

Judicial Intervention in the Asia-Pacific Region*

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1. Introduction

It comes as no surprise that there has been a great increase of international arbitrations being heard in the Asia-Pacific region over the past few decades.¹ This can in part be attributed to developing and rapidly industrialising economies, particularly those in Asia, which in turn leads to an increase in business opportunities, dealings and disputes that follow. Naturally, there is a degree of competition between arbitral jurisdictions to attract international arbitration. A failure to present as an attractive seat for arbitration by a country's legislature and courts can have significant adverse consequences, not only for its international arbitration credentials, but also in terms of the development of a jurisdiction's international legal expertise, and the involvement of its legal and other professionals in international trade and commerce.

Whether a jurisdiction presents itself as being a desirable seat for arbitration depends very much on the level of support provided by its courts. Legislatures commonly seek to facilitate laws that provide a favourable arbitral environment,² and arbitral institutions support the arbitral process by providing sets of rules and frameworks to which parties may have recourse to govern the structure of their arbitration. However, it is the courts, in their supervisory and enforcement role, which must support the process of international arbitration in all material respects – in an impartial and efficient manner.

I have previously expressed the view that the development of international arbitration and arbitration generally requires “minimum court intervention, maximum court support.”³ That said, judicial intervention is a necessary and significant aspect in safeguarding the integrity of international arbitration. Without courts and judges in many jurisdictions now taking a pro-arbitration approach, international arbitration would not have the same level of attractiveness

¹ See Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) at 33-43.

² Legislatures of countries in the Asia-Pacific region have undertaken significant work in ensuring that the respective pieces of arbitration legislation are in line with international standards and provide the best framework to promote and develop arbitration in the region. For example, see Australia's overhaul of its federal *International Arbitration Act* 1974 (Cth) and its states' uniform domestic commercial arbitration legislation. In Hong Kong the Arbitration Ordinance (Hong Kong) Cap.609 came into force on 1 June 2011 and which abolished the distinction between domestic and international arbitration. In Singapore, the *International Arbitration (Amendment) Act* 2009 (Singapore) commenced on 1 January 2010, and the more recently, the Singapore government passed the International Arbitration (Amendment) Bill [Bill 10 2012], to amend its *International Arbitration Act*.

³ See a paper presented at the Arbitrators' and Mediators' Institute of New Zealand Annual Conference, 25 – 27 July 2013 (Auckland) entitled “How the Judiciary can support domestic and international Arbitration.”

as an alternative – or, in many cases, the primary – mechanism for resolving cross-border disputes. The real issue, which remains hotly debated, is the degree to which courts should intervene in the arbitration process itself; including the enforcement of its product, the arbitral award.

Two broad issues are discussed in this paper. First, the role of the courts generally with respect to arbitration and the circumstances in which judicial intervention is necessary. Secondly, focusing on one of the most controversial aspects of judicial intervention – when a court should set aside or refuse enforcement of an international arbitral award. The focus of the discussion of these issues is on recent significant decisions in the Asia-Pacific region in order to provide something in the nature of an overall regional picture.

2. Role of the courts in the arbitration context

Commentators have observed that:⁴

“The courts have an important role to play through their intervention at various stages of the arbitral process. In the absence of such intervention the fair resolution of disputes before an impartial tribunal, without unnecessary delay or expense, may not be achieved. Whether court intervention is viewed as supporting or interfering with the arbitral process will depend upon a range of factors including the timing, manner and degree of such intervention. Much will also depend upon the relative importance of the competing concepts of party autonomy and due process. Consequently the question of whether intervention supports or interferes with the arbitral process is often hotly debated.

There is a view, particularly amongst those involved with international arbitration, that the involvement of courts in the arbitral process general constitutes unwanted interference. But the reality is that arbitration would not survive without the courts. Indeed, as Lord Mustill observed, it is only a court with coercive powers that could rescue an arbitration which is in danger of foundering.”

The UNCITRAL Model Law (whether in its original form or as revised in 2006) has been adopted by the majority of the significant arbitral jurisdictions in the Asia-Pacific region.⁵ Under both the original and revised Model Law, there are a number of provisions which empower courts to assist and, if thought necessary, to intervene in aspects of the arbitral process.

⁴ John Lurie, “Court Intervention in Arbitration: Support or Interference” (2010) 76(3) *The International Journal of Arbitration, Mediation and Dispute Management* 447.

⁵ Countries which have adopted the 2006 Model Law include: Australia and its states; Hong Kong; Mauritius; and New Zealand. Countries which have adopted the 1985 Model Law include: Bangladesh; Cambodia; India; Japan; Macao; Malaysia; Oman; Philippines; Republic of Korea; Singapore (but with subsequent amendments to the underlying legislation); Sri Lanka; and Thailand. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

Importantly, Article 5 expressly prohibits any court intervention beyond the provisions of the Model Law:

“In matters governed by this Law, no court shall intervene except where so provided in this Law.”

This is an important provision and has been interpreted strictly.⁶ It sets out the boundaries of judicial intervention, which include the following:

- Staying court proceedings when there is a valid arbitration agreement governing the parties’ dispute: Article 8.
- Providing parties with interim measures of protection: Articles 9 and 17J.⁷
- Assisting with the appointment of an arbitral tribunal: Articles 11, 13 and 14.
- Determining the jurisdiction of an arbitral tribunal: Article 16.
- Recognition and enforcement of interim measures issued by an arbitral tribunal subject to a number of grounds for resistance: Articles 17H and 17I.⁸
- Assisting in taking evidence: Article 27.
- Determining whether an arbitral award can be set aside: Article 34.
- Recognising and enforcement an arbitral award: Articles 35 and 36.

It is not the purpose of this paper to examine these species of intervention comprehensively. Rather, I will focus on a number of the important cases with respect to judicial intervention in the most controversial of areas: the setting aside and refusing enforcement of international arbitral awards.

⁶ See, for example, *teleMates (previously Better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd* [2011] NSWSC 1365 at [53].

⁷ Noting that Art 17J is only available under the 2006 Model Law.

⁸ Noting that these articles are only available under the 2006 Model Law.

3. Challenges against and enforcement of international arbitral awards

3.1 General

It is unsurprising that any discussion of judicial intervention will inevitably lead to Articles 34 to 36, which contain provisions for the setting aside and enforcement of arbitral awards.

The comment has been made that “[i]n order to minimise judicial intervention in international commercial arbitration, every occasion where such intervention is permitted has to be scrutinised closely.”⁹ It is not surprising that the extent to which an arbitral award may be set aside was one of the most difficult issues to be settled with respect to the drafting of the original Model Law.¹⁰ The difficulties are associated with the court being asked to balance the principle of preserving the finality of arbitration with the need to safeguard the integrity of arbitration.

Arbitration, it has been observed, “is not intended to be the first step on a ladder of appeals through national courts.”¹¹ That sentiment has been echoed by the Supreme Court of Victoria:¹²

“Those who choose to resolve their disputes by invoking the provisions of the Commercial Arbitration Act must take the good with the bad. They trade litigation, with its strict adherence to justice in accordance with law and its relatively generous rights of appeal, for a species of alternative dispute resolution with its advantages of speed and, possibly, cost — but with more limited rights of recourse to the courts thereafter. In short, they thereby take a step which limits the power of this Court subsequently to intervene.”

However, whilst the finality of an arbitral award is one of the essential features of international arbitration, the possibility of appeals to the courts (with the possibility of further recourse to courts of appeal) is necessary to instil confidence that the arbitral procedure is adequately supervised and safeguarded by courts of law. Professor Doug Jones has observed that:¹³

“Arbitral proceedings are not judicial proceedings. When the parties choose arbitration, they choose finality. They choose to have their dispute resolved once and for all by an arbitral

⁹ Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd ed, Sweet & Maxwell, 2010) at 376.

¹⁰ UNCITRAL, *Report of the Secretary-General: “Possible Features of a Model Law on International Commercial Arbitration”*, UN Doc A/CN.9/207 (14 May 1981) at [107].

¹¹ Nigel Blackaby, Constatine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th ed, Oxford University Press, 2009) at 587.

¹² *Gunns Forest Products Pty Ltd v North Insurances Pty Ltd* [2004] VSC 155 at [2] (Harper J).

¹³ Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2011) at [10.100].

tribunal, in preference to the interminable layers of appeal characteristic of the judicial process. All of this will seem very sensible to the party in whose favour the award is made. The problem is that, as the annals of history reveal, nobody likes losing. The losing party will no longer be convinced of the wisdom of choosing to arbitrate and will be eager for an avenue to challenge the award. Recourse to the courts, where justified, is not only important to the parties to a particular dispute, but also serves to preserve confidence in the institution of arbitration.”

This echoes the comments made by Lord Mustill:¹⁴

“Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the Court may not only be permissible but highly beneficial.”

Under Article 34 of the Model Law, there are only limited grounds under which an award can be challenged. Article 34 provides that an arbitral award may be set aside if:¹⁵

- “(2) An arbitral award may be set aside by the court specified in article 6 only if:
- (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
 - (b) the court finds that:

¹⁴ See *Coppee-Lavelin SA/NV Ken-Ren Chemicals and Fertilisers Ltd (in liq)* [1995] 1 AC 38 (HL).

¹⁵ It should also be noted that the ground set out in Article 34 of the Model Law is replicated in Article V of the New York Convention. For a discussion as to the historical background to the drafting of Article 34 of the Model Law, see Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2010) at [7-011]–[7-024] and Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) at 910–1003.

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.”

The majority of the states in the Asia-Pacific region have adopted the Model Law provisions, including those with respect to setting aside an international arbitral award.¹⁶ The importance of these provisions is reaffirmed by the fact that they cannot be excluded by the agreement of the parties. Further, parties cannot agree to expand the grounds upon which an arbitral award can be set aside (i.e. effectively extending the laws of the seat of arbitration by way of agreement).¹⁷ Generally speaking, an award is not set aside by courts which are not located in the seat of the arbitration.¹⁸

Article 34 of the Model Law is a crucially important provision and one which raises significant issues – as was apparent from the difficulties faced when drafting the provision.¹⁹

Article 34 sets forth the standards against which courts of the Model Law State are to judge the arbitral award, the final “products” of the arbitral proceedings. Developing and drafting these standards presented unusually sensitive and difficult problems. The Secretariat predicted at the outset, in fact, that these issues would be ‘amongst’ the most difficult ones to be settled in the model law.’ It also suggested, however, that these issues would be central to the success of the Model Law as a whole. The delicacy of the task is perhaps borne out by the fact that the *travaux préparatoires* of Article 34 are longer than those of any other single article of the Model Law except for Article 1.

The most difficult question was, of course, what grounds would justify setting aside an arbitral award. The primary issue here was whether the grounds for setting aside an award should be limited to those grounds on which recognition and enforcement of an award may be refused under the [New York Convention]. The Secretariat urged from the very beginning that the New York Convention grounds be incorporated into the Model Law’s setting-aside provision. They are internationally accepted bases for attacking an award and adopting them, it was said, would ‘help prevent...an international award [from] fall[ing] victim to local particularities of law.’

¹⁶ The only exceptions are those contained in the provisions of Indonesia’s Arbitration and Dispute Resolution Act 1999 (Art. 70) and China’s Arbitration Law (Arts. 58 and 70). The restrictive grounds of Art 34 of the Model Law is similarly reflected in most other states, though noting that in certain countries the grounds for setting aside an international arbitral award can be narrower (such as France and Switzerland) or wide (such as England).

¹⁷ See, for example, *Hall Street Associates LLC v Mattel Inc.* 128 S Ct 1396, 2008 (US Supreme Court); and the comments of the New Zealand Court of Appeal in *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 at [105].

¹⁸ For rare circumstances where it has, however, occurred see *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* (No. 2) [2003] 4 HKC 488; *Hitachi Ltd v Mitsui & Co and Rupali Polyester* (2000) XXV Yearbook of Commercial Arbitration 486, 10 June 1998; *Luzon Hydro Corporation v Baybay and Transfield Philippines* (2007) XXII Yearbook of Commercial Arbitration 456; and *Venture Global Engineering v Satyam Computer Services* (2008) 4 SCC 190.

¹⁹ Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) at 911.

The Working Group initially agreed. In view of the importance of the question, however, the Working Group and the Commission repeatedly revisited it and discussed it at length. Numerous other possible grounds were considered. Each time, however, the conclusion to adopt the New York Convention grounds, with some relatively minor modifications, was reaffirmed.

The general modern philosophy towards arbitral awards was discussed by Bingham J (as he then was):²⁰ “[As] a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye, endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to ready and arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it.”

With respect to enforcement, Article 35 of the Model Law provides that:

- “(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
- (2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.”

The “enforcing” court may only refuse to enforce the award if the provisions of Article 36 are made out. Article 36 is in similar terms to Article 34; subject to some variation to accommodate the more limited application of Article 34. Article 36 provides that enforcement of an award may only be refused where:

- “(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may only be refused only:
 - (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of

²⁰ *Zermalt Holdings v Nu-Life Upholstery Repairs* [1985] 2 EGLR 14 at 15.

- the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) 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.”

In this context, I turn now to a number of important cases in the Asia-Pacific region where awards have been challenged and enforcement resisted.

