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Survey of South East Asian Nations on the Application of the New York Convention

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This article surveys arbitration legislation in South East Asian countries, and ties it to judicial attitudes of intervention based on public policy grounds in respect of the setting aside, recognition and enforcement of arbitral awards.

I. INTRODUCTION

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NYC) sees its fiftieth anniversary worldwide but it has only been in the past decade that the countries of South East Asia have seen the rapid development and acceptance of arbitration as a form of alternative to the traditional form of dispute resolution that is litigation.

The question that naturally arises is, why now? After all, these states (with the exception of Vietnam) have been parties to the NYC for over two decades. Some countries have had arbitration laws dating back to the mid-nineteenth century.

We suggest that one prominent factor that has encouraged the rise of the use of arbitration has been the formal adoption of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) in various South East Asian jurisdictions in recent years.¹ Whatever the reason, the net effect is to make our survey primarily one of Model Law countries.

This article will set out what types of awards are subject to the purview of domestic arbitration legislation, and take a brief look at the prevailing judicial opinion on arbitration in the region and its impact on Article V, before dealing with the issue by breaking up Article V of the NYC into three parts: (a) arbitrability, (b) procedural due process, and (c) denial of enforcement, particularly on grounds of public policy.

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¹ For the relationship between the New York Convention and UNCITRAL Model Law, see Renaud Sorieul, *The Influence of the New York Convention on the UNCITRAL Model Law on International Commercial Arbitration*, 2 DISP. RES. INT'L 27 (No. 1, 2008).

II. IMPLEMENTING LEGISLATION

Table 1: Implementing legislation by country

Country	Entry of NYC into force	Reservations	Implementing legislation
Singapore	November 19, 1986	(a) ^a	International Arbitration Act
Malaysia	February 3, 1986	(a), (b) ^b	2005 Arbitration Act, which replaced the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985
Thailand	March 20, 1960	Nil	Arbitration Act of 2002, replacing 1987 Arbitration Act
Indonesia	January 5, 1982	(a), (b)	Law on Arbitration and Alternative Dispute Settlement ^c
Philippines	October 4, 1967	(a), (b)	Ratified by Philippine Senate under Res. No. 71 and the current statutory provision RA 9285, Alternative Dispute Resolution Act of 2004, ss. 42–48 provides for recognition and enforcement of foreign arbitral awards
Vietnam	December 11, 1995	(a), (b) and (c) ^d	Civil Procedure Code of the National Assembly, June 15, 2004. It replaced the Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam, September 27, 1995
Brunei Darussalam ^e	October 23, 1996	(a)	Arbitration Act 1994 (Cap. 174 Rev. 1999)
Kingdom of Cambodia ^e	April 4, 1960	Nil	Commercial Arbitration Law 2006
Lao People's Democratic Republic ^e	September 15, 1998	Nil	Decree of Prime Minister No. 106/PM on the Settlement of Economic Disputes, July 15, 1994
Myanmar ^e	Not acceded	n.a.	n.a.

^a Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.

^b Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

^c No. 30 of 1999.

^d Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment.

^e This survey will not be dealing with Cambodia, Laos, Brunei and Myanmar.

The importance of implementing legislation cannot be understated as ratification alone might still be insufficient to protect the rights of parties seeking to enforce their arbitral awards. Accordingly, despite Indonesia having ratified the New York Convention, the Indonesian Supreme Court cast serious doubt as to its applicability in 1984. In the case of *Navigation Maritime Bulgare v. P.T. Nizwar*,² the court held that foreign arbitral

² 11 Y.B. COM. ARB. 508 (1986).

awards were still unenforceable in Indonesia because the Indonesian government had yet to pass implementing regulations instructing the courts as to how they were to enforce such arbitral awards.³

III. APPLICATION TO WHICH AWARDS?

The lack of universality as to which awards the New York Convention applies to is derived from the differing definitions of what constitutes a domestic award, as well as the reservations made to the NYC.⁴ As a result, there is no “one-size-fits-all” approach.

Pursuant to Article I(1), the NYC applies in only two circumstances. The first is the award of a foreign arbitration, i.e. “arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought.” The other (potential) situation is those of international awards, i.e., not strictly “foreign” but “not considered as domestic awards in the state where their recognition and enforcement are sought.”

The Model Law, however, draws the distinction, not between foreign and non-foreign awards, but between awards derived from domestic as opposed to international commercial arbitrations.⁵ Where a country has adopted the Model Law, this allows parties to an arbitration where the seat is within that state to have that arbitration still be considered as an international one and subject to the pro-enforcement bias of the NYC.⁶

While most countries in the region have adopted the international arbitration position, certain states have adopted either a more restrictive or a more relaxed approach. With regard to the recognition and enforcement of arbitral awards, sections 38 and 39 of Malaysian Arbitration Act 2005 do not draw a distinction between domestic and foreign awards.⁷

There appears to be a lacuna in Malaysian laws due to the language of section 38. Specifically, section 38(1) reads:

On an application in writing to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State shall, subject to this section and section 39, be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.

It follows that an arbitral award made in an international arbitration where the seat is Malaysia would not be enforced in that country, e.g., an ICC arbitration held in Kuala Lumpur between a Malaysian party and a foreign one.⁸ This is because the award rendered is neither (a) a domestic award nor (b) an award made in a foreign state.

