is in place in order to ensure justice and fair procedures between the parties to international arbitration. International public policy will include that of European Conventions such as the European Convention on Human Rights (ECHR).⁶¹ For sources such as human rights under public policy, a clear breach of human rights would satisfy the ground of public policy if an award is made. For human rights specifically, States party to the New York Convention and the Model Law is a highly accepted universal standard of law. These standards constitute the “fundamental principles and values that constitute the international public policy”.⁶²

Domestic constitutions would be another source of public policy. Issues may arise in applying the ‘law of the State’ under public policy in this regard. Although constitutional laws are

⁵⁹ Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201.

⁶⁰ *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* [1958] ICJ Reports 55.

⁶¹ Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201.

⁶² Cecilia Fresnedo de Aguirre, *Diversity and Integration in Private International Law* (Edinburgh University Press 2019) 342.

written in each State, interpretations of such allows for a wider scope than that written into law. In this regard, States in which the application is brought forward to set aside or refusal of recognition. For State Laws, such as the Constitution or principles of customary international law can be interpreted as based on the understanding of these principles of international law, which can differ from State to State. Where public policy takes a turn is the excessive use of power of the courts and broad interpretation of international law principles under the ground of public policy.⁶³

For contracting States to the Model Law, significant case law is accessible. UNCITRAL provides various resources in assisting to apply Model law to international arbitration in the hopes of a united and harmonious interpretation of international law principles. The CLOUT function provides to each party in international arbitral proceedings, the arbitral tribunal and the Courts in each Member States access to case law in each Member State for various issues arising in the application and interpretation of Model Law. This proves extremely useful when applying the grounds for setting aside and refusal of enforcement under Article 34 and 36 respectively. By accessing such resources, Member States can analyse various Court decisions on the grounds for setting aside/refusal of recognition specifically through a named Article such as public policy. Interpretation of public policy can be accessed through this case law and applying international public policy.

Sources of international law by way of international arbitral Conventions: with links to various international Conventions, the New York Convention provides access and links to Conventions that may be relevant to the New York Convention. The New York Convention makes reference to other Conventions such as the Montevideo, Panama, Moscow, Vienna, Washington and Geneva conventions.⁶⁴ International law sources are expansive, and this is the difficulty that arises when assessing the sources of international public policy. With the inclusion of general principles of law in customary international law, States with a broader approach to public policy can imply aspects of customary international law and generally accepted principles of law under public policy to allow for Court intervention under the New York Convention and the Model Law.

Integration of international conventions are evident in considering the sources of public policy as referred to in the relevant arbitral Conventions that govern international arbitration. For the

⁶³ Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 146.

⁶⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

functioning of public policy in accordance with international arbitral harmonisation standards, Cecilia Fresnedo de Aguirre has determined that States should interpret the ground “according to the fundamental principles on which that country bases its legal individuality and that cannot be set aside by any foreign law that results by virtue of the applicable private international law rules”.⁶⁵

It has been widely identified that the sources of public policy may develop as international law and trade does, as determined by Rawat, ‘public policy imports something that is uncertain and fluctuating, varying with the changing economic needs, social customs and moral aspirations of the people’.⁶⁶ As discussed, the ground of public policy can be determined on three different levels – national, transnational and international. For States such as Ireland, Singapore and India, the Model Law has been adopted to international arbitration. In the case of Ireland, the Model Law has been directly applied to arbitrations in the State through the adoption of the Arbitration Act. In the case of Singapore and India, elements of the Model Law have been mimicked and enacted through their respective national arbitration laws. In both cases of the Indian and Singaporean national arbitration Acts, additions under the grounds to set aside have been made to the Model Law. Generally, it has been accepted that a narrow approach will be applied to international arbitration. However, States are free to apply a broader interpretation at a national level as provided for in the respective national laws. While this may be unbeneficial towards arbitrations aim, it is clear that States must apply an international perspective in accordance with the Model Law for international arbitration.

The basis for successful, fair and unified arbitration rests on the balance of the following according to Sebastian, “partiality of the arbitrator, enforcement of arbitration awards, Judicial interference in Arbitration Proceedings and Jurisdiction of Arbitration Tribunals”.⁶⁷ The understanding of the sources and differences between national and international rules on public policy is imperative for the progression of international arbitration and the clarification of the public policy ground under International Conventions.

⁶⁵ Cecilia Fresnedo de Aguirre, *Diversity and Integration in Private International Law* (Edinburgh University Press 2019) 342.

⁶⁶ M.S Rawat, ‘International Commercial Arbitration and Transnational Public Policy’ (2007) 49 (1) *Journal of the Indian Law Institute* 60.

⁶⁷ Alwyn Sebastian, ‘The Public Policy Concern in Enforcing Arbitration Awards: A Comparative Analysis between India and the United States of America’ (2014) 8 *NUALS LJ* 127.

4.1.1 National and International Public Policy Issues

Differences in National and International public policy exists in arbitration. While States have adopted the Model Law and/or New York Convention to international arbitration in a bid to harmonise arbitration and promote unified standards and principles for States to follow. Some States, such as India and Singapore have adopted principles of the Model Law to National arbitration legislation. While this may be in accordance with the Model Law principles, excessive deviations may prove to be contrary to the aims of international arbitration. Ireland has adopted the Model Law to both National and International arbitral proceedings. As such, the ground of public policy is taken at an international level. For the likes of the ECHR, for States party to the Convention principles under the Convention are taken as public policy.⁶⁸ The ECHR includes fundamental human rights that are implied as public policy. Such laws if broken or arise as issues in international arbitration would be absolutely contrary to public policy. Such serious breaches will satisfy the public policy ground if an award is made and the arbitrator deems this as an arbitrable matter. This is a good example for implied sources of international public policy along with international customary law principles. Customary International Law principles are a source for international public policy.