3.2 Australia

Background

Australia is currently undergoing somewhat of a revolution with respect to arbitration – on both a domestic and international level. At times there may have been a regrettable perception that the Australian courts have hindered effective commercial arbitration by taking an interventionist approach in relation to the arbitration process and interpretation of the arbitral law – rather than taking an approach supportive of arbitration and the arbitration process. Regardless of whether this perception was warranted, one can certainly say that, with respect to enforcement of some domestic and international arbitral awards, Australian courts were inconsistent in their approaches. By way of example, in *Resort Condominiums Inc v Bolwell*,²¹ the Supreme Court of Queensland considered sub-sections 8(5) and (7) of the then *International Arbitration Act 1974* (Cth) (“IAA”) (which mirrors Article V of the New York Convention²²) and held, inconsistently with the generally accepted position internationally, that the grounds for resisting the enforcement of an international arbitral award provided for in the provisions of the Act (and thus the New York Convention) were *not* exhaustive. On the other hand, some decisions displayed a general reluctance by

²¹ *Resort Condominiums Inc v Bolwell* [1995] 1 Qd R 406.

²² *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*.

Australian courts to grant leave to appeal an arbitral award – an approach consistent with Australia’s broader policy toward enforcing arbitral awards.²³ More broadly, and particularly given the provenance of the arbitration legislation and the English case law, it would have to be conceded that there were some other “unfortunate” decisions.²⁴ There were some problems with over intervention in the arbitration process by way of judicial review of awards. There was also an increasing tendency for parties to challenge awards on the basis of what may be described as “technical misconduct”. However, this should not overshadow the very effective and useful work of the Australian courts in expediting and supporting arbitration through “arbitration friendly” decisions, such as those in relation to the scope and operation of arbitration legislation. This is perhaps unsurprising as it is consistent with the approach of the common law over a long period of time. In this regard, it is, in my view, worth noting that the common law courts were, as far back as the eighteenth century, extraordinarily supportive of commercial arbitration – as Professor James Oldham’s account of the work of Lord Mansfield in the latter part of that century illustrates.²⁵ Australian courts have more recently been, and continue to be, very supportive of arbitration.

The unfortunate perception of Australian courts being unduly interventionist warranted the attention of the Australian Commonwealth and State legislatures. The result was legislation to ensure that the grounds for challenging and enforcing international arbitral awards were narrow – and consistent with international standards.

²³ See *Koolan Iron Ore Pty Ltd v Rizhao Steel Holding Group Co Ltd* [2010] WASC 384 where domestic arbitral awards were enforced pursuant to the s 33 of the Commercial Arbitration Act 1985 (WA); and *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd [No 2]* [2010] WASC 385 where the court denied an application for leave to appeal the awards.

²⁴ See, for example, *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies* [2011] ACTSC 59 with respect to interpretation of arbitration clauses and the staying of related court proceedings; *Resort Condominiums Inc v Bolwell* [1995] 1 Qd R 406 where the Supreme Court did not think the grounds for resisting enforcement under Art V of the New York Convention was exhaustive; *American Diagnostica Inc v Gradipore* (1998) 44 NSWLR 312 where the Supreme Court of New South Wales held that international arbitrations held in Australia were also subject to the relevant state law governing domestic arbitration; *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461 which stood for the authority that expressly adopting a set of procedural rules (in that case, the ICC Rules) meant the parties evinced an intention not to adopt the Model Law (which was then permitted under IA Act, though that is no longer permitted by the IA Act). See also the series of decisions with respect to the standard of reasoning required in arbitral awards: *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA; *Gordian Runoff Ltd v Westport Insurance Corp* [2010] NSWCA 57; and *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 94.

²⁵ J. Oldham, *English Common Law in the Age of Mansfield* (2004, University of North Carolina Press), at 68-72.

Following the recent widespread changes made by Australian legislatures to both international arbitration legislation²⁶ and domestic arbitration legislation,²⁷ Australian courts are moving to a significantly more positive, pro-arbitration, position. For example, the IAA was amended so that a court may *only* refuse to enforce a foreign award in accordance with the narrow grounds listed under sub-sections 8(5) and (7) of the IAA.²⁸ Those provisions read as follows:

- “(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
- (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;
 - (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
 - (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;
 - (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
 - (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.
- ...
- (7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

²⁶ See *International Arbitration Act 1974* (Cth).

²⁷ See the *Uniform Commercial Arbitration Acts*.

²⁸ Additionally, it should also be noted that the term “public policy”, which has a history of being broadly defined by local courts, is now limited by section 8(7A) of the IAA to scenarios where: (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award. This ensures there is some level of predictability with respect to arguments about award which are not in accordance with Australia’s “public policy”.

- (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
 - (b) to enforce the award would be contrary to public policy.
- (7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:
- (a) the making of the award was induced or affected by fraud or corruption; or
 - (b) a breach of the rules of natural justice occurred in connection with the making of the award.”

Pro-arbitration approach of courts

In a Federal Court of Australia decision, *ESCO Corporation v Bradken Resources Pty Ltd*,²⁹ Foster J interpreted these provisions in accordance with international norms:³⁰

“...a foreign arbitral award is to be enforced in Australia unless one of the grounds in s 8(5) of the IAA is made out by the party against whom the award is sought to be enforced or unless the public policy of Australia requires that the award not be enforced. The pro-enforcement bias of the Convention and its domestic surrogate, the IAA, requires that this Court weigh very carefully all relevant factors when considering whether to adjourn a proceeding pursuant to s 8(8) of the IAA. The discretion must be exercised against the obligation of the Court to pay due regard to the objects of the IAA and the spirit and intendment of the Convention.”

The pro-arbitration approach has been highlighted by a number of judges speaking and writing extra-curially. For example, Chief Justice Marilyn Warren of the Supreme Court of Victoria has said:³¹

“In arbitration, the directive role of the Court needs to be minimised. The focus instead turns to ways in which the Court can support the arbitration process and enforce arbitral awards in a timely and cost effective manner.”

Additionally, Justice James Allsop³² observed at CIArb’s Asia Pacific Conference in 2011:³³

“The clear trend in judicial decision-making about arbitration in Australia [has transformed] from suspicion, to respect and support...In terms of intervention [by the judiciary], restraint is essential. Arbitration depends for its success on the informed and sympathetic attitude of the courts.”

²⁹ *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905.

³⁰ *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905 at [85].

³¹ Marilyn Warren, “The Victorian Supreme Court’s Perspective on Arbitration” (Speech delivered at the International Commercial Arbitration Conference, Melbourne, December 4, 2009).

³² Now the Chief Justice of the Federal Court of Australia.

³³ Justice James Allsop, “International Arbitration and the Courts: the Australian approach” in CIArb’s Asia Pacific Conference 2011 – *Investment & Innovation: International Dispute Resolution in the Asia Pacific* (2011), 1 and 7.

TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia

Despite the support shown for arbitration, the legal framework establishing international and domestic arbitration was potentially threatened in the very recent and most significant case before the High Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*.³⁴ This case arose from an application by a party seeking to enforce an Australian arbitration award rendered in its favour in the Federal Court of Australia. The unsuccessful party sought to challenge the enforcement of the award. When the Federal Court rejected the challenge, the unsuccessful party sought special leave from the High Court to appeal the Federal Court decision on that the basis the legislative framework of international arbitration in Australia was not constitutionally valid.

The facts of the case are relatively simple and are set out in the joint-judgments of Hayne, Crennan, Kiefel and Bell JJ:

- “61. Under the agreement, TCL granted Castel the exclusive right to sell in Australia air conditioners manufactured by TCL. In July 2008 Castel submitted to arbitration in Australia a dispute arising from contractual claims against TCL, seeking damages. Following a hearing, on 23 December 2010 an arbitral tribunal constituted by Dr Gavan Griffith AO QC, the Honourable Alan Goldberg AO and Mr Peter Riordan SC ("the tribunal") made an award which upheld Castel's claims and required TCL to pay Castel a sum of \$3,369,351. On 27 January 2011, the tribunal made a further award that TCL pay Castel \$732,500 in respect of the costs of arbitration.
62. TCL failed to pay Castel the amounts owing under the arbitral awards. On 18 March 2011, Castel applied to the Federal Court to enforce the arbitral awards. TCL opposed their enforcement on the ground that the Federal Court lacked jurisdiction and on the alternative ground that, if the Federal Court did have jurisdiction, the arbitral awards should not be enforced as to do so would be contrary to public policy because of an alleged breach of the rules of natural justice by the tribunal. TCL also applied in separate proceedings in the Federal Court to set aside the arbitral awards on the basis that they were contrary to public policy because of that alleged breach of the rules of natural justice.
63. On 23 January 2012, Murphy J ruled that the Federal Court had jurisdiction under the IA Act to enforce the arbitral awards. Subsequently, his Honour rejected TCL's claims of a breach of the rules of natural justice by the tribunal.”

TCL's contention rested upon the adoption of Articles 35 and 36 of the Model Law in the IAA.³⁵ As discussed above, these articles effectively require a court to enforce an international award unless enforcement of the award falls within the narrowly defined exceptions. A court is not permitted to refuse enforcement of an international award on the

³⁴ *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.

³⁵ The IAA gives effect to both the Model Law (as adopted in 2006) and the New York Convention.

basis that the award, on its face, contains an error of law. TCL argued that the requirement under the IAA was incompatible with the *Commonwealth of Australia Constitution Act* (“Australian Constitution”). Chapter III of the Australian Constitution specifically provides that “[t]he judicial power of the Commonwealth shall be vested...in federal courts”, which includes the Federal Court.

TCL’s first argument was that section 16 of the IAA (which gave force to Articles 5, 6, 8 and 35 of the Model Law), together with section 7 and Part III of the IAA, were constitutionally invalid as they were inconsistent with the requirements in Chapter III of the Australian Constitution that Australian courts exercise independent judicial power. TCL contended that the relevant provisions of the IAA sought to remove this independence, and that enforcement of the award in the manner envisaged by the IAA meant that the Federal Court was exercising judicial power without any independent judicial process. Consequently, courts would be required to give “*judicial imprimatur*” to an award despite its legal flaws. The High Court rejected this argument; unanimously holding that arbitral power is not judicial power. In other words, judicial power operates regardless of the parties’ consent whereas arbitral power is dependent on it. Thus, in enforcing an arbitral award, a court is merely enforcing an agreement between the parties.

TCL’s second argument was that the IAA imbues arbitrators with Commonwealth judicial power, which is not compatible with Chapter III of the Australian Constitution. Again, after carefully exploring the differences between judicial and arbitral power, the High Court rejected the argument.

The High Court’s unanimous decision was welcomed by the Australian arbitration community; indeed, the Attorneys-General of four Australian states appeared (as well as the Australian Centre for International Commercial Arbitration, the Institute of Arbitrations and Mediators Australia and the Chartered Institute of Arbitrators (Australia), arguing for the constitutional validity of the IAA. The proceeding had very much hung like the “Sword of Damocles” over the recent efforts of the Australian government and the arbitration stakeholders to promote arbitration in Australia. The strong unanimous and pro-arbitration findings of the High Court (consisting of six justices) confirm that Australia sits well within international standards and norms for the enforcement of awards. It also reinforces the legislative measures taken in recent times to position Australia as a pro-arbitration jurisdiction.

Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd

A further example of an Australian decision supportive of international arbitration and the effective enforcement of awards is *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd*³⁶ where Foster J of the Federal Court of Australia made a declaration that an arbitration award rendered in Uganda and in favour of a Ugandan company (“UTL”) and against an Australian company (“Hi-Tech”).

Hi-Tech sought to resist the enforcement of the award on a number of grounds under the IAA, arguing that the award contained an error of law, on the basis the arbitrator had miscalculated the quantum of damages, and that enforcement would be contrary to public policy under section 8(7)(b) of the IAA.³⁷ Foster J rejected the arguments and held that it was not contrary to public policy for a Court to enforce an award without having to re-examine the merits of the award.³⁸

“Section 8(5) of the Act does not permit a party to a foreign award to resist enforcement of that award on such a ground. Nor is it against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award. **The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.**” (emphasis added)

His Honour helpfully compared the respective approaches taken by Australian and American courts. He noted that:³⁹

“127 In the United States, the courts have generally regarded the public policy ground for non-enforcement as one to be sparingly applied. It has not been seen as giving a wide discretion to refuse to enforce an award which otherwise meets the definition of foreign arbitral award under the Convention.

128 An example of this approach is *Parsons & Whittemore Overseas Co, Inc v Société Générale De L’Industrie Du Papier* 508 F 2d 969 (2d Cir 1974). In that case, at 974, the Court said that:

We conclude, therefore, that the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.

³⁶ *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131.

³⁷ This provision reflects Art V(2)(b) of the NY Convention.

³⁸ *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [126].

³⁹ *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [127]-[130].

- 129 Other courts in the United States have held that there is a pro-enforcement bias informing the Convention (eg *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 274 at 306 (2004).
- 130 A more conservative approach has sometimes been taken in Australia (see eg *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428–432).”