India's current Arbitration Consolidation Act is based upon the standards set out in the Model Law. This is a step toward unifying both national and international arbitral legislation. Minimising the gap in the difference between both gives a unified perspective with Courts better equipped for international issues in arbitration by way of interpreting the grounds for setting aside or refusing enforcement. It is important for India to find a balance of international public policy as Singapore has done. Overstretching the ground of public policy in India has resulted in a confusion and dissociation from the harmonisation of international arbitration standards. While sources vary with State participation to International Conventions, for international public policy a refocus is necessary to keep up with international standards and in the Model Law principles.

While the basis of the Model Law has been incorporated to national arbitral legislation in India, some differences are evident, specifically in the grounds for challenging an award. Under Section 13 of the Conciliation Act, to challenge an award based on Arbitral Tribunal issues such as impartiality, only post award challenges can be made.⁶⁹ Further grounds for setting

⁶⁸ Lesley Dingle, 'Sources of Public International Law' (2009) 9 *Legal International Management* 273.

⁶⁹ Alwyn Sebastian, 'The Public Policy Concern in Enforcing Arbitration Awards: A Comparative Analysis between India and the United States of America' (2014) 8 *NUALS LJ* 127.

aside have also been added to that of the Model Law under Article 34. These additional grounds include “maintaining confidentiality... and prohibiting any reference to views, suggestions, admissions or proposals made by parties during proceedings”.⁷⁰ Differences and additions from the Model Law to State arbitration laws can be detrimental for arbitration, specifically when the basis of State Law is from that of the Model Law. For India, the additions of the grounds for setting aside widens the scope for Court intervention and allow further scope for applications to be brought to the Courts. These further grounds are not in accordance with that of the Model Law. By giving further grounds to set aside an award, the Courts are welcoming extra cases to be brought forward. In relation to the deviation under Section 13 of the Act, by determining that the parties cannot bring forward an issue/complaint against the arbitral tribunal for issues covered such as impartiality until an award is made also is incompatible with to the aims of the Model Law.⁷¹ This undermines the arbitral tribunal’s award by allowing the continuation of the process, with the interference after the award has been made, Sebastian renders the procedure time consuming and “contrary to the spirit of arbitration”.⁷²

In the case of *Hindustan Zinc Ltd*, the Indian Court restated the sources of public policy that may satisfy the ground.⁷³ In a bid to modernise and harmonise its legislation to be in line with that of internationally accepted standards, the Court set out the sources that encompass the ground. In determining the sources to satisfy the ground for public policy, the Court in India gave reference to “substantive provisions of law or the provisions of the Arbitration and Conciliation Act 1996 or against the terms of the contract” would be held to be contrary to public policy.⁷⁴ The Court gave reference to the Model Law internationally accepted standards. To endorse the internationally accepted standards of law, an international perspective of public policy should be applied. India’s current Arbitration Consolidation Act is based upon the standards set out in the Model Law. This is a step toward unifying both national and international arbitral legislation. Minimising the gap in the difference between both gives a unified perspective with Courts better equipped for international issues in arbitration by way of interpreting the grounds for setting aside or refusing enforcement.

⁷⁰ Alwyn Sebastian, 'The Public Policy Concern in Enforcing Arbitration Awards: A Comparative Analysis between India and the United States of America' (2014) 8 NUALS LJ 127.

⁷¹ Ibid.

⁷² Ibid.

⁷³ *Hindustan Zinc Ltd v Friends Coal Carbonisation* [2006] 4 SCC 445.

⁷⁴ M.S Rawat, 'International Commercial Arbitration and Transnational Public Policy' (2007) 49 (1) Journal of the Indian Law Institute 60.

Under the United States Arbitration Act (here in after FAA), Section 10 deals with the ground of public policy to set aside an arbitral award. The ground does not specifically stipulate 'public policy' nor attempt to define what this would include. Like other States party to Conventions such as the New York Convention, the US adopts other international conventions, principles and standards of international law in addressing the sources of international public policy. The FAA provides for national arbitration in the US provides as "a body of substantive law that binds state courts as well, requiring that arbitration agreements be enforced on the same footing as other contracts".⁷⁵ Precedent to already enshrined National arbitration laws in the US, the Model Law approach does not align with that of the FAA. William W Park argues that the line between national and international arbitral determinations may be blurred in the 'spillover of domestic precedents into international cases'.⁷⁶ The danger of this 'spillover' and conformity of National and international arbitration leaves inaccuracy in some principles of international arbitration. While the US has adopted the New York Convention for foreign arbitral awards (which mimics that of the wording of the Model Law), the US may find the need to apply a more narrow approach to the principles of international arbitration to minimise Court intervention.

The U.S in depicting similar to the ground of public policy under the New York Convention (Article V). Section 10 provides that an award may be refused enforcement if: "a) awards procured by corruption, fraud or undue means, b) awards where the arbitrators were clearly partial or corrupt, c) awards involving misbehaviour prejudicing a party's rights, or d) awards where the arbitrators exceeded their power".⁷⁷ U.S source of public policy is based on "law and legal precedent".⁷⁸ As a pro-arbitration State, an international perspective of public policy is evident in US Arbitration. The US applies the FAA to domestic arbitral proceedings and the New York Convention governs international awards.

In Singapore, the Model Law has been adopted into international arbitration through the International Arbitration Act (IAA) and through the National Arbitration Act (AA) which governs national arbitration. Similar to India, Singapore has added the inclusion of two additional grounds in both AA and IAA for grounds to set aside an arbitral award. These

⁷⁵ William W Park, 'The Specificity of International Arbitration: The Case for FAA Reform' (2003) 36 Vanderbilt Journal Transnational Law 1241.

⁷⁶ Ibid.

⁷⁷ S 10 United States Arbitration Act 1990.

⁷⁸ David M Glanstein, 'A Hail Mary Pass: Public Policy Review of Arbitration Awards' (2001) 16 Ohio State Journal on Dispute Resolution 297

include: “1) Making award was induced or affected by fraud or corruption. 2) Breach of rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced”.⁷⁹ In the case of *Hainan Machinery Import & Export Corporation*, it was held that the award was enforced, although there was claims that it should be refused enforcement on the grounds of public policy as the arbitration did not decide on the matters agreed to in arbitration.⁸⁰ In the case of *PT Asuransi* two separate awards were made at the conclusion of arbitral proceedings.⁸¹ One party then applied to set aside the award under the ground of public policy. The Court of Singapore held that ‘errors of law... did not engage the public policy of Singapore’ with regards to international public policy of the State held under the Model Law.⁸² Support from the Courts in Singapore has been indispensable for the pro-arbitration development of the State in accordance with the Model Law.

An important case in Singapore for distinguishing between international and National public policy is the case of *AJT*. The award made by the Arbitral Tribunal was set aside under the ground of public policy in Singapore for the first time.⁸³ Poon comments on that of the Singaporean Court of Appeal, ‘although the Court of Appeal in *AJU* rightly noted that the notion of public policy for setting aside purposes has an "international focus", this does not mean that only public policy which is accepted by most nations would qualify as a ground for setting aside’.⁸⁴ In Singapore, the lack of case law that demonstrates an award successfully set aside or refused enforcement on the grounds of public policy shows the rigidness of the Courts to interfere with an award made. Generally, the ground of public policy is set to a high and narrow standard and is as such in line with that of international public policy. Unlike the additional grounds of that in India, the IAA and AA grounds for setting aside, the grounds are narrowly construed and have to constitute a serious breach for the grounds to be satisfied.

In comparison to Singapore, India has demonstrated a broader approach for the ground of public policy in international arbitration. By allowing the umbrella of public policy to encompass far more than beneficial for the independence of the arbitral process and the finality

⁷⁹ Locknie Hsu, 'Public Policy Considerations in International Arbitration: Costs and Other Issues - A View from Singapore' (2009) 26 J Int'l Arb 101.

⁸⁰ *An Arbitration between Hainan Machinery Import & Export Corporation and McArthy Pte Ltd In re* [1996] 1 SLR 1.

⁸¹ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597.

⁸² Michael Pryles, 'Recent Singapore Decisions on International Arbitration' (2012) 24 (1) National Law School of India Review 35.

⁸³ Nicholas Poon, 'Striking a Balance Between Public Policy and Arbitration Policy in International Commercial Arbitration *AJU v AJT*' (2012) Singapore Journal of Legal Studies 185.

⁸⁴ *Ibid.*

of arbitral awards. Due to this broad scope, the differences between both Model Law States leaves a major disconnect in international public policy. In distinct contrast of the Indian stance seen in *Saw Pipes*, Singapore demonstrates a limited international public policy approach, with breaches consisting in those of international law standards.⁸⁵

In States such as the US and Ireland, an international public policy approach is taken solely instead of national approach to the ground of public policy in setting aside an award. By restricting excessive judicial intervention in arbitral proceedings by way of promoting international public policy standards in National proceedings.

4.1.2 International Conventions

International Law sources are identified as including “International Conventions, International Custom, general principles of law recognised by civilised nations, judicial decisions and teachings of publicists”.⁸⁶ Ireland has an advanced legal system and has adopted both the Model Law and the New York Convention successfully into arbitral proceedings. As mentioned previously, the Model Law is in operation for both national and international arbitration. The differences of National and International public policy will be.

In relation to Customary International Law, its source is that it is “founded on the common consent as well as the common sense of the world”.⁸⁷ From the Irish perspective, international public policy sources would consist of criminal and civil law breaches, international and multilateral treaties and the laws set out in the Constitution. As included under the Arbitration Act 2010, which gives reference to various International Conventions such as the Geneva Convention/Protocol and Washington Convention which is enacted along with the Model Law and New York Convention.⁸⁸ These links and enactments of other Conventions relating to international commercial arbitration set out under the Irish Arbitration Act provide a forthcoming for the progress of international standards of public policy.

International obligations of various other Conventions are upheld through the Arbitration Act (and the Model Law). This is set out under Section 24 of the Arbitration Act.⁸⁹ The Arbitration Act allows for the Model Law and New York Convention to be applied into Irish Law while

⁸⁵ *ONCC v Saw Pipes* [2003] 5 SCC 705.

⁸⁶ Lesley Dingle, 'Sources of Public International Law' (2009) 9 *Legal International Management* 273.

⁸⁷ Jordan J Paust, 'Customary International Law: Its Nature, Sources and Status as Law of the United States' (1990) 12 *Michigan Journal of International Law* 59.

⁸⁸ Arbitration Act 2010.

⁸⁹ Section 24 Arbitration Act 2010.

adhering to various other Treaties and Conventions that the Irish State is party to. This inclusion of various international conventions and principles add to the harmonisation of international law and promotes the harmonisation of these laws.