Foster J also cited the decision of *Corvetina Technology Ltd v Clough Engineering Ltd*⁴⁰ where McDougall J took a very broad interpretation of the enforcement provisions of the IAA.⁴¹

- “18. It was suggested in the course of argument that if I did not accede to the plaintiff’s notice of motion then, in substance, it would send a warning signal to those who wish to enforce international arbitrations in Australia. Again, I do not agree. **The very point of provisions such as s 8(7)(b) is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award. In some cases the inquiry that is required will be limited and will not involve detailed examination of factual issues. In other cases, the inquiry may involve detailed examination of factual issues. But I do not think that it can be said that the court should forfeit the exercise of the discretion, which is expressly referred to it, simply because of some “signal” that this might send to people who engage in arbitrations under the Act.** There is, as the cases have recognised, a balancing consideration. On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy. The resolution of that conflict, in my judgment, should be undertaken at a final hearing and not on an interlocutory application.” (emphasis added)

After considering these cases, his Honour expressed the view that the enforcement provisions ought to be given a narrow interpretation:⁴²

- “132 Whether or not, in 2004, there was a general discretion in the Court to refuse to enforce a foreign award which was brought to the Court for enforcement, the amendments effected by the 2010 Act make clear that no such discretion remains. Section 8(7)(b) preserves the public policy ground. However, it would be curious if that exception were the source of some general discretion to refuse to enforce a foreign award. Whilst the exception in s 8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases. The principles articulated in those cases sit more comfortably with the purposes of the Convention and the objects of the Act. To the extent that McDougall J might be thought to have taken a different approach, I would respectfully disagree with him.
- 133 The complaint in the present case is that the assessment of general damages in the Award is excessive because the arbitrator failed to consider the costs and expenses that would have to be expended by UTL in generating the gross income which he found was likely to be earned. This is quintessentially the type of complaint which

⁴⁰ *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317.

⁴¹ *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317 at [18].

⁴² *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [132]-[133].

ought not be allowed to be raised as a reason for refusing to enforce a foreign award. The time for Hi-Tech to have addressed this matter was during the arbitration proceedings in accordance with the timetable laid down by the arbitrator. It chose not to do so at that time. It cannot do so now. As the Court in *Karaha Bodas* also said at 306:

Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.”

Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd

More recently, in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*,⁴³ Foster J of the Federal Court of Australia, again, was asked to consider an application to enforce an international award under the IAA. The principal issue in this proceeding was whether the respondent was a party to the arbitration agreement and whether there was a sufficient ground to prevent enforcement of the award.

Foster J took a pro-arbitration position, holding that Beach Building & Civil’s mere assertion that it had been misdescribed in the charterparty (without any evidence being called to demonstrate otherwise) was not enough to overcome the operation of section 9 of the IAA. Section 9 reflects Article IV of the New York Convention in providing that if an applicant seeking enforcement of an award duly produces the requisite documents, enforcement can only be resisted if the court is satisfied that enforcement would contravene sub-sections 8(5) and (7) of the IAA. The provision reads as follows:

- “(1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:
- (a) the duly authenticated original award or a duly certified copy; and
 - (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.
- (2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:
- (a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or
 - (b) it has been otherwise authenticated or certified to the satisfaction of the court.

⁴³ *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696.

- (3) If a document or part of a document produced under subsection (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case may be, certified to be a correct translation.
- (4) For the purposes of subsection (3), a translation shall be certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.
- (5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates.”

In this case, the Court did not think that Beach Building & Civil had overcome the evidentiary position under section 9(5) of the IAA. Foster J held that this approach was consistent with that taken by the English courts:⁴⁴

- “78 This approach is supported by the reasoning of Mance LJ (as he then was) (with whom Neuberger and Thorpe LJ agreed) in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd’s Rep 326 at [10]–[12] (pp 331–332) where his Lordship said:
- (a) Under the UK Act, a successful party to a Convention award has a prima facie right to enforcement. This reflects the pro-enforcement bias of the Convention.
 - (b) At the first stage of enforcement, upon production of the award and of the arbitration agreement appropriately authenticated, the award creditor is entitled to have the award enforced. Enforcement may be refused at the second stage (the *inter partes* stage) only if the award debtor proves to the satisfaction of the Court that the situation falls within [one of the heads in the UK Act equivalent to s 8(5) and s 8(7) in the Act].
 - (c) Provided that the documents produced to the Court at the first stage establish that the arbitrators had purported to act pursuant to the arbitration agreement produced at that stage, that is sufficient to move the enquiry to the stage where the award debtor must establish one or more of the statutory grounds for refusing to enforce the award.
 - (d) Once the award creditor establishes the matters referred to in (b) and (c) above, any challenge to the existence or validity of the arbitration agreement must be brought under [the statutory provision in the UK Act which is equivalent to s 8(5)(b) of the Act]. That is to say, it is for the party resisting enforcement of the award to raise and prove any challenge to the validity of the arbitration agreement.”

⁴⁴

Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd [2012] FCA 696 at [78]-[79].

Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)

In *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)*,⁴⁵ Traxys Europe SA (“Traxys”) had obtained an award in its favour and against Balaji Coke Industry Pty Ltd (“BCI”) to an amount in excess of USD\$3 million in relation to a contractual dispute.

After the award had been made, the parties took various independent steps either to have the award set aside or enforced. In early July 2011 BCI sought to have the award set aside by the Court of the District Judge at Alipore in the South District of India (“Indian District Court”). The Indian District Court refused to grant BCI an interim stay; however, on appeal, the High Court of Kolkata (“Indian High Court”), on an *ex parte* basis, restrained Traxys from enforcing the award. Traxys did not have any involvement in these proceedings. On the other side of the world, the English Commercial Court allowed Traxys to enforce the Award as well as granting an interim injunction restraining BCI from taking further steps in the Indian District Court. BCI were not involved in the English Commercial Court proceedings and did not take steps to challenge the award in England.

Traxys then made an application in the Federal Court of Australia, *inter alia*, to have the award recognised and enforced in Australia pursuant to the IAA. Foster J found that, for the purposes of IAA and *Federal Court Rules* 2011, Traxys had complied with the procedural requirements by producing a certified copy of the award and the arbitration agreement, and that the award had been made pursuant to the arbitration agreement. BCI, however, sought to resist the application on three grounds. BCI first argued that no judicial act was required for a foreign award to become binding as a judgment of the Court and that it became such a judgment the moment any attempt was made to enforce the award. Foster J did not accept BCI’s interpretation of the IAA:⁴⁶

“72 ...Section 8(3) should, therefore, be interpreted to mean: Subject to Pt II of the IAA, a foreign award (as defined in the IAA), may be enforced in the Federal Court of Australia as it would be if it were a judgment or order of this Court. That is to say, such an award is not, and is not deemed to be, by dint of the operation of s 8(3) alone, a judgment or order of this Court. Steps have to be taken to render it such a judgment or order. But, once those steps have been taken, the terms of the decision embodied in the award become a judgment or order of this Court. That judgment or order must reflect the Award and cannot differ in any material way from the terms thereof.”

⁴⁵ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276.

⁴⁶ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [72].

His Honour considered the *Federal Court Act 1976* (Cth) and the requirements for the exercise of judicial power before any remedy could be pursued.⁴⁷

“75 ...

The Constitutional requirement for this court to be seised of a controversy which must be quelled before it can be regarded as exercising the judicial power of the Commonwealth can only satisfactorily be met when a party seeks to enforce a foreign award pursuant to s 8(3) of the IAA (assuming that that provision is a valid law of the Parliament) if the Court gives effect to its decision as to the enforcement of that award by directing the entry of a judgment or by making an order in the terms of the award or by dismissing the application for such relief on one or more of the grounds specified in s 8(5) or s 8(7) of the IAA. Either way, there must be a judicial determination of the question whether the Award is to be enforced or whether enforcement is to be refused.”

Foster J concluded that this meant there could be no “deemed” judgments under the IAA.

BCI then submitted that an award could not be enforced if the award debtor did not have assets in the relevant jurisdiction. Foster J also rejected this argument and concluded that, for the purposes of the IAA, there is no prerequisite to establish proof of assets in the jurisdiction for the rendering of a judgment or the making of an order enforcing an award:⁴⁸

“82 There is nothing in the IAA that, as a matter of law, prevents an Australian court from directing the entry of judgment or the making of an order in the terms of the relevant award if there is evidence which proves that, at the time such a judgment is entered or such an order is made, there may be or, even, definitely are, no assets within Australia against which execution might be levied.

83 The ordinary entitlement of a successful party in litigation to a judgment is a fundamental entitlement and is not dependent upon that party proving to the satisfaction of the court that there are likely to be assets available to the judgment creditor at any particular time against which execution might be levied. The litigious process which culminates in the entry of judgment or the making of an order and the process of levying execution in order to obtain satisfaction in respect of that judgment or order are quite separate processes.

84 A judgment creditor is entitled to levy execution against assets which come into the jurisdiction after the judgment is entered or which did not even exist at the time judgment was entered.”

BCI’s third argument was that enforcement of the award would be contrary to public policy because it would be futile given Traxys’ inability to establish that BCI had any assets in Australia. BCI further noted that there was an unfinalised application to set the award aside in India and an interim injunction in place in that jurisdiction restraining Traxys from

⁴⁷ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [75].

⁴⁸ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [82]-[84].

enforcing the award. Foster J said, with reference to academic commentary,⁴⁹ that the public policy exception to the enforcement regime provided for by section 8(7) of the IAA had the potential to provide “a broad loophole for refusing enforcement”.⁵⁰ Continuing, his Honour said:⁵¹

“90 Clearly the pro-enforcement bias of the Convention, as reflected in the IAA, requires that the public policy ground for refusing enforcement not be allowed to be used as an escape route for a defaulting award debtor. That ground should not be made available too readily, lest it undermine the purpose of encouraging and facilitating the enforcement of foreign arbitral awards embodied in the Convention and in the IAA. As previously observed, arbitration facilitates international trade and commerce by providing an efficient and certain dispute resolution process to commercial parties. If the enforcement of awards is to be subjected to the vagaries of the entire domestic public policy of the enforcement jurisdiction, there is the potential to lose all of the benefits of certainty and efficiency that arbitration provides and which international traders seek.”

Foster J considered the critical issue with respect to notions of “public policy”. Making reference to the New York Convention, Foster J said:⁵²

“94 Article V(2)(b) of the Convention makes clear that, under the Convention, it is the public policy of the enforcement state which matters. There is no express reference in the Convention to any concept of international or transnational public policy. Having regard to s 2D and s 39(2) of the IAA, s 8(7)(b) should be interpreted in a manner which is consistent with Art V(2)(b) of the Convention. For this reason, s 8(7)(b) should be interpreted as requiring the Court to consider the public policy of Australia when the public policy ground of refusal is invoked by an award debtor.

95 What then is the scope of the public policy which must be considered? Is it the entire domestic public policy of Australia or a more refined concept? The expression is not defined in the Convention, in the UNCITRAL Model Law or in the IAA. Nonetheless, some assistance as to its meaning is provided by the examples of matters which would definitely be contrary to public policy which are specified in s 8(7A) of the IAA. The matters covered by s 8(7A) are matters which most fair-minded thinking persons would regard as obvious reasons for refusing to enforce a foreign award.”

After considering the authorities,⁵³ Foster J ultimately concluded that in the circumstances of the case enforcement of the award would not be contrary to the public policy.⁵⁴

⁴⁹ See Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008) at 218-9.

⁵⁰ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [89].

⁵¹ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [90].

⁵² *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [94]-[95].

⁵³ See *Hebei Import and Export Corporation v Polytek Engineering Co. Ltd* [1999] HKCFA, *Parsons & Whittemore Overseas Co, Inc v Société Générale De L'Industrie Du Papier (RAKTA)* 508 F 2d 969 (2d Cir 1974) and *Corventina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317 and also referring to his Honour's own decision in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415.

“105 Thus, in my view, the scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defence of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state. This view is consistent with the language of s 8(7), the terms of s 8(7A), the text of Art V(2) of the [New York] Convention, the fundamental objects of the Convention and the objects of the IAA. This approach also ensures that due respect is given to Convention-based awards as an aspect of international comity in our interconnected and globalised world which, after all, are the product of freely negotiated arbitration agreements entered into between relatively sophisticated parties.”

The importance of this decision lies in the way in which Foster J analysed and emphasised the purpose of the IAA provisions as being directed to the application and implementation of the New York Convention and its pro-enforcement provisions contained in the Australian IAA. It follows that any infelicity in the drafting of the IAA should not be taken to stand in the way of the application of the New York Convention according to its terms as understood internationally.

Eopply New Energy Technology Co Ltd v EP Solar

In the decision *Eopply New Energy Technology Co Ltd v EP Solar*,⁵⁵ Eopply New Energy Co Ltd (“Eopply”), the award creditor sought to have a CIETAC (Shanghai Sub-Commission) award enforced against EP Solar (“EP”). Prior to the hearing of the application, Eopply was informed that liquidators had been appointed over EP for the purposes of winding up. The liquidators did not oppose Eopply’s claim or leave for Eopply to proceed. Under section 500(2) of the *Corporations Act 2001* (Cth), where there has been the passing of a resolution for voluntary winding up of a company, no action or other civil proceeding can proceed against that company, except where the court grants leave upon imposed conditions. Foster J gave consideration to various factors in determining whether to exercise the Court’s discretion.⁵⁶ Although his Honour had some concern about the lack of evidence as to the financial position of EP for the purpose of making an assessment whether

⁵⁴ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [105].