A strong advantage as Ireland for the seat of arbitration and choice of laws rules is the international perspective of arbitration in National and international arbitral proceedings. With this international outlook, cases such as *Snoddy* demonstrate a unified approach to the public policy ground and the reluctance of the Irish Courts to interfere with the arbitral award in setting aside or refusing enforcement.⁹⁰ This case of domestic arbitration sought to interpret the provisions of the Model Law and the Arbitration Act symbiotically. In the High Court Laffoy J sought to determine the grounds for setting aside an arbitral award.⁹¹ Laffoy J reiterated that the same stance as adopted in the cases discussed recognizing the “very limited jurisdiction which [the] court has under the Act of 2010 and the Model Law to set aside an arbitral award”.⁹² In a latter case Gilligan J endorsed the approach taken by Laffoy J in *Snoddy* and commented that the grounds for setting aside an arbitral award under Article 34 of the Model Law “are to be construed narrowly and the onus in this regard is on the moving party”.⁹³

Generally, cases that demonstrate a serious illegality in accordance with public policy for Constitutional or criminal law breached in arbitration will not reach conclusion. The Arbitral Tribunal’s jurisdiction will deem the agreement illegal. Furthering Conventions through the Arbitration Act such as the New York Convention, the Washington Convention and Geneva Protocol, due regard to international Conventions for the purposes of modernising and unifying international commercial law is clear. An likeness and strong correlation between national and international principles of arbitration is praised by scholars. As stated by S C Reichert, “Ireland has a high-quality, independent judicial system and a high-quality bar”.⁹⁴

4.1.3 Statute

The case *Saw Pipes* resulted in the Court trying to merge other substantive laws of the country along with the laws governing arbitration which is not in accordance with international public policy.⁹⁵ The decision in the subsequent case of *McDermott International* attempted to revise

⁹⁰ *Snoddy & Browne v Mavroudis & O’Leary* [2013] IEHC 285.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Delargy v Hickey* [2015] IEHC 436.

⁹⁴ S C Reichert, 'Commentary on the (Relatively) New Irish Arbitration Law: The Uncitral Model Law in (Almost) Pure Form' (2012) 18 Colum J Eur L Online Supplement 82.

⁹⁵ *ONCC v Saw Pipes* [2003] 5 SCC 705.

the threshold for intervention on the grounds of public policy in India, narrowing Court jurisdiction in public policy.⁹⁶ The case of *Venture Global* demonstrates the Indian Court's excess jurisdiction on international arbitration. The Court in the case set aside a foreign arbitral award. This is not in accordance with the Model Law although the Indian Supreme Court stipulated to set aside the award under section 34 of the Act.⁹⁷ The Supreme Court also quoted that of *Saw Pipes* when assessing the ground of public policy as determining the ground to include, "the fundamental policy of India, the interests of India, justice or morality and patent illegality".⁹⁸

There is a necessary correlation between national and international laws with regards to arbitration rules. As we have seen, there are elements in the New York Convention and the Model Law that allows for National procedural laws and intervention if required in the grounds for setting aside and refusing enforcement. If national legislation for arbitration allows for State intervention by way of assessing the merits of the arbitral tribunals findings, then State intervention through the grounds in the Model Law may be interpreted broadly with a wider scope allowing for an excessive amount of judicial interference.

While historically the FAA allowed for the assessment of merits, developments have looked to optimise judicial intervention in national arbitration. The FAA interprets now that merits of the case should not be assessed by the courts. To apply a narrow approach to court intervention is beneficial for the independence of the arbitral tribunal and brings the FAA closer in accordance with that of the New York Convention. Similar to this is the ground of public policy.⁹⁹ The case of *Eastern Associated Coal Corporation* held to satisfy the ground the award must "violate some explicit, well defined, and dominant source of public policy ascertained from positive law and not general concerns for supposed public interests".¹⁰⁰ Intended to be defined as a narrow scope in the realm of arbitration both nationally and internationally. As demonstrated in earlier cases in the US such as *Misco*, to satisfy the ground of public policy to set aside or refuse recognition, the party must demonstrate a legality based on law or legal precedent.¹⁰¹ In *Misco*, the Court held in relation to the ground of public policy must

⁹⁶ Aditya Sondhi, 'Arbitration in India – Some Myths Dispelled' (2007) 19 (2) Student Bar Review 48.

⁹⁷ Alwyn Sebastian, 'The Public Policy Concern in Enforcing Arbitration Awards: A Comparative Analysis between India and the United States of America' (2014) 8 NUALS LJ 127.

⁹⁸ *Venture Global Engineering v Satyam Computer Services* [2008] 4 SCC 190.

⁹⁹ William W Park, 'The Specificity of International Arbitration: The Case for FAA Reform' (2003) 36 Vanderbilt Journal Transnational Law 1241.

¹⁰⁰ *Ibid.*

¹⁰¹ *United Paperworkers International Union v Misco* [1987] 484 US 29.

demonstrate “some explicit public policy that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests’”.¹⁰²

4.2 A Test for International Arbitration

The Model Law sets out the grounds in which an arbitral agreement is international. This is set out under the scope of application:

‘(a) their places of business in different States (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country’.¹⁰³

UNCITRAL have also set out the interpretation to be given to the term ‘commercial’. This should be given a wide approach for arbitration harmonisation purposes. As a modernised text aimed at harmonising international arbitration, the interpretation to satisfy the international commercial element to apply the Model Law. For parties to arbitration, the Model Law principles are attractive through the limitation of judicial intervention, accepted principles under Model Law and the narrow interpretations for the grounds to set aside and refuse enforcement that should be taken by contracting States. This would promote international arbitral standards, giving party’s minimum standards and protections from the Model Law. With regards to the New York Convention and the Model Law for international procedures in arbitration, it is clear that national legislation must be in some forms related to the international Conventions. This is due to procedural laws and the public policy/arbitrability grounds that are left to national legislation.¹⁰⁴

Conclusion

While public policy remains undefined at an international level and the ground under the Model law and New York Convention remains the most subjective ground internationally. With some States applying a narrow interpretation vs a broad scope there comes confusion in. By identifying the sources of international public policy this may assist in keeping in line with the

¹⁰² *United Paperworkers International Union v Misco* [1987] 484 US 29.

¹⁰³ Article 1 UNCITRAL Model Law on Commercial Arbitration 1985 with Amendments as Adopted in 2006.