⁵⁵ *Eoply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356.

⁵⁶ *Eoply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356 at [22].

Eopply could in factor recover any part of an amount awarded to it, there were considerations which weighed heavily in allowing the award to be enforced. His Honour said:⁵⁷

“23 In the present case, the following considerations point to the grant of leave:

...

- (b) The applicant’s claim is based upon a foreign award. Although that award is binding upon the parties to it without any further step needing to be taken (s 8(1) of the IAA), if the award is to be enforced in Australia, steps must be taken either in an appropriate State or Territory court or in this Court to obtain a judgment in order to give effect to the award. When appropriate regard is had to s 2D of the IAA⁵⁸ which specifies the objects of the IAA and to s 39 of the IAA,⁵⁹ there is good reason to make the path to recovery by the award creditor easier by granting leave and allowing judgment to be entered rather than leave the award creditor to the vagaries of the proof of debt process.”

***Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109**

Recently the Full Federal Court of Australia handed down a decision which again affirmed Australia’s pro-enforcement approach – in *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd*.⁶⁰ Allsop CJ, Besanko and Middleton JJ unanimously dismissed an appeal from an earlier decision which had enforced an international arbitral award.⁶¹

The decision not only affirms Australia’s pro-enforcement approach, but confirms that Australian courts will give great weight to prior decisions of courts at the seat of arbitration

⁵⁷ *Eoply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356 at [23].

⁵⁸ Section 2D of the IAA provides that the objects of this Act are:

- “(a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
 (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
 (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
 (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and
 (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
 (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.”

⁵⁹ Section 39 of the IAA sets out the matters which the court must have regard to in exercising its powers under section 8 of the IAA and Articles 35 and 36 of the Model Law (as in force in subsection 16(1) of the IAA).

⁶⁰ [2013] FCAFC 109.

⁶¹ *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Limited* [2013] FCA 882.

dealing with the same issues. The award debtor in this case had attempted to challenge the award before the English High Court on procedural grounds but had failed. The Federal Court agreed with the English High Court's findings and said that it would generally be inappropriate for an enforcement court applying the New York Convention to reach a different conclusion from the court at the seat of the arbitration.

In this case, Coeclerici Asia (Pte) Ltd ("Coeclerici") sought to recover payments from Gujarat NRE Coke Limited ("Gujarat") and Mr Jagatramka (together the "respondents") in relation to an agreement for the sale of metallurgical coke. The agreement was governed by English law and disputes between the parties had to be arbitrated in London under the terms of the London Maritime Arbitration Association. Prior to the commencement of the arbitration hearing, the parties reached a settlement whereby the respondents admitted liability and agreed to a settlement payment structure. It was also agreed that if the settlement payments were not made by the respondents, Coeclerici would be entitled to an immediate consent award, without the need for any pleadings or hearing. Following the respondent's failure to make the first payment, on 4 February 2013, Coeclerici requested the tribunal to make an award in its favour. The tribunal emailed the solicitors for the respondents asking whether there was any reason why the award should not be made. After a slight delay in receiving instructions, the respondents' solicitors emailed the arbitrators over a number of days stressing that they had not been afforded a reasonable opportunity to present their case that there had been a breach of the settlement agreement.

The tribunal ultimately made the award on 14 February 2013. The respondents then unsuccessfully sought to have the award set aside by the English High Court on the basis that they had not been provided with an opportunity to be heard and there was serious irregularity.⁶²

Coeclerici then sought to have the award enforced by the Federal Court pursuant to s 8 of the IAA. The respondents resisted the enforcement on similar grounds to those raised before the English High Court, namely that they had not been afforded a reasonable opportunity to present their case in arbitration (see section 8(5)(c) of the IAA) and there had been a breach of the rules of natural justice so that enforcement would be contrary to public policy (see subsections 8(7)(b) and 8(7A)(b) of the IAA). Foster J granted the application to enforce the

⁶² *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Limited* [2013] EWHC 1987 (Comm); and noting that the "serious irregularity" is confined to the English *Arbitration Act* 1996.

award. His Honour rejected the respondents' argument and found that they had ample opportunity to put their case before the arbitrators before 14 February 2013. Notably, his Honour also said that given the evidence and submissions that were before him were similar to those before the English High Court, there was a possibility that the question of reasonable opportunity was issue estoppel and *res judicata*. In any event, even if that were incorrect, his Honour observed it would be inappropriate to reach a different conclusion to the same question already answered by the court in the seat of the arbitration; namely the English High Court.

On appeal, the Full Court agreed with Foster J's finding that the English High Court was correct in determining that the respondents had been afforded a reasonable opportunity to plead their case.⁶³ The Full Court also noted that generally speaking it would be inappropriate for an enforcement court in a New York Convention country to reach a different conclusion on the same question as that reached a court at the seat of the arbitration. With respect to issue estoppel, the Full Court said that it was not necessary to deal with the issue but made the following and important observations:⁶⁴

- “56. The primary judge referred at length to the reasons of Judge Mackie QC. He said that the question of whether the appellants had a reasonable opportunity to present their case in the arbitration was decided by Judge Mackie QC as a fundamental part of the reasoning that was employed in declining to set aside the award upon the application of the appellants. The primary judge concluded that issue estoppel was capable of application when the issue had been determined in a prior judgment in a foreign court and he cited in support of that proposition the decision in *Armcel Pty Ltd v Smurfit Stone Container Corp* [2008] FCA 592; 248 ALR 573 at 580 - 583 [56] - [82]. The primary judge noted that before Judge Mackie QC the appellants had submitted that they were shut out on 4 February 2013 by the arbitrators from making submissions in support of their opposition to the making of the award sought by the respondent, and that they had also submitted that thereafter they were not afforded a reasonable opportunity to put their case. The primary judge noted that this second proposition was based upon “the very same emails as were tendered before me in support of grounds 1 and 2 of the respondent's amended notice of grounds of opposition” (at [102]).
57. The primary judge concluded that the issues raised in the proceeding before him had been determined by the English High Court of Justice and could not be re-litigated before him. He said that there was an issue estoppel.
58. The primary judge also went on to say that it would be generally inappropriate in any event for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question as that reached by the court of the seat of arbitration. He noted that the English Court was the court of the seat of arbitration

⁶³ [2013] FCAFC 109 at [42]-[54].

⁶⁴ [2013] FCAFC 109 at [56]-[68].

and that under the United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the International Arbitration Act 1974 (Cth) any application to set aside the award must be made in that court. The trial judge said that it would be a rare case where it would be appropriate for this Court, as an enforcement court of a Convention country, to reach a different conclusion on the same question as that reached by the court of the seat of the arbitration.

59. The appellants submitted that the primary judge erred in deciding that the English Court had decided the same issue as the issue before the primary judge. We reject that contention.
60. An issue estoppel only arises in relation to those matters which a prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion. As Sir Owen Dixon said in a well-known passage in *Blair v Curran* (1939) 62 CLR 464 at 532:

Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negated.
61. It is true, as the appellants submitted, that the relevant statutory provisions in the case before the English Court were different from subss 8(5), (7) and (7A) of the International Arbitration Act. The statutory provisions in issue in the proceeding before the English Court were subss 68(2)(a) and (c), and s 33(1) of the *Arbitration Act* 1996 (UK), to which we have already made reference. The concepts of a “serious irregularity” and “substantial injustice” are not found (at least expressly) in subss 8(5), (7) and (7A) of the International Arbitration Act.
62. It is also true that the basic exercise before the English Court was different from the exercise before the trial judge. The English Court was considering a challenge to the arbitration award, whereas the trial judge was considering whether the award, being a foreign award, should be enforced. Nevertheless, we think that the English Court did decide the key issue which was the issue before the primary judge. The key issue before the primary judge, whether formulated under the rubric of subss 8(5)(c), (7) and (7A) of the *International Arbitration Act*, was whether the appellants had been given a reasonable opportunity to present their case at the arbitration. One of the elements of a serious irregularity under s 68(2) of the English Act is a failure to comply with s 33. A failure to comply with s 33 includes a failure to give each party an opportunity to put its case. Judge Mackie QC considered this issue directly in [23] of his reasons, which we have earlier set out.
63. The conclusion of Judge Mackie QC in the last sentence of [23] was indispensable to the final result – the rejection of the challenge to the award. In fact, once the conclusion had been reached the challenge could not succeed.
64. Both parties made detailed submissions on whether issue estoppel operates in circumstances where an Australian court is considering whether to refuse to enforce a foreign award on the grounds identified in subss 8(5)(c) and (7) of the International Arbitration Act. The issue is one of importance and of potential difficulty. It is not

resolved in a clear way by any authority binding on this Court: see generally *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; 282 ALR 717 at 724-725 [26] per Warren CJ; *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763 at 834-835 [98] per Lord Collins; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2003] 380 HKCU 1 at [48] – [53] per Burrell J.

65. We do not propose to attempt a resolution of the issue, because we think that a prompt judgment is desirable in this case and, at the very least, the primary judge was correct to hold that it will generally be inappropriate for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration. We endorse and apply the following observations of Colman J in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 as to the weight to be given to the views of the supervising court of the seat of the arbitration. That experienced commercial judge said at 331:

In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards, so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word ‘normally’ because there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement application is to be most strongly deprecated. (emphasis added)

66. In this case there is nothing to suggest that it falls within one of the exceptional cases identified by Colman J.
67. Thus we agree with the primary judge’s conclusion as to the appropriateness of not departing from the conclusion of Judge Mackie QC, as the second ground which the primary judge identified under the rubric of “issue estoppel” and that is sufficient for the purposes of this case.
68. It may be that considerations of the kind expressed in the views of Colman J in *Minmetals* would also have relevance if we were of the view that there was a procedural defect amounting to a breach of the rules of natural justice and if we were called on to consider the question whether, in the light of the supervising court’s views, the award should nevertheless be enforced. It is unnecessary to deal with this question.”

3.3 New Zealand

Background

In a case decided prior to introduction of the *Arbitration Act 1996* (NZ) – and the adoption of the Model Law – Cooke J (as he then was) of the New Zealand Court of Appeal said:⁶⁵

“[R]easons given by an arbitrator or umpire should be read fairly and as a whole. Awards should not be vitiated by fine points; the modern approach is in favour of sustaining awards where that can fairly be done, rather than destroying them.”

It comes as no surprise then that the setting aside an arbitral award under Article 34 of the Model Law is generally difficult. For example, it has been noted that:⁶⁶

“The High Court in New Zealand has approached the discretion under Article 34 in a relatively open way, taking into account causation and materiality considerations when deciding whether to set aside an award once a ground for setting aside has been established. Thus, even if such a ground is present, the Court may consider the magnitude of the defect and the extent to which it had or might have had an impact on the outcome of the dispute, and particularly whether the tribunal might have reached a different conclusion had it adopted the correct approach.”⁶⁷

Hi-Gene Limited v Swisher Hygiene Franchise Corporation

In *Hi-Gene Limited v Swisher Hygiene Franchise Corporation*,⁶⁸ the New Zealand Court of Appeal, in considering an appeal from a judgment enforcing an international arbitral award, laid out the approach which it was to take into account:⁶⁹

⁶⁵ *Money v Ven-Lu-Ree Ltd* [1988] 2 NZLR 414 (CA) at 417.

⁶⁶ Professor David A R Williams QC, “Defining the Role of the Court in Modern International Commercial Arbitration” presented at the SMU Asian Arbitration Lecture, Singapore 2012.

⁶⁷ For example *Sinke v Remarkable Residential Homes Ltd* (HC Wellington, CP274-98, 6 October 2000, Durie J) at [21]; *Downer Connect Ltd v Pot Hole People Ltd* (HC Christchurch, CIV 2003-409-2878, 19 May 2004, Randerson J) at [111]–[112]; *Caudwell & Ors v Gosling* (HC Auckland, CIV2005-404-84, 9 May 2005, Williams J) at [68]; *Asian Foods West City Ltd v West City Shopping Centre Ltd* (HC Auckland, CIV-2007-404-001215, 11 September 2007, Harrison J) at [18] and [31]. The requirement for a causal link between a defect and the award was raised for discussion during the drafting of Article 34 of the Model Law but was ultimately not included in the final text. The New Zealand High Court has however determined that a breach of natural justice founded on evidentiary inadequacy must also cause a substantial miscarriage of justice in order for an award to be set aside: *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC) at [103]. Compare the English Act, s68, discussed below, under which an award may be set aside if a serious irregularity in the arbitration will cause substantial injustice to the applicant. See also J Beraudo “Egregious Error of Law as Grounds for Setting Aside an Arbitral Award” (2006) 23 *Journal of International Arbitration* 351 at 353 contending that award should not be set aside if wrong application of a legal principle has no impact on the rights of the losing party.

⁶⁸ *Hi-Gene Limited v Swisher Hygiene Franchise Corporation* [2010] NZCA 359.

⁶⁹ *Hi-Gene Limited v Swisher Hygiene Franchise Corporation* [2010] NZCA 359.

- “[19] As is well known, New Zealand enacted the Arbitration Act 1986 based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL). ...
- [20] Of particular relevance here are the purposes of encouraging the use of arbitration as an agreed method of resolving disputes; the promotion of international consistency of arbitral regimes based on the Model Law; and the facilitation of the recognition and enforcement of arbitration agreements and arbitral awards. Consistent with these purposes, the courts of New Zealand have followed the decisions of courts in other jurisdictions in setting a high threshold when considering applications to refuse recognition or enforcement of an arbitral award under article 36. The onus is on the party seeking an order under that provision to establish one or more of the defined grounds. An order refusing recognition or enforcement of the arbitral award may be made only if one or more of those grounds is established.
- [21] In the context of article 34 of the First Schedule, this Court held in *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd*⁷⁰ that a narrow reading is to be given to the public policy ground. The Court cited with apparent approval authorities in the United States, the United Kingdom and Canada. These variously described the defence as applying only where enforcement would:
- “violate the forum state’s most basic notions of morality and justice”;⁷¹
 - where there was “some element of illegality or that the enforcement of the award would be clearly injurious to the public good or possibly that it would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised”;⁷²
 - where “it is not consonant with our system of justice and general moral outlook to countenance the conduct ...”;⁷³ or
 - where “the integrity of the court’s processes and powers will thereby be abused”.⁷⁴
- [22] Reference may also be made to a decision of the Supreme Court of India in which it was said that an award could be opposed on public policy grounds where “it shocks the conscience of the court”.⁷⁵
- [23] Although the decision of this Court in *Amaltal* was made in the context of article 34 (which deals with an application to the Court for orders setting aside arbitral awards) the threshold for the public policy ground under article 36 is to be approached in a similar fashion. Indeed, some of the authorities relied upon by this Court in *Amaltal* derive from cases where the public policy ground was relied upon in an attempt to resist the enforcement of arbitral awards.
- [24] Mr Gilchrist submitted that article 36(1)(a)(ii) afforded a discrete ground upon which the enforcement of the arbitral award might be resisted. While that is undoubtedly so,

⁷⁰ [2004] 2 NZLR 614 at [41] – [47].

⁷¹ *Parsons & Whittemore Overseas Co Inc v Société Générale De L’Industrie Du Papier (RAKTA)* 508 F 969 (2d Cir 1974) at 974.

⁷² *Deutsche Schachtbau v Shell International Petroleum Ltd* [1990] 1 AC 295 (HL) at 316.

⁷³ *Boardwalk Regency Corp v Maalouf* (1999) 6 OR (3d) 737 (ONCA) at 743.

⁷⁴ *Soleimany v Soleimany* [1999] QB 785 at 800.

⁷⁵ *Oil & Natural Gas Corporation v SAW Pipes Ltd* [2003] SOL Case No 175, 17 April 2003 at [27].

there is a substantial overlap between that ground and the natural justice/public policy ground, at least in the factual context of the present case. It would be contrary to the purposes of the Act to refuse to recognise or enforce an arbitral award in the absence of serious grounds to intervene. It would be anomalous if a different threshold were adopted for the ground in article 36(1)(a)(ii) than that for the public policy ground under article 36(1)(b)(ii) when both involve essentially an allegation of breach of natural justice through the refusal of the adjournment. We endorse the following statement in the Laws of New Zealand Arbitration:⁷⁶

... each party must have a reasonable opportunity to be present throughout the hearing, together with advisers and witnesses. A party should be provided with sufficient time for their case to be properly prepared for the hearing. Efforts should be made to take into account the availability of the parties or important witnesses. However, this does not imply that a party has an absolute right to be consulted in every aspect pertaining to the hearing. The matter is subject to discretion of the arbitral tribunal. The Court will intervene only in cases of positive abuse. If a party elects not to attend a hearing after receiving proper notice, the proceedings may properly proceed in the party's absence. (Emphasis added and footnotes deleted.)

[25] This passage essentially adopts similar observations made by the learned editors of *The Law and Practice of Commercial Arbitration in England*.⁷⁷

[26] The adoption of a high threshold has been said to be appropriate for all the grounds under article 36(1). As Redfern & Hunter explain:⁷⁸

... the intention of the New York Convention and of the Model Law is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively. As a noted commentator on the Convention has stated:⁷⁹

As far as the grounds for refusal for enforcement of the Award as enumerated in Article V are concerned, it means that they have to be construed narrowly.

[27] The Convention's intention to remove obstacles to enforcement of arbitral awards and to apply a narrow construction (or high threshold) to all grounds for refusing enforcement is confirmed in *Parsons Whittimore Overseas Co v Société Générale de L'industrie du Papier*, a decision cited by this Court in *Amaltal*.⁸⁰

Gallaway Cook Allan v Carr

More recently, the case of *Gallaway Cook Allan v Carr*⁸⁰ raised the question whether an arbitration clause was invalid and therefore liable to be set aside under Article 34(2)(a)(i) of the Model Law. The respondents were the purchasers of a group of farming and hotel assets

⁷⁶ Laws of New Zealand (Arbitration) at [76].

⁷⁷ Sir Michael Mustill and Stewart Boyd QC, *The Law and Practice of Commercial Arbitration in England* (2nd ed. Butterworths, London, 1989) at 303.

⁷⁸ Alan Redfern & Martin Hunter *Law and Practice of International Commercial Arbitration* (4th ed. Sweet & Maxwell, London, 2004) at 445.

⁷⁹ Albert van den Berg *The New York Arbitration Convention of 1958* (Kluwer, The Hague, 1981) at 267-268.

⁸⁰ *Gallaway Cook Allan v Carr* [2013] NZCA 11.

under an agreement. The appellant law firm acted for and on behalf of the respondent purchasers. The agreement contained, among other things, a series of conditions precedent which had to be satisfied by a certain time. The agreement specified that time was of the essence. The vendor subsequently cancelled the contract on the basis that a number of conditions had not been satisfied by the time required. The appellant commenced professional negligence proceedings against the respondent, arguing that the respondents had failed to complete the conditions. The appellant calculated its loss under the transaction at approximately \$12 million.

The agreement contained an arbitration clause and the dispute went to arbitration. The arbitral tribunal issued an award on the question of liability which determined that although the respondent had been negligent, the negligence did not cause the appellant the loss claimed. The respondent filed a notice of appeal, alleging errors of both fact and law under the terms of the arbitration agreement. Later, the respondent sought to amend its notice of appeal, going further to allege that the arbitration agreement was invalid under the law of New Zealand because it purported to permit an appeal of any arbitration award on questions of fact, which is contrary to statute. On this basis, the respondent sought to set aside the arbitration award.

The New Zealand High Court held that the agreement to arbitrate was not valid under New Zealand law. In particular, the High Court considered that the arbitration agreement, which permitted judicial review of “questions of law and fact”, could not be severed to exclude the words “and fact” from the clause. On this basis, the High Court held that the clause failed in its entirety, and ordered the award be set aside.

This case was appealed to the New Zealand Court of Appeal. The primary question was whether the High Court correctly set aside the arbitral award in circumstances where the agreement to refer to arbitration included an invalid and unenforceable right of appeal on questions of fact. The Court of Appeal also considered important underlying issues, which included legal principles of severance of contractual provisions, and the Court’s residual discretion to set aside arbitral awards.

The Court of Appeal reversed the decision of the High Court, and reinstated the award. The Court of Appeal held that the inclusion of an invalid contractual right to appeal the award on a question of fact – a right expressly excluded by the operation of the statute – did not render

the arbitration clause invalid. Accordingly, the Court of Appeal emphasised the importance of encouraging the use of arbitration by demonstrating a willingness to not read down arbitration agreements. The Court of Appeal stated:⁸¹

“The discretion vested by [Article 34 of the Arbitration Act] is of wide and apparently unfettered nature. We are satisfied it must be exercised in accordance with the purposes and policy of the Arbitration Act. Two specific purposes are to encourage the use of arbitration as an agreed method of resolving commercial and other dispute, and to facilitate the recognition and enforcement of arbitration agreements and arbitral awards. The principles and philosophy behind the statute are party autonomy within its framework, equal treatment, reduced court intervention and increased powers for the arbitral tribunal. Parliament has clearly stated its intention that parties should be bound to accept the arbitral decision where they have chosen that method of resolution. The recognised benefits of arbitration included speed, economy, choice of forum, anonymity and finality, the last by allowing the parties to limit their rights of appeal even though they cannot contract out of [article 34].

The statutory principles and philosophy, when considered in the context of this case, plainly favour validation of the agreement. In our judgment it would be inappropriate within the exercise of our statutory discretion to set aside the award.”

The Court of Appeal placed significance on the United States Court of Appeals for the Ninth Circuit decision in *Kyocera Corporation v Prudential-Bach Trade Services*.⁸² In this case, the parties had agreed to permit the judicial review of the arbitral award. Following the reference of a dispute to arbitration in accordance with the agreement, the plaintiff was awarded USD\$243 million against the defendant. The defendant sought to challenge the award on the basis that the agreement to permit judicial review of an award rendered the arbitration agreement wholly invalid. The Ninth Circuit Court held that while jurisdiction to review an arbitration award could be agreed to between the parties, invalidity of the agreement did not necessarily result in the entire arbitration agreement being rendered void and unenforceable. The Court held that the invalid appeal provision in the clause did not taint the central underlying purpose of the agreement to arbitrate.

The New Zealand Court of Appeal said that as both parties agreed to resolve their commercial disputes by arbitration, and had obtained legal advice to this effect, it would go against the intention of the law to allow one party who agreed to arbitrate to avoid the award on a legal technicality. The Court stated that a party, who initially agreed to “to take away what he perceived to be the benefits of following the arbitration course” would not then seek to set aside the award, not on its merits but “in reliance on an error for which he must bear his own independent responsibility.”

⁸¹ *Galloway Cook Allan v Carr* [2013] NZCA 11 at [66]-[67].

⁸² *Kyocera Corporation v Prudential-Bach Trade Services* (2003) 341 F 3d 987 (9th Cir).

3.4 Singapore

Background

The Singapore courts take a very strong pro-arbitration position with respect to challenges against and enforcement of international awards. A review of the case law indicates that the Singapore courts have set aside arbitral awards in only a handful of decisions – and those decisions are generally confined to domestic arbitral awards rather than international arbitral awards.

In his keynote address at the 2010 Singapore Arbitration Forum, Justice V.K. Rajah (Judge of Appeal of the Supreme Court of Singapore) said:

“Let me conclude by pointing out that the Supreme Court of Singapore has now as part of its core, judges with substantial previous experience both as arbitrators and counsel in international arbitrations. We recognize and appreciate that arbitration is not simply about the mechanical and mindless application of rules; indeed it is also about having a deep understanding and clear grasp of arbitration culture and conventions and how this is constantly evolving. We see ourselves essentially as partners of the wider arbitral community in policing and preserving standards. The courts, as we have emphasised in our decisions, have a limited role to play, in that they essentially assist rather than subvert the arbitral process. No international arbitration award has been set aside in Singapore in the course of the last decade and we hope this trend will continue. The judiciary will continue to unstintingly support arbitral processes in every way permitted by the laws of Singapore. There need be no concerns whatsoever about our Courts performing a medieval dance in the discharge of their responsibilities in supervising international arbitrations, if and when they are asked to do so.”

This pro-arbitration approach is particularly evident in two very significant decisions of the Singapore Courts – *Astro Nusantara International BV v PT Ayunda Prima Mitra*⁸³ and *PT Pukuaifu Indah v Newmont Indonesia Ltd*⁸⁴ – in which the Court emphasised the need to avoid curial interference with arbitral awards. It is helpful, in this context, to note the comments of Belinda Ang Saw Ean J in *Astro Nusantara International BV v PT Ayunda Prima Mitra*⁸⁵ where her Honour said that “[t]he pro-arbitration stance taken by [Singapore’s *International Arbitration Act* (“Singapore IAA”)] privileges party autonomy and the finality of awards, and espouses limited curial intervention.”⁸⁶

⁸³ *Astro Nusantara International BV and Others v PT Ayunda Prima Mitra and Others* [2012] SGHC 212 (Belinda Ang Saw Ean J).

⁸⁴ *PT Pukuaifu Indah v Newmont Indonesia Ltd* [2012] SGHC 187 (Lee Seiu Kin J).

⁸⁵ *Astro Nusantara International BV and Others v PT Ayunda Prima Mitra and Others* [2012] SGHC 212 (Belinda Ang Saw Ean J).

⁸⁶ *Astro Nusantara International BV and Others v PT Ayunda Prima Mitra and Others* [2012] SGHC 212 at para [70] (Belinda Ang Saw Ean J).