¹⁰⁴ William W Park, 'The Specificity of International Arbitration: The Case for FAA Reform' (2003) 36 *Vanderbilt Journal Transnational Law* 1241.

overall aim of Model Law and the New York Convention to promote a unified set of standards in international commercial arbitration. To understand the sources of public policy, parties to arbitration, the Arbitral Tribunal and States party to the Model Law/New York Convention would assist and avoid unnecessary claims brought forward under the guise of public policy, specifically those brought forward to determine the merits of a case already decided by the arbitral tribunal.

What would be interesting to see for a clarification on the ground of public policy, would be to compile an easy to use source list of International Conventions that apply and would satisfy the ground of public policy if breached accompanied by a list of the Member States to each Convention. This way, parties will be able to see which Conventions apply in various Member States based on choice of law rules and where the award will be enforced. This may lessen the scope of public policy, parties to arbitration will also be able to determine if their issue with an award will satisfy the ground under Model law and the New York Convention. This will in turn limit Court intervention on the ground, with cases brought forward on serious illegalities from the sources provided. This would also promote a narrow interpretation of public policy. The issue in promoting a full set of laws is that this may develop over time along with the addition to national constitutional laws per Member States.

As stated in Redfern and Hunter,

‘It is understandable that a State may wish to have the right to refuse to recognise and enforce an arbitration award that in some ways offends the State’s own notions of public policy. Yet, when reference is made to public policy, it is difficult not to recall the sceptical comment of the English Judge who said more than a century ago: it is never argued at all but where other points fail’.¹⁰⁵

The issue of public policy is encapsulated in this quote. To limit and control the broad interpretation that is demonstrated in some states in international arbitration, by recognising the sources of public policy by way of customary international law principals, criminal and civil law breaches an open ended approach may be curbed. If parties and States can understand the sources of public policy and the limitations applied to international public policy under arbitration, court involvement can be kept minimal, specifically under this ground.

Various international conventions exist in the realm of international arbitration. With these various sources of arbitration legislation, the ground of public policy (and reference of this) is

¹⁰⁵ Nigel Blackaby and Constantine Partasides and Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn Oxford University Press 2015).

limited in clarification. There is no attempt to limit or define the sources of public policy. Any limitations by the convention would overstep that of State Jurisdiction of those States party to each Conventions, it is important for State independence and the portion of national legislation. For the 'coordination of legal diversity' in public policy it is fundamental to understand the sources of international public policy in arbitration. Fundamental principles of law widely accredited worldwide encompass the sources of public policy in international arbitration. These laws that comprise various international law principles and accepted standards under international public policy. Although difficult to isolate all sources of international public policy that a breach would satisfy the ground of public policy, it is important to understand the standards widely accepted in international law. As a subjective ground based on national Laws, a pro-arbitration State would imply these principles and standards of international law without overstepping and allowing for an open-ended approach by the Courts. By modernising international law through the harmonisation of international arbitration laws by way of conventions and treaties has assisted in identifying the sources and acceptable standards of international public policy.

Chapter 5

The Relationship Between the Arbitrability and the Public Policy Grounds

Within both the Model Law and the New York Convention, the primary allowance for court intervention to set aside or refuse enforcement of an arbitral award is set out under Articles 34/36 of the Model Law and Article V of the New York Convention. Under the grounds of public policy and arbitrability of a dispute, the courts' subjectivity is permitted, and judicial clarifications are welcomed. In this chapter, I will discuss the relationship between these grounds and assess whether a dispute can be arbitrable, if the award rendered would be contrary to the public policy of a State in which the award was made or the State in which a party would seek to enforce the award. As discussed, the ground of public policy and the interpretation of the meaning, sources and threshold of public policy will differ from State to State with a difference also existing in the crossover between national and international public policy interpretations.

While the ground of public policy will be invoked once the award has been made, the Arbitral Tribunal may also determine the arbitrability of a dispute. The ground of arbitrability is covered under Article 34 (2)(b)(i) as follows, "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State".¹⁰⁶ I will assess whether there is a crossover between the issue of public policy and arbitrability. As public policy constitutes a serious illegality in national and international arbitral proceedings for the States discussed. If an award is made which is contrary to public policy, should the dispute be referred to arbitration.

5.1 Identifying Non-Arbitrable Matters

Similar to identifying the sources of public policy to help understand the basis of the threshold of public policy, the arbitrability ground is parallel. As each State may have its own subject matters that it will deem non-arbitrable, the Courts may exert its jurisdiction to determine the arbitrability to set aside or refuse enforcement of an award. Traditionally, both arbitrability and public policy have been recognised symbiotically. Arbitrability is part of the public interest of a State and thus, the two may go hand in hand. Identically to the public policy ground, the

¹⁰⁶ Article 34(2)(b)(i) UNCITRAL Model Law on International Commercial Arbitration 1985 With Amendments as Adopted in 2006.

ground of arbitrability is not limited or defined under the Model Law or the New York Convention. The public policy ground frequently permits excessive Court intervention in international arbitration. As discussed, clarity on the ground would be welcomed from UNCITRAL to assist States which have adopted a wide interpretation of public policy. National courts enjoy a similar discretion in assessing the question of arbitrability also. Although this is not as heavily criticised, it is possible that excessive judicial interference in arbitration may be implied through the arbitrability of a subject matter. The arbitrability ground cannot encompass as many principles as that of public policy. The ground of arbitrability may be deemed as constituting mandatory law. While issues such as criminal law are reserved for the Courts, non-arbitrable matters in international law could be implied to reserve Court Jurisdiction.