The pro-arbitration approach was also encapsulated in the decision in *Tjong Very Sumito and others v Antig Investments Pte Ltd*⁸⁷ where it was observed that:⁸⁸

- “28 There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. *An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore.* It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with. ...
- 29 There are myriad reasons why parties may choose to resolve disputes by arbitration rather than litigation. The learned authors of Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) (“*Redfern and Hunter*”) offer two principal reasons: first, the opportunity to choose a “neutral” forum and a “neutral” tribunal (since parties to an international commercial contract often come from different countries); and second, international enforceability of arbitral awards under treaties such as the New York Convention. Under these treaties, an arbitral award, once made, is immediately enforceable both nationally and internationally in all treaty states. One would imagine that parties might be equally motivated to choose arbitration by other crucial considerations such as confidentiality, procedural flexibility and the choice of arbitrators with particular technical or legal expertise better suited to grasp the intricacies of the particular dispute or the choice of law. Another crucial factor that cannot be overlooked is the finality of the arbitral process. Arbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals. It is meant to be the first and only step. *Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration. It must also be remembered that the whole thrust of the IAA is geared towards minimising court involvement in matters that the parties have agreed to submit to arbitration.*” (emphasis added)

It does not, however, follow from such a position, that there are no circumstances where an award can be challenged. Certainly, there have been a number of relatively recent decisions which have led to commentators querying “whether all is well in what to many previously seemed to be arbitration’s Garden of Eden.”⁸⁹

⁸⁷ *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 (Andrew Phang Boon Leong JA and V K Rajah JA).

⁸⁸ *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at 745–747 (Andrew Phang Boon Leong JA and V K Rajah JA). See also the comments of Judith Prakash J in *Re An Arbitration Between Hainan Machinery Import and Export Corp and Donald & McArthy Pte Ltd* [1995] 3 SLR(R) 354 at 367. This view has received the support of the Singapore Court of Appeal in *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR 690 (Belinda Ang Saw Ean J, Chao Hick Tin JA, Yong Pung How CJ).

⁸⁹ Peter Megens, “Singapore Arbitration and the Courts: Quo Vadis?” (2012) 78(1) *Journal of Chartered Institute of Arbitrators* 26. For example, see *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202 where the court overturned a majority international arbitral award, and the decision was upheld in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33.

So Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd

In cases concerning the question of natural justice and procedural fairness,⁹⁰ the courts have been reluctant to interfere with the arbitral tribunal's discretion. Further, in *So Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*,⁹¹ the Court of Appeal went so far as to say that even if there had been a breach of the rules of natural justice, the award would not be set aside unless the applicant could demonstrate it suffered some prejudice from the technical breach.⁹² The Court of Appeal said:⁹³

- “(1) Parties to arbitration had, in general, a right to be heard effectively on every issue that might be relevant to the resolution of a dispute. The overriding concern was fairness.
- (2) Fairness, however, was a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award had been made. The courts were not a stage where a dissatisfied party could have a second bite of the cherry.
- (3) The latter conception of fairness justified a policy of minimal curial intervention, which had become common as a matter of international practice.
- (4) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice were complied with in the arbitral process was preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that had been expressly acknowledged under the Act.
- (5) It was almost invariably the case that parties proposed diametrically opposite solutions to resolve a dispute. The arbitrator, however, was not bound to adopt an either/or approach.
- (6) Each case should be decided within its own factual matrix. It had always to be borne in mind that it was not the function of the court to assiduously comb an arbitral award microscopically in an attempt to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.”

In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd*⁹⁴ Judith Prakash J clarified the boundaries of judicial intervention with respect to setting aside an award by finding that the grounds for setting aside an award, as preserved in Article 34 of the Model

⁹⁰ See *So Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 1 SLR(R) 32 and *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871.

⁹¹ [2007] 1 SLR(R) 32.

⁹² *So Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 1 SLR(R) 32 at para [91]. Note that although this case concerned a domestic arbitration award, the principles enunciated are equally applicable to international arbitration.

⁹³ *So Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 1 SLR(R) 32 at para [64].

⁹⁴ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 (Judith Prakash J).

Law and section 24 of the Singapore IAA, provided the only grounds from which an award could be challenged:⁹⁵

- “15 In its submissions, SSGC relied heavily on the contention that the Award was perverse, manifestly unreasonable and irrational, and should therefore be set aside. SSGC deployed this argument in two ways.
- 16 In oral arguments before me, SSGC relied on it as an independent ground on which the Award could be challenged: counsel for SSGC submitted that the various circuits of the United States courts of appeal had recognised that a “manifest disregard of the law” could justify vacating an arbitration award. In support of the submission, counsel cited *Merrill Lynch, Pierce, Fenner & Smith, Inc v Jack Bobker* 808 F 2d, 930 (2nd Cir, 1986) at 933 and *Arthur H Williams v Cigna Financial Advisors Incorporated* 197 F 3d, 752 (5th Cir, 1999) at 757. Counsel for SSGC urged me to recognise that, while mere errors of law committed by an arbitral tribunal in the course of rendering an award could not invite the court’s intervention, the court could nonetheless exercise a supervisory power when the award was so manifestly unreasonable that no reasonable person could have so decided.
- 17 In essence, counsel for SSGC was asking me to recognise that the court could, independently of the Act, set aside arbitral awards which were “*Wednesbury* unreasonable” (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223).
- 18 This contention was untenable as a matter of principle and authority. Although the court undoubtedly has, on judicial review, a power to quash an administrative decision when its substantive merits are so absurd that no sensible person could have made that decision, I was of the view that no such power is available where the decision in question is made by an arbitral tribunal. This is because there is no appropriate analogy between administrative and arbitral decisions. Review for *Wednesbury* unreasonableness or irrationality exists because it is presumed that, when Parliament gives an administrative decision-maker a discretion, that discretion is not unfettered; rather, Parliament intends that that discretion be exercised reasonably: see HWR Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 9th Ed, 2004), pp 349–365. This presumption of rationality, however, finds no purchase in the context of private arbitrations, where parties have contractually agreed to abide by the decision of the arbitral tribunal. Parties must therefore be held to that agreement, in the absence of any of the specific grounds for challenging an award set out by Parliament in the Act. The ability to challenge an award for unreasonableness or irrationality is not a ground set out in the Act.
- 19 It is settled law that in Singapore, the Act provides the exclusive means by which a disappointed party to the arbitration may challenge the eventual award: *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 (“*PT Asuransi*”) at [54]–[55] and [57] and *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [60]–[66].
- 20 As Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) point out at para 9-35:

⁹⁵ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at 7–8 (Judith Prakash J).

... there is no provision in the Model Law for any form of appeal from an arbitral award, on the law or on the facts, or *for any judicial review of the award on its merits*. If the tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award – good, bad or indifferent – is final and binding on the parties. [emphasis added]

- 21 As the Model Law has the force of law in Singapore (see [4]), it was not open to me to set aside the Award on the freestanding ground that its substantive decision on the merits was outrageous or irrational. The position of the courts in the United States was adopted against a different legislative and legal background and could not influence the decision here. Although counsel for SSGC submitted that a perverse award went beyond a mere mistake of fact or law (against which there is no right of appeal under the Act), I was of the view that any alleged perversity of the Award was nonetheless ultimately a question of whether the Tribunal had committed an error of law (eg, by subjecting the Agreement to an irrational construction) and/or an error of fact (eg, by ignoring or misunderstanding the factual matrix surrounding the dispute). Such an error of law or fact, if indeed committed, did not cease to be such even if the error was gross and manifest.
- 22 Since any alleged perversity or irrationality of the Award would still, in the final analysis, have involved errors of law or fact, on the plain wording of the Act and on the authorities cited in [19] and [20] above, there could be no right of appeal against such errors, independent of s 24 and Art 34 of Sch 1 of the Act.”

PT Prima International Development v Kempinski Hotels SA and other appeals

The recent decision of *PT Prima International Development v Kempinski Hotels SA and other appeals*⁹⁶ is a further instance of the pro-arbitration and pro-enforcement approach of the Singapore courts - reaffirming the position that the Singapore courts will not interfere with the decision of the arbitral tribunal except on the limited grounds set out in the Singapore IAA.

In this case, Kempinski (Swiss company) and Prima (Indonesian company) were parties to a 20-year hotel management contract (the “Contract”). Under the Contract, Kempinski was given the right to manage a hotel owned by Prima in Jakarta. In February 2002, Prima terminated the Contract on the basis that Kempinski had not performed its obligations. Kempinski commenced an arbitration in Singapore in May 2002 under the auspices of the Singapore International Arbitration Centre (“SIAC”), claiming specific performance and damages for wrongful termination. Prima initially pleaded only that the termination was valid. It later amended its defence to plead that the Contract had become illegal under Indonesian law on the basis of three decisions of the Indonesian Ministry of Tourism which made it illegal for foreign companies to manage hotels in Indonesia unless certain steps had been taken (which Kempinski had not taken). Two interim awards were rendered by the

⁹⁶ [2012] SGCA 35.

arbitrator finding that the Contract had not been rendered impossible of performance as a result of the Ministry of Tourism's decision. The Contract could be performed if Kempinski adopted an alternative method of performance consistent with the Ministry's decisions. Accordingly, Kempinski was entitled to damages if it could show that the Contract had been wrongfully terminated.

After the second interim award was published, Prima became aware of the fact that Kempinski had entered into a new management contract with another hotel (the “New Contract”); action which was a breach of a clause in the Contract. Prima did not, however, apply to amend its defence; instead it requested the arbitrator for clarification of the second award. The arbitrator then issued a third interim award confirming that as the New Contract was a breach of the Contract, the methods of alternative performance suggested in the second award were no longer possible. The arbitrator then published a fourth award holding that since Kempinski had not been in compliance with the Ministry’s decisions, any award of damages for that period would be contrary to public policy.

Although the High Court found that the New Contract had not been pleaded in the arbitration, the Court of Appeal took the position that since Kempinski was seeking damages for the remaining period of the Contract, new facts arising or a change in law affecting Kempinski's right to the remedies (including the New Contract), fell within the submission to arbitration. Further, it was also relevant that the arbitrator had given Kempinski ample opportunity to respond to Prima's case on the New Contract, meaning that Kempinski had suffered no prejudice by the fact that the New Contract had not been included in Prima's pleadings.

This decision of the Court of Appeal avoided a formal approach to pleadings in arbitration. Instead, it considered whether the wronged party had been prejudiced by the conduct of the other party. It is a sensible and practical approach which is consistent with Singapore’s continued support for arbitration and enforcement – and which has now been adopted in the SAIC Rules as revised earlier this year.⁹⁷

TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd

In *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd*⁹⁸ (“*TMM Division*”) it was alleged that the single arbitrator had denied the applicant natural justice (s 24(b) of the

⁹⁷ See SIAC Rules 2013, r 24(n).
⁹⁸ [2013] SGHC 186 at [1]-[2].

Singapore IAA) and that the award dealt with issues not within the terms of reference (Article 34(2)(a)(iii) of the Model Law). The applicant alleged that the arbitrator had breached the rules of natural justice by not providing the applicant an opportunity to be heard and that the arbitrator was apparently biased.

Chan Seng Onn J begun his judgment by observing that courts must be careful in identifying genuine challenges to an award within the scope permitted by the Singapore IAA from those which are seeking to challenge the merits of the award:⁹⁹

- “1 However good or bad in the eyes of a party, the decision of an arbitral tribunal with the requisite jurisdiction is final and binding. This general proposition of law is a manifestation of the fundamental principle of interest *reipublicae ut sit finis litium* or finality in proceedings. Arbitration will not survive, much less flourish, if this core precept is not followed through by the courts. The integrity and efficacy of arbitration as a parallel dispute resolution system will be subverted if the courts appear unable or unwilling to restrain themselves from entering into the merits of every arbitral decision that comes before it. As is well-established under Singapore arbitration jurisprudence, the power to intervene in arbitrations generally, and more specifically to set aside awards, must and should only be exercised charily, in accordance with the rules under the applicable arbitral framework.
- 2 Although parties have a right and expectation to a fair arbitral process and the courts should give maximum effect to these safeguards in deserving cases, parties must not be encouraged to dress up and massage their unhappiness with the substantive outcome into an established ground for challenging an award. Particularly for international commercial arbitrations under [the IAA], it is imperative that an application to set aside an award under s 24 read with Art 34(2) of the [Model Law] is not a guise for a rehearing of the merits. Unfortunately, as this case exemplifies, sieving out the genuine challenges from those which are effectively appeals on the merits is not easy under the present law.”

His Honour then said:¹⁰⁰

- “42 When a challenge is brought against an award, the court has a duty to entertain and engage the challenge. That is what the IAA and Model Law provide and that is what the court must do. If the complaint against the award is that the arbitral tribunal did too much or did not do what it was supposed to do, regardless of whether one couches the challenge under natural justice or excess of jurisdiction, the court is effectively asked to review the actions or inactions of the arbitral tribunal. Invariably, the court must look at the evidence on the record to determine the merits of the challenge. However, **it does not follow, and neither do I accept, that this process always entails sifting through the entire record of the arbitral proceedings with a fine-tooth comb.**

...

⁹⁹ [2013] SGHC 186 at [1]-[2].

¹⁰⁰ [2013] SGHC 186 at [42], [45], and [47].

45 The court should not nit-pick at the award. Infelicities are to be expected and are generally irrelevant to the merits of any challenge...

...

47 It should also not be forgotten that one of the main reasons for choosing arbitration is the fact that arbitrators are commercially minded persons with expertise and experience with the subject-matter which may be extremely technical. Their value to the parties comes from their knowledge of the trade, and not necessarily their knowledge of the law. Some may have a legal background, but the legislation and rules usually do not prescribe a law degree or training as a prerequisite for appointment as an arbitrator. This is not a suggestion that a lower standard is expected of such arbitrators but a reminder that if parties have agreed to appoint specific individuals to preside over their disputes, they should be held to their agreement to the fullest extent possible.” (emphasis added)

The court found, on the facts, that the duties had not been breached and that the applicant’s real argument was that the arbitrator had misunderstood the law and the facts, which is not a ground for challenging an award under the Singapore IAA.