In the US and other States, it is clear from case law that antitrust laws and competition laws are reserved for the Courts at a National level. Generally, in National arbitral proceedings claims/disputes in bankruptcy, security laws, criminal law and public policy issues constitute non-arbitrable subject matters.¹⁰⁷ As neither the Model Law nor the New York Convention provide a clear context of the ground of arbitrability as a ground to set aside/refuse enforcement of an award, some international similarities have been noted.

5.1.1 State Arbitrability and Case Law

The ground of arbitrability is adopted in each of the analysed States in international arbitration through the Model Law and/or the New York Conventions. In Ireland, as the Model Law has been incorporated into national arbitration, alike the ground of public policy, an ‘international’ outlook is taken to arbitrable and non-arbitrable matters. Under the Arbitration Act, arbitrable and non-arbitrable subject matters are provided for under Section 30, which deals with the exclusion of arbitrable matters. In particular, Section 30 excludes:

‘An arbitration under an arbitration agreement providing for the reference to, or the settlement by, arbitration of any question relating to the terms or conditions of employment or the remuneration of any employees, including persons employed by or under the State or local authorities’.¹⁰⁸

¹⁰⁷ Michael F Hoellering, ‘Arbitrability of Disputes’ (1985) 41 (1) The Business Lawyer 125.

¹⁰⁸ Section 30 (1)(a) Arbitration Act 2010.

The Irish Act also allows for trade disputes to be referred to arbitration on agreement of the parties under the arbitrability section of the Act. Also not included is the sale of land as provided for under Section 20 of the Act. With the lack of non-arbitrable matters, generally with the pro-arbitral outlook in Ireland, an arbitral tribunal may also rule on its own Jurisdiction whether the dispute/subject matter is capable of arbitration.

In overturning the District Courts decision, the Supreme Court ruled that in *Scherk*, “a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction”.¹⁰⁹ The international case enforced a pro-arbitral outlook to the ground of arbitrability. By allowing this, the international focus was restored in the US. Prior to this case, the US case law on arbitrability implied that the Courts had extensive jurisdiction on the case as covered under non-arbitrable matters.

Similarly, in the case of *Mitsubishi Motors*, the US relied on the decision upheld by the Supreme Court in *Scherk*.¹¹⁰ The Agreement included an arbitration clause that the parties would refer any disputes to arbitration. Drawing on the pro-arbitral outlook determined in *Scherk*, the case sought a high threshold for non-arbitrable matters in international arbitration. Soler claimed that the dispute was non-arbitrable on the basis that it was covered under the Sherman Act, and the party did not agree to refer the antitrust issue to be heard by an arbitrator. Ultimately, the Court referred the dispute to arbitration in stating that, “the antitrust issues would not be arbitrable if this were a purely domestic dispute but holds that the international character of the controversy makes it arbitrable”.¹¹¹ This position of the Court was also upheld in *Cocchi*, with the separability of the claim applied to two out of the four claims.¹¹² These grounds were deemed as arbitrable by the US Supreme Court in determining, “if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation”.¹¹³

¹⁰⁹ *Scherk v Alberto-Culver Co* [1974] US 417.

¹¹⁰ *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc* [1985] 473 US 614.

¹¹¹ *Ibid.*

¹¹² *KPMG LLP v Cocchi* [2011] 565 US 18.

¹¹³ *Ibid.*

5.2 International Arbitrability

Under the New York Convention, the ground of arbitrability is covered under Articles I, II and V. Under Article II,

‘Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration’.¹¹⁴

This Article provides that contracting State Courts are obliged to refer the dispute back to arbitration if the subject matter is arbitrable, if such a dispute is brought before the Courts and the Agreement has been agreed to be referred to arbitration primarily. As we have observed with the ground of public policy through the New York Convention and the Model Law, the ground of arbitrability is also unrestricted and undefined. No limitations or guidance is given as an international standard to imply issues that are non-arbitrable. As both grounds are mentioned separately in both Conventions, it is clear that arbitrability and public policy do not have to be symbiotically satisfied to refuse enforcement or set aside an arbitral award.

In the US, case law on the subject of arbitrability has demonstrated a pro-arbitral stance specifically in international arbitral proceedings. By developing over the years, the US has shown unification in upholding the independence of both the Arbitral Tribunal’s Jurisdiction and the arbitral proceedings to limit the Courts intervention by way of Article V of the New York Convention. The same is demonstrated under the ground of public policy, where the Courts show a reluctance to satisfy the ground unless the award shows an inherent illegality to the public policy of the US. By limiting the Courts approach to non-arbitral matters and the public policy ground, the US has demonstrated support in harmonising international arbitration. The Courts in the US favour the decisions applied in both *Scherk* and *Mitsubishi Motors*, as setting a standard to follow in international arbitrability determinations.

With regards to the Model Law, States who have adopted should generally follow a pro-arbitral outlook to international arbitration. As the text is aimed at harmonising and unifying international arbitration while upholding the independence and jurisdiction of the arbitral tribunal. In recent years, States party to both Conventions, who have also adopted aspects of these International Conventions to National Arbitral proceedings have furnished an accepted

¹¹⁴ Article II (1) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

standard for arbitrability. Outside of cases of criminal law and other clear Jurisdictions of State Courts, arbitrability has been extended to allow for international arbitral standards.

5.2.1 The Separability and Kompetenz-Kompetenz Principles

Under Article 16 of the Model Law,

‘The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause’.¹¹⁵

This Article relates to a dispute arising by either party on the arbitrability of the dispute referred to arbitration. The Doctrine of Separability allows the dispute to be dissected so that the dispute may be partially arbitrable while other matters of the dispute may not. This principle under the Model Law allows for the independence of the Arbitral Tribunal. This allows the arbitration to continue and for some part of the dispute under separability to be capable of settlement by arbitration. This causally relates to the arbitrability ground under Model Law Articles 34 and 36 for setting aside or refusing enforcement of an award. If the Arbitral Tribunal has determined through its Jurisdiction under Article 16 that partial or full issues may be resolved by arbitration, States should give regard to these issues determined by the arbitral tribunal. An inability to present the case to an arbitral tribunal may be contrary to public policy, hence the correlation to the ground of arbitrability under international arbitration. Under Section 6 of the Arbitration Act in Singapore, it is held that arbitrability will be favoured where possible within holding the pro-arbitration position. The court will stay the arbitral proceedings if it is clear that there are “no sufficient reason[s] why the matter should not be referred in accordance with the arbitration agreement”.¹¹⁶ In the case of *BLY*, the courts in Singapore adopted a “special circumstances test” in the interpretation of Article 16 of the Model Law.¹¹⁷ This test identified that the courts in Singapore should use its discretion to stay proceedings while adopting a pro-arbitration approach. Under this approach, scholars such as Tan and Pang have stated,

‘that [the] arbitral proceedings can continue despite a party having filed an application for curial review of a tribunal’s jurisdiction ruling. The ‘special circumstance’ test would therefore accurately capture the balance between the court’s need to have control

¹¹⁵ Article 16 (1) UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006.

¹¹⁶ James H Carter, *The International Arbitration Review* (8th edn Law Business Research 2017) 406.

¹¹⁷ *BLY v BLZ and another* [2017] SGHC 59.

over a tribunals decision on jurisdiction and ward against the abuse of his remedy to hold up the arbitration'.¹¹⁸

5.3 Arbitrability and Public Policy – A Symbiotic Relationship?

Similarities are evident through the two grounds of public policy and arbitrability. Under the Model Law and New York Convention, the Courts in the State in which the award is made or sought enforcement may set aside or refuse enforcement on its own action, if it is deemed to be contrary to public policy or a non-arbitrable matter. Under both grounds, the Court may employ its own jurisdiction without either party having brought forward the claim under either ground. As both grounds relate to the State and are subject to State legislation, both are subjective. Subjectivity in international arbitration may be atypical but is essential in upholding State independence and State legislation.

Historically, the U.S has associated the ground of public policy and arbitrability under the FAA and New York Convention as symbiotic. Public policy was interpreted as an element in considering the arbitrability of the subject matter under arbitration.¹¹⁹ While the public policy ground may involve a plethora of issues, generally arbitrability will be implied and upheld to ensure the dispute is correctly heard under arbitration as per the Agreement by the parties. Arbitrability in the U.S has been widely approached in comparison to other States. Under Section 2 of the FAA,

'any written provision to settle disputes arising out of a contract by arbitration, or an agreement to submit and existing controversy to arbitration shall be valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract'.¹²⁰

In the US, a clear improvement has been made in international arbitrability. A form of good public policy involves upholding the arbitral process. As such, the US has demonstrated an improvement in allowing the jurisdiction of the arbitral tribunal by narrowing the courts' involvement on the ground of arbitrability under the New York Convention. The ground of arbitrability constitutes a public interest.

¹¹⁸ James H Carter, *The International Arbitration Review* (8th edn Law Business Research 2017) 412.

¹¹⁹ Abby Cohen Smutny and Hansel T Pham, 'Enforcing Foreign Arbitral Awards in the United States: The NonArbitrable Subject Matter Defense' (2008) 25 (6) *Journal of Intemational Arbitration* 657.

¹²⁰ Section 2 Federal Arbitration Act 1925.

Under the Digest of Case Law published by UNCITRAL on the Model Law in 2013, in analysing case law from contracting States of the ground of non-arbitrable matters as provided Article 34(2)(b)(i), the connection is also made to the Doctrine of Separability.¹²¹ Giving regard to the Doctrine and Jurisdiction of the Arbitral Tribunal, case law on the matter has suggested that for the Courts determining the subject-matter of the dispute under Article 34 2(b)(i) should limit exhibiting excess judicial review on matters decided by the Arbitral Tribunal. These further limits the scope for non-arbitrable matters disputed under the Model Law and promotes a pro-arbitral stance that should be taken by contracting State Courts. Commonly, both grounds are discussed by scholars together as falling under the realm of Court interpretations. Compared as the “substantive defences” in international arbitration Conventions such as the Model Law and the New York Convention.¹²²

5.3.1 Optimising Arbitrability

While the doctrine of separability exists and has been applied in cases such as in the case of *Cocchi*, a clear outlook as to arbitrable and non-arbitrable matters should be clarified in each State. Differences in National and International arbitrability can deem the ground unfocused and widely interpreted as the public policy ground is perceived. While the Agreement between parties may be disputed on validity, according to the Digest of Case Law on the matter, “a pro-arbitration approach is normally also adopted in cases where the arbitration agreement is challenged for lack of provision”.¹²³ This adopts an international perspective that Contracting States should adopt a flexible arbitrability approach to a dispute. By adopting this approach and promoting, it will attract choice of law rules and the seat of arbitration within an arbitral Agreement. In the case of Ireland, a pro-arbitral stance is taken as above with regards to the validity of the arbitral agreement, adopting the doctrine of separability successfully and limiting the non-arbitral matters disputed under Article 34 (2)(b)(i) of the Model Law. Reiterated by Lu, “like the procedural defences, however, enforcing courts often construe the public policy ground narrowly”.¹²⁴ The same goes for the arbitrability ground.

¹²¹ UNCITRAL, *Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) 142.

¹²² May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England' (2006) 23 *Ariz J Int'l & Comp L* 747.

¹²³ UNCITRAL, *Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) 142.

¹²⁴ May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England' (2006) 23 *Ariz J Int'l & Comp L* 747.