With respect to the natural justice arguments, Chan Seng Onn J found that:

- A tribunal might be in breach of the rules of natural justice if it decided a case on a ground not raised or contemplated by the parties. However, the arbitrators cannot be confined so as to be permitted to only adopt in their conclusions the premises put forward by the parties – especially where an unargued premise flows reasonably from an argued premise.¹⁰¹
- A tribunal is not required to deal with every argument presented by the parties as that would be impractical and unrealistic. All that is required is that the essential points are dealt with.¹⁰²
- A tribunal has a duty to comprehend the parties’ arguments, but whether that has been the case cannot be reflected in the award alone. The central issue is whether the award reflects the fact that the tribunal had applied its mind to the critical issues and arguments.¹⁰³
- A tribunal has duty to give reasons in the award, but even if some of an arbitral tribunal’s conclusions are bereft of reasons, that is not necessarily fatal. The crux is

¹⁰¹ [2013] SGHC 186 at [63]-[65].

¹⁰² [2013] SGHC 186 at [72]-[77].

¹⁰³ [2013] SGHC 186 at [88]-[91].

whether the contents of the arbitral award taken as a whole inform the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues; there is no requirement for the arbitral tribunal to touch on “each and every point in dispute” in its grounds of decision.¹⁰⁴

In rejecting the applicant’s case completely, his Honour concluded:¹⁰⁵

“125 ...Any real and substantial cause for concern should be demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions. Otherwise, curial recourse against an award will be used (and abused) as an opportunity to invite the court to judge the full merits and conduct of the arbitration. As a further aside, an over-jealous scrutiny of the arbitral tribunal’s decision will also encourage parties to, via the statutorily permitted mechanism of curial recourse, tactically frustrate and delay the enforcement of the arbitral award.”

BLB and another v BLC and others

In *BLB and another v BLC and others*,¹⁰⁶ in dealing with an application to set aside an arbitral award on the basis that the award failed to decide a counterclaim submitted to arbitration – under s 24(b) of the Singapore IAA and Article 34(2)(a)(iii) of the Model Law – Belinda Ang Saw Ean J found that there was a narrow aspect which had not been considered by the arbitrator. In this case, it was necessary to intervene as it was apparent on the face of the award that one of the counterclaims had been mischaracterised as an issue of relief rather than liability. The arbitrator had therefore failed to consider an entire head of counterclaim, which was one of the essential issues before him. Whilst the award was upheld, the counterclaim was remitted back to a new tribunal for determination.

Whilst her Honour found that these circumstances warranted the Court’s intervention, her Honour observed, on a general basis, that:

“[2] The first to third defendants viewed [the application to set aside an the relevant arbitral award] as an attempt by the plaintiffs to have the court interfere with and judicially review the merits of the findings of fact and law reached by the sole arbitrator (“the Tribunal”). In such a case, there would be no recourse to the court, and the losing parties would remain contractually bound to accept the Tribunal’s decision whether or not they think it right. In contrast, the plaintiffs’ principal ground of complaint, viz. that the Tribunal’s treatment of their counterclaim was contrary to the rules of natural justice, represents the other extreme. On this ground of complaint, the law permits recourse to the courts pursuant to s 24(b) of the [IAA] and Art 34(2) of the [Model Law]. The parties’ opposing positions embody a tension that is

¹⁰⁴ [2013] SGHC 186 at [97]-[105].

¹⁰⁵ [2013] SGHC 186 at [125].

¹⁰⁶ [2013] SGHC 196 at [2]-[3].

becoming increasingly apparent in the context of curial challenges to arbitral decisions. On one hand, the supervisory function of the court requires it to step in to provide relief in cases of genuine challenges. On the other hand, the linked principles of minimal curial intervention and finality in proceedings demand that this power of intervention be exercised warily and only in meritorious cases where statutorily prescribed grounds for setting aside have been established. This tension is further heightened when the losing party attempts to air its grievances before the court as complaints of breaches of natural justice or other established grounds of challenge and in doing so attempts to re-open the arbitration or traverse over the issues in the arbitration. The court must firmly resist any such attempts.

[3] ...due to the concerns just discussed, it is my view that in a borderline case the benefit of doubt would invariably favour the tribunal.”

3.5 Hong Kong

Background

As the cases indicate, the Hong Kong courts are very supportive of arbitration, without being “hands on”. Additionally, the Hong Kong Government policy has been to make it clear that the courts cannot intervene unless provided for under the Arbitration Ordinance. Given the Hong Kong Arbitration Ordinance is largely based on the Model Law, the grounds for setting aside an award are limited.¹⁰⁷ Not only are the grounds limited, but the Hong Kong courts will construe these grounds narrowly.

Dispute between Pacific China Holdings Ltd and Grand Pacific Holdings Ltd

This is clear from the recent series of decisions in the proceedings between Pacific China Holdings Ltd (“Pacific China”) and Grand Pacific Holdings Ltd (“Grand Pacific”) under a loan agreement which was governed by New York law, with an International Chamber of Commerce (“ICC”) arbitration clause specifying Hong Kong as the place of arbitration. After an award was made by the ICC arbitral tribunal in favour of Grand Pacific, Pacific China sought to have the award set aside on the basis that it was unable to present its case; relying on Article 34(2)(a)(ii) of the Model Law.

Pacific China raised three grounds in support of its application. First, Grand Pacific had been granted an additional 10 days to finalise its pre-hearing submissions which gave it time to access Pacific China’s pre-hearing submissions; secondly, the arbitral tribunal rejected Pacific China’s application to submit three additional legal authorities without having proper

¹⁰⁷ Though parties can choose to opt-in to Schedule 2 which expands the grounds for challenging an award to include serious irregularity and on questions of law.

consideration to their relevance; and, thirdly, the arbitral tribunal rejected an application to Pacific China to make further submissions. Justice Saunders of the Court of First Instance¹⁰⁸ accepted Pacific China's submissions and set the award aside.

Grand Pacific then sought to have the Court of Appeal overturn Justice Saunders' decision; which it did so unanimously.¹⁰⁹ The Court of Appeal took the view that the procedure for setting aside an award is not like an appeal, and a court can only look to the arbitral process. The Court of Appeal added that, in any case, for Article 34(2)(a)(ii) to be invoked, the conduct complained of must be "sufficiently serious or egregious so that one could say a party has been denied due process." The Court of Appeal concluded that none of the grounds raised by Pacific China met that threshold. Pacific China then unsuccessfully applied to have the Court of Appeal decision overturned; but that application was rejected by the Court of Final Appeal.¹¹⁰ The Court of Final Appeal concluded that the tribunal's decisions related to case management and were within the tribunal's discretion.

Gao Haiyan v Keeneye Holding Ltd

In Hong Kong, an application for enforcement of an arbitral award is generally made by issuing an *ex parte* originating summons supported by an affidavit setting out the relevant background. These applications are simple and are dealt with, in most instances, by the Court of First Instance on the papers. Additionally, arbitral awards rendered in Hong Kong are more easily enforced in China thanks to the "Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region" ("the Arrangement"). Under the Arrangement, to enforce a Hong Kong arbitral award, a party may apply to the Intermediate People's Court of the place where the party against whom the application is filed is domiciled or in the place where the relevant asset is located. On the other hand, a party with a Mainland China arbitral award can apply to the Court of First Instance of Hong Kong for enforcement of the award. A similar arrangement was also recently agreed between Hong Kong and Macau.¹¹¹

¹⁰⁸ *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd* [2011] 4 HKLRD 188

¹⁰⁹ *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1

¹¹⁰ See FAMV No. 18 of 2012

¹¹¹ The Arbitration (Amendment) Bill 2013 was recently tabled on 24 April 2013 to implement the "Arrangement Concerning Recognition & Enforcement of Arbitral Awards between Hong Kong and Macau".

In a relatively recent, but important decision, the Court of Appeal enforced an award where there were some concerns of bias relating to the “arb-med” procedure. In this matter, Gao Haiyan (“Gao”) and Keeneye Holdings Ltd (“Keeneyes”) had been parties to an arbitration conducted under the auspices of the Xi’an Arbitration Commission (“XAC”). During the first round of hearing, the tribunal suggested the matter be mediated with members of the tribunal acting as mediators. The mediation was ultimately unsuccessful. At the second round of hearings, the tribunal found in favour of Gao. Keeneye then sought to have the decision set aside by the Xi’an Intermediate Court on the basis that the tribunal had held a private mediation session over dinner at an hotel which was attended by the tribunal member appointed by Gao, Secretary-General of the XAC and a third party related to Keeneye. Neither Keeneye nor its lawyers were invited to the dinner. At the dinner, the mediators suggested a settlement structure on their own initiative, which was ultimately rejected by both parties. The arbitration proceeded to final determination without Keeneye raising objection as to how the mediation had been conducted. The Xi’an Intermediate Court dismissed Keeneye’s appeal, and finding that the arb-med process had been conducted in compliance with the XAC Arbitration Rules.

Gao then sought to have the award enforced in Hong Kong. Keeneye was successful in resisting the enforcement on public policy grounds.¹¹² Justice Reyes found that whilst actual bias had not been established, the circumstances of the arb-med process would leave a reasonable observer with a sense of unease so that the award would be viewed as being tainted by apprehended bias and the award ought not to be upheld. The Court of Appeal overturned the first instance decision, and enforced the award on two main grounds.¹¹³ First, the Court of Appeal found that Keeneye had waived its right to object by not raising the concern of bias during the arbitration hearing despite it being clear under the XAC Arbitration Rules that a party would be deemed to have waived its rights if it continued to participate in the arbitration without complaint. Secondly, the Court of Appeal overturned the finding of apparent bias. It took the position that enforcement should only be refused if it would be contrary to the fundamental conceptions of morality and fairness of Hong Kong. The Court of Appeal said that due weight ought to be given to the Xi’an court’s views on whether the mediation had been conducted in a manner giving rise to apprehended bias. It

¹¹² *Gao Haiyan v Keeneye Holding Ltd* [2011] 3 HKC 157.

¹¹³ *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKLRD 627.

was said that the Xi'an court was in a better position to decide whether dinner at a hotel was acceptable mediation practice in China – even if such practice is not the norm in Hong Kong.

3.6 China

The legal framework in the People's Republic of China ("PRC") concerning recognition and enforcement of international arbitral awards is consistent with international standards. However, in recent times, some parties have experienced difficulties in having a foreign award enforced expeditiously in China.¹¹⁴

That said there have been some major developments in China with respect to its standing in the arbitration community. First is the relationship it has with Hong Kong and the now established reciprocal relationship with respect to the enforcement of arbitral awards rendered in Hong Kong.¹¹⁵ Under the agreement, ad hoc and institutional arbitration awards made in Hong Kong are enforceable in mainland China, subject to certain specific grounds for refusal. Secondly, in 2009, there were further promising signs after the Ningbo Intermediate People's Court in the PRC ("Ningbo Court") became the first court in the PRC to enforce an ICC arbitral award.¹¹⁶ In this proceeding, the claimant sought to resist enforcement of an ICC award which had been rendered in arbitral proceedings which were heard in the PRC. The respondent relied on the argument that since the award was not made by one of the PRC's arbitration commissions (such as CIETAC) the award could not be enforced. That argument was rejected by the Ningbo Court which classified the ICC award as being "non-domestic" and allowed the ICC award to be enforced. This decision moved away from the previous position taken by courts in the PRC,¹¹⁷ and indicates a positive development of courts in the PRC taking a pro-enforcement approach.

¹¹⁴ See, for example, the difficult circumstances set out in *Rizhao Stell Holding Group v Koolan Iron Ore Pty Ltd* [2011] WASC 207 at [7]; and see also I-Ching Tseng, "Some Thoughts on the Recognition and Enforcement of Foreign Arbitral Award in China" (2011) 30(2) *The Arbitrator and Mediator* 21.

¹¹⁵ See p 33 "Concerning Questions Related to the Enforcement of Hong Kong Arbitral Awards in the Mainland" (the "Notice") Fa [2009] No. 415. See also the "Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region" ("Arrangement").

¹¹⁶ *Duferco SA v Ningbo Arts & Crafts Import and Export Co Ltd* (Decision of 22 April 2009, ICC Award 14006/MS/JP/JEM).

¹¹⁷ See, for example, *Züblin Int'l GmbH v. Wuxi Woco-Tongyong Rubber Engineering Co. Ltd.* (2003) Min Si Ta Zi No. 23 (Supreme People's Court, 8 July 2004)

3.7 Malaysia

Substantially based on the Model Law, Malaysia's arbitration framework is governed by the *Arbitration Act 2005* (as amended in 2011) and to some extent the *Arbitration Act 1952*. Malaysia is quickly developing into a key arbitration hub in the Asia-Pacific region, thanks to the efforts of a supportive government, the strong marketing of arbitral institutions and the work of those institutions (particularly the Kuala Lumpur Regional Centre for Arbitration), and pro-arbitration courts.

The Malaysian courts have shown their willingness to support arbitration in a number of ways.¹¹⁸ *Tamdar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd*¹¹⁹ reflects Malaysia's pro arbitration stance and the narrow circumstances under which a court will set aside an arbitration award. In this case, the Plaintiff (Taman) sought to set aside a number of arbitration awards against the Defendant (Dindings). The Malaysian court held that the *Arbitration Act 2005* seeks to prohibit court intervention in arbitral awards, and that the courts should refrain from intervening. It was held that the Act makes it compulsory for the courts to respect the decision of the arbitrator and that real proof is required before the courts interfere or refuse to recognise and enforce the arbitral award.

3.8 India

As discussed, under the Model Law an award debtor can only challenge an award in the country which is the seat of the arbitration. Until recently, this was not the position in India. In *Bhatia International v Bulk Trading SA*¹²⁰ ("Bhatia"), the Supreme Court of India interpreted India's *Arbitration and Conciliation Act 1996* in a manner which permitted the challenge of an international arbitral award rendered in any state in India. In that decision, the Court took the view that the wording in the Indian legislation differed from its Model Law counterparts, which meant that Pt I of the legislation (effectively replicating the Model Law) applied to all arbitrations regardless of whether the seat of arbitration was India, unless explicitly excluded by the parties or by implication. Section 2(2) of the *Arbitration and Conciliation Act 1996* stated: "This Part shall apply to arbitration held in India..." In comparison, Article 1(2) of the Model Law provides: "The provisions of this Law...apply

¹¹⁸ For example, with respect to stay of court proceedings see *Renault Sa v Inokom Corporation Sdn Bhd & Anor and Other Applications* 2010 5 CLJ 32 and *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* 2010 7 CLJ 785.

¹¹⁹ *Tamdar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83

¹²⁰ *Bhatia International v Bulk Trading SA* [2002] 4 SCC 105

only if the place of arbitration is in the territory of this State.” (emphasis added) The *Bhatia* decision was applied in subsequent cases which led to inconsistent decisions,¹²¹ and led to the decision of *Venture Global Engineering v Satyam Computer Services Ltd*¹²² where the Supreme Court found that Pt I of the Act would apply not only to international commercial arbitrations as discussed in *Bhatia* but also to arbitrations not seated in India; so that an aggrieved party could also challenge a foreign award in the Indian courts.

Fortunately, this difficult state of affairs has now been rectified by the Supreme Court of India in *Bharat Aluminium Co v Kaiser Aluminium Technical Services*¹²³ (“*Bharat*”), which overruled the decision in *Bhatia* so that Part I of the Indian *Arbitration Act* has no application to future arbitration agreements where the seat of arbitration is not India. The dispute in *Bharat* related to a 1993 computer installation agreement. The agreement provided for the arbitration to be held in England with the laws of England governing the arbitration. The law of the agreement was Indian law. The appellants were dissatisfied with the award and sought to have it set aside, relying on the decision of *Bhatia*. The Supreme Court held that *Bhatia* was incorrect in law. In interpreting the legislation the Supreme Court considered the history of the legislation and held that the Indian legislature intended to give effect to the Model Law. In considering whether the omission of the word “only” from the Indian legislation could lead to the approach taken in *Bhatia*, the Court said as follows:

“69. We are unable to accept the submission of the learned counsel for the appellants that the omission of the word “only”, would show that the Arbitration Act, 1996 has not accepted the territorial principle. The Scheme of the Act makes it abundantly clear that the territorial principle, accepted in the UNCITRAL Model Law, has been adopted by the Arbitration Act, 1996.

...

71. Similarly, the acceptance of the territorial principle in UNCITRAL has been duly recognized by most of the experts and commentators on International Commercial Arbitration. The aforesaid position has been duly noticed by Howard M. Holtzmann and Joseph E. Neuhaus in “A guide to the UNCITRAL Model Law on International

¹²¹ See *Intel Technical Services Pvt Ltd v WS Atkins PLC* (2008) 10 SCC 308; *Citation Infowares Ltd v Equinox Corporation* (2009) 7 SCC 220; *Dozco India P. Ltd v Doosan Infracore Co Ltd* (2011) 6 SCC 179; *Videocon Industries Ltd v Union of India (UOI)* (2011) 6 SCC 161; *Yograj Infrastructure Ltd v Ssang Yong Engineering and Construction Co Ltd* 2011 (9) SCALE 567; and as discussed in Karikey Mahajan and Mallika Anand, “Heralding a New Dawn for Arbitration in India: Is There Reason to Be Circumspect Any More?” (2013) 79(1) *The International Journal of Arbitration, Mediation and Dispute Management* 28 at 29-30.

¹²² See, for example, *Venture Global v Satyam Computer Services Limited* [2008] 4 SCC 190 where the Court set aside a London Court of International Arbitration award.

¹²³ *Venture Global Engineering v Satyam Computer Services Ltd* (2008) AIR SC 1061

Commercial Arbitration, Legislative History and Commentary”. Dealing with the territorial scope of application of Article 1(2) at Pages 35 to 38, it is stated:-

...

“The Commission adopted the principle that the Model Law would only apply if the place of arbitration was in the enacting State – known as the “territorial criterion” for applicability – only after extensive debate. The primary alternative position was to add a principle called the “autonomy criterion” which would have applied the Law also to arbitrations taking place in another country if the parties had chosen to be governed by the procedural law of the Model Law State. Thus, if the autonomy criterion had been adopted, the parties would have been free, subject to restrictions such as fundamental justice, public policy and rules of court competence, to choose the arbitration law of a State other than that of the place of arbitration. The courts of the Model Law State would then presumably have provided any court assistance needed by this arbitration, including setting aside, even though the place of arbitration was elsewhere. Such a system of party autonomy is envisioned by the New York Convention, which recognizes that a State may consider as domestic an award made outside the State, and vice versa.” “The Commission decided not to adopt the autonomy criterion. It was noted that the territorial criterion was widely accepted by existing national laws, and that where the autonomy criterion was available it was rarely used.”

The decision is an important one. This is reflected in the fact that the case was fast-tracked to a hearing of a constitutional bench (of five judges). Additionally, leave was given to interested parties to make submissions, including SIAC and LCIA India.¹²⁴ The decision means that the law in India has been restored to its position prior to *Bhatia* and that the laws of India are now closely aligned with international standards.

Following the historic *Bharat* decision, the Supreme Court of India also recently handed down an important decision in *Shri Lal Mahal Ltd v Progetto Grano SpA*.¹²⁵ The bench (consisting of three judges) held, consistently with international standards, that a review of a foreign arbitral award on its merits is not permitted under the New York Convention. Significantly, the judgment indicated that the Court viewed that public policy of India was to be more narrowly construed with respect to international arbitration than domestic arbitration. Having observed that there may be differences in this respect the Court made it clear that public policy with respect to international arbitration is to be construed more narrowly than it would be in domestic arbitration.

¹²⁴ For further analysis and discussions see Karikey Mahajan and Mallika Anand, “Heralding a New Dawn for Arbitration in India: Is There Reason to Be Circumspect Any More?” (2013) 79(1) *The International Journal of Arbitration, Mediation and Dispute Management* 28

¹²⁵ Civil Appeal No. 5085 of 2013.

4. Conclusion

There is no doubt that courts play an essential role in supporting and promoting arbitration. The majority of courts in developed arbitral jurisdictions are vested with at least some degree of supervisory, supportive and enforcement jurisdiction over all forms of arbitration. This is reflected by the significant increase in the number of specialist arbitration lists or arbitration courts within countries in the Asia-Pacific region.

A number of relatively recent developments are indicative of increasing judicial support in the Asia-Pacific region. In India, in August 2010, the High Court of Bombay announced the creation of a court dedicated to arbitration-related applications. In China, a practice has arisen where a lower court decision not to enforce an award is automatically referred to a higher court for review; and if the award is not enforced by the higher court, the decision not to enforce is, in turn, reviewed by the Supreme People's Court of the People's Republic of China. These developments are aimed at ensuring that specialisation in the resolution of arbitral disputes leads to consistent and predictable outcomes in line with global arbitration jurisprudence and international conventions and obligations. Both the Court of First Instance of the High Court of Hong Kong and the High Court of Singapore have been achieving consistency and predictability for some considerable time. The Dubai International Financial Centre Court has similar goals and has a co-operative relationship with the DIFC-LCIA Arbitration Centre.

From an Australian perspective, the Supreme Court of Victoria is vested with broad jurisdiction to assist and guide parties with respect to most aspects of both domestic and international commercial arbitration. The Federal Court of Australia only has jurisdiction with respect to international arbitration.¹²⁶ On 1 January 2010, the Arbitration List of the Commercial Court in the Supreme Court of Victoria began operation. The Commercial Arbitration List of the New South Wales Supreme Court¹²⁷ is the only other specialist arbitration list in Australia.¹²⁸ The benefits flowing from having a specialist arbitration list in

¹²⁶ As defined in the Australian *International Arbitration Act* 1974 (Cth), as amended in 2010.

¹²⁷ See Practice Note No. SC Eq 9, accessed at <http://www.lawlink.nsw.gov.au/practice_notes> on 3 May 2013. The Practice Note was issued on 15 December 2009 and commenced on 1 February 2010

¹²⁸ The Federal Court of Australia has a panel of judges available to hear arbitration matters, but it has not established a separate list.

a state Supreme Court are many;¹²⁹ including, and of real significance, having a specialist judge who is aware of the developments in arbitration, from both a legal and practical perspective, and who can ensure a more consistent body of arbitration related decisions is developed. It is critical that consistent interpretation and application is given to both the international and the domestic legislative provisions – which are based upon the Model Law – so that they conform with international thinking and arbitral practice, particularly having regard to the Model Law’s international heritage.

These developments reflect the general positive trend in the approach of the courts to arbitration. In this respect, I note the comments in the paper presented to the ICCA Congress in 2012 in Singapore by Chief Justice Menon of the High Court of Singapore:¹³⁰

- “4. A second sign of this golden age is the degree of judicial deference accorded to arbitration in the name of party autonomy. In *Tjong Very Sumito v Antig Investments* [[2009] 4 SLR(R) 732 at [28]] the Singapore Court of Appeal observed that ‘an unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore’, and it went on to say –

‘Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitrations ... In short, the role of the court is now to support, and not to displace, the arbitral process.’

5. This judicial tone has been echoed around the world, including in England,¹³¹ Australia,¹³² New Zealand,¹³³ Hong Kong¹³⁴ and Korea;¹³⁵ and it represents the prevailing mainstream philosophy of the courts today towards arbitration. This is a relatively recent phenomenon and it has taken some doing for Judges to let go of the cherished ideal of a unified system of adjudication within a country. It was long

¹²⁹ See The Hon Justice Clyde Croft, *The Supreme Court of Victoria’s Arbitration List and its role within Australia’s arbitration framework*, a paper prepared for the ICC International Court of Arbitration, Paris, 23 May 2011 and accessible at <<http://www.supremecourt.vic.gov.au/find/publications/the+supreme+court+of+victorias+arbitration+list+and+its+role+within+australias+arbitration+framework>>

¹³⁰ ICCA Congress 2012 Opening Plenary Session – International Arbitration: The Coming of a New Age for Asia (and Elsewhere) at [4] and [5].

¹³¹ *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221 at 230-231, per Lord Steyn, quoting Lord Wilberforce’s comments during the Second Reading in the House of Lords of the 1996 Arbitration Bill (Hansard (HLDebates), 18 January 1996, col 778) and the preface to Lord Mustill’s and Stewart Boyd QC’s Commentary on the 1996 Act (Commercial Arbitration: 2001 Companion Volume to the Second Edition, preface); *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER (Comm) 264, *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 Lloyd’s Rep 192.

¹³² *Comandate Marine Corp v Pan Australia Shipping Pty Limited* (2006) 157 FCR 45

¹³³ *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318; *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614.

¹³⁴ *PCCW Global v Interactive Communications* [2007] 1 HKC 327; and *Ocean Park v Proud Sky* [2007] HKCFI 1221

¹³⁵ *GKN* case, Korean Supreme Court, 10 April 1990, 89 Daka 20252, as cited in *International Commercial Arbitration: An Asia-Pacific Perspective*, by Simon Greenberg and others, 2011, Cambridge University Press, at 454.

considered that arbitration entailed a usurpation of judicial power by private entities and was therefore to be closely watched and carefully monitored.”

The prevailing view is that courts worldwide have or are beginning to embrace a pro-arbitration outlook. The outlook is encouraging as even courts in nation states which have been considered as “difficult” with respect to arbitration generally are beginning to show encouraging signs of embracing arbitration.¹³⁶ Whilst judicial intervention is necessary to ensure the integrity of international arbitration, the recent decisions of the courts in this region indicate a very positive trend; they will only intervene when clearly required and when, in the broad sense, the intervention will support arbitration.

¹³⁶ See, for example, the courts of the United Arab Emirates as discussed in Gordon Blanke and Soraya Corn-Bakhos, “Enforcement of New York Convention Awards: Are the UAE Courts Coming of Age?” 78(4) *The International Journal of Arbitration, Mediation and Dispute Management* 359.