Conclusion

In relation to both grounds of arbitrability and public policy in international arbitration, evidently there exists some uncertainty in court intervention of both. Although upholding state legislation, as demonstrated under the ground of public policy, this may be used as a tactic for excessive court interference in arbitral proceedings. The ground of arbitrability is better accepted and generally parties will have an express clause to refer the dispute to arbitration. As demonstrated, both grounds have a symbiotic relationship on the basis that, if an award or agreement would be deemed to be contrary to public policy, it should not be arbitrable. The frame for arbitrability is widely accepted nationally and internationally, where other than the issues reserved for the Court, the Courts will refer the dispute to arbitration if it has been agreed. The Doctrine of Separability and the *Kompetenz-Kompetenz* rules assist as a form of guidance in promoting arbitrability in commercial contracts. Issues arise when a dispute is referred to arbitration which is then restricted on the basis of national jurisdictional issues such as public policy or non-arbitrability. Although these issues are based on the jurisdictional policies and legislation of each State, it is evident that excess Court discretion in international arbitral proceedings undermine the objectives of both conventions and the independence of arbitration as a mechanism for dispute resolution. While these grounds cannot be limited, it would be wise for States to apply a pro-arbitration outlook for the development of international arbitral standards which would promote these States as the seat or choice of law rules on arbitration. Public policy and arbitrability in international arbitration are enacted as a result of legal and political consideration of national inputs to international arbitration.

Chapter 6

Conclusion and Recommendations

Throughout this dissertation I have analysed the ground of public policy which exists to set aside or refuse enforcement of an arbitral award under the Model Law and the New York Convention. The States which I have analysed – Ireland and Singapore, India and the U.S, each have adopted one or both international conventions discussed. Within these States there exists some discrepancies in the application and interpretation of the ground of public policy in international arbitration. With some States having applied the principles of these international conventions into national arbitration laws, it is evident that deviations may expose a detrimental result to the overall aims of harmonising arbitration. By creating deviations, by way of additions for the grounds to set aside or refuse enforcement under national arbitration laws while adopting other principles of the Model Law, such as Singapore and India. Singapore has demonstrated a pro-arbitral outlook and the additional grounds for setting aside an arbitral award enshrined in its legislation successfully intertwine with international law principles demonstrated by the limitations applied and the high threshold for setting aside and refusing enforcement on the basis of public policy. By applying excessive issues under the guise of public policy, broad interpretations of the ground are employed which is contrary to the aim of unifying and harmonising international commercial arbitration. While the standard of public policy and the threshold to be reached are generally high, case law has demonstrated for the likes of India that there is improvement required.

It is suggested that the ground of public policy should be limited in International Arbitration. Regarded as the “unruly horse” ground to set aside or refuse enforcement of an arbitral award, a plethora of variable case law shows that an international outlook is not always applied to the ground. In some cases, state courts will take advantage of the grounds to apply their own motives in determining or reviewing the merits of the case.

Although the developments in recent years outweigh that of historical issues with the ground of public policy, the subjective nature of the ground should be progressively limited to allow for the independence of arbitration. Courts should exercise caution when a case is requesting the Courts to determine the merits of a case, which would be already decided by the arbitral tribunal. While case law in India has demonstrated issues with the Courts deciding on the merits of a case, it is apparent that a refocus is necessary to clarify the international stance on public

policy. This case law is in stark contrast to other States such as Ireland, Singapore, and the U.S in which the courts have exhibited a reluctance for court intervention on the ground of public policy. By employing a high threshold to satisfy the ground, the court can successfully reserve the right to exclude its jurisdiction in the case of serious illegalities or other issues contrary to the public policy of that State while upholding the independence and finality of the arbitral award. By narrowing the scope of application of the ground of public policy, States may become an attractive choice as a seat of international arbitration or choice of law rules. It is essential for States and parties to arbitration to understand the sources of international public policy. As far as national public policy goes, it is important to understand sources of national public policy that would satisfy the ground as far as possible. UNCITRAL have various functions such as CLOUT and the Digest of Cases on the Model Law to provide clarification and guidance through the aims and objectives of the Model Law. By assessing case law in areas such as public policy and arbitrability of the dispute matter, States, parties to arbitration and the arbitral tribunal can gain valuable knowledge of the international perspective and the threshold applied to the public policy ground.

There is a strong correlation between the grounds of public policy and the arbitrability ground which are provided for under Article 34/36 2(b)(i) of the Model Law and Article V (2)(a) of the New York Convention. Both are subjective grounds that may be seen to welcome judicial interpretation. Both public policy and arbitrability invoke the legal and political matters of national jurisdictions in international arbitration. Principles such as the Doctrine of Separability and the *Kompetenz-Kompetenz* principle correlate to “non-arbitrable” disputes held as a ground to set aside or refuse enforcement. These principles aid in arbitrability. If a State employs a pro-arbitral stance to international commercial arbitration non-arbitral disputes should be clear and the jurisdiction of the arbitral tribunal upheld, except for clear deviations from national legislation with regards to non-arbitrable disputes.

A refocus to the international outlook is necessary in some States to successfully employ a limited and ‘international’ approach to the ground of public policy. Although national laws may differ to encompass various grounds under public policy, varieties in the interpretation of international public policy prove detrimental to the aim of harmonising international law principles. It is clear from the analysis of national and international arbitration laws on the ground of public policy in Ireland, Singapore, India, and the U.S that discrepancies occur. Most damaging to the harmonisation of international commercial arbitration are the differences that exist in interpretation of the ground of public policy. By extending the ground of public policy

to allow the courts exert excessive involvement which proves contrary to the independence of arbitration.

It is necessary for States to find a balance between national legislation and international public policy to promote the unification of international commercial arbitration. By understanding the sources and threshold applied by States party to both the Model Law and the New York Convention on the ground of public policy, a clear pro-arbitral stance should be taken.

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