Amongst the Model Law states, Malaysia’s lacuna appears to have been a drafting mistake rather than a deliberate choice to exclude the operation of the Model Law in enforcing international arbitration awards made on their soil. For example, the Singapore

³ The regulations were eventually passed in 1990, *see* Sup. Ct. Reg. 1 (1990) (Indon.).

⁴ Most states surveyed have both the reciprocity and commercial reservations, with the exception of Thailand, Cambodia, and Laos, which have made no reservations.

⁵ Foreign arbitral awards are by definition non-domestic.

⁶ Art. 1(3).

⁷ There is a tendency towards domestic (and non-foreign) awards being subjected to greater scrutiny and review by the domestic courts.

⁸ ARBITRATION IN ASIA 606 (Michael Moser ed., forthcoming 2008).

Act excludes the Model Law enforcement provisions by virtue of section 3(1), which states that “[s]ubject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.” The rationale was to avoid any conflict between the provisions of Chapter VIII and the provisions of the New York Convention. Thus, an award pursuant to an international arbitration held in Singapore will be enforced differently from a foreign award. Provision is thus made under section 19 for such an international arbitral award to be enforceable, with the leave of the High Court, as a judgment or order of the High Court. In contrast, under section 29, recognition or enforcement of foreign awards in the High Court may be made either by action or as a judgment by leave of the High Court or a judge.

Indonesia adopts a more restrictive approach as to the types of arbitration that will be recognized as international. Under the old Dutch colonial legislation relating to arbitration,⁹ the Supreme Court in *Ascom Electro A.G. v. P.T. Manggala Mandiri Sentosa*¹⁰ dismissed an application for the enforcement of an award as an international award that had been rendered in an arbitration between a domestic and foreign party but held domestically, i.e., in Indonesia.¹¹ The Indonesian judicial position is that the term “international arbitration awards” only refers to awards rendered outside Indonesia.¹²

It would be expected that the increasing adoption of the Model Law and the enactment of national legislation to give effect to the Model Law reflects a modern pro-arbitration sentiment. Since 2001, Thailand, Philippines, Vietnam, and Malaysia have all taken this step of more closely aligning their domestic legislation with the Model Law.¹³ Article 5 of the Model Law provides for minimal court intervention by stating that “[i]n matters governed by this Law, no court shall intervene except where so provided in this Law.” Such language is paralleled or copied verbatim in South East Asian arbitration legislation. In this survey of states, Vietnam is the only country whose arbitration legislation does not contain such a provision.

The reality, however, is that curial interference has occurred in spite of ostensible support of arbitration and express support in legislation. While the right phrases have been used and repeated, the actual judicial practice has sometimes demonstrated over-reach and an approach that can be said to be more visceral than cerebral. Part of it can be attributed to overcoming residual historical distrust of arbitration. The other part may be attributed to a misplaced sense of judicial parochialism and perhaps unfamiliarity with the arbitration process. However, on the whole, we do see a growing trend towards pro-arbitration sentiments and practices pursuant to the increasing enactment of arbitration legislation adopting the Model Law, coupled with reduced hostility to, and growing judicial acceptance of, arbitration as an alternative dispute resolution method.

⁹ The colonial legislation has remained “substantially unchanged since 1847,” and continues to be found as arts. 615–651 of the Colonial Code on Civil Procedure for Europeans (Reglement op de Rechtsvordering). See INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA 95 (Philip J. McConaughay & Thomas B. Ginsburg eds., 2006) [hereinafter “ICCA”].

¹⁰ W7.Dc.Ht.02/Pdt.Eks/Abt.Int/1993.3746IX.1993.03, September 22, 1993.

¹¹ ARBITRATION IN ASIA, *supra* note 8, at 475.

¹² ICCA, *supra* note 9, at 119.

¹³ Singapore was already a Model Law country but made some amendments in 2001.

IV. ARBITRABILITY

The term arbitrability can be misleading. Even within the provision of Article V itself, it may refer to two distinct concepts: that of substantive arbitrability and procedural arbitrability.

Substantive arbitrability refers to the situation where the subject matter *itself* is not arbitrable even if there might be nothing wrong with the validity of the arbitration agreement per se. This ground can be found in Article V(2)(a) which states that recognition and enforcement of an arbitral award may be refused if the court where such recognition and enforcement is sought finds that “[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country.”

Procedural arbitrability refers to situations where there is some problem with the arbitration agreement, with the result that the arbitration, and subsequently the award itself, are both not valid. This is provided for in Article V(1)(a) and (c).

Article V(1)(a) provides that:

Recognition and enforcement of the award may be refused ... if ... [t]he parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made.

Article V(1)(c) provides that:

Recognition and enforcement of the award may be refused ... if ... [t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

Another distinction to be drawn is that, while procedural arbitrability is a ground that is party initiated, substantive arbitrability can be court initiated.

That Article V(1)(a) and (c) are different grounds for the court to impugn awards has found judicial confirmation in Singapore in the case of *Aloe Vera of America, Inc. v. Asianic Food (S) Pte. Ltd. & Anor*,¹⁴ where the argument was made by the challenger of the award sought to be enforced that, as he was a non-signatory to the arbitration agreement, the award made against him should not be recognized and enforced. The Singapore High Court held that, while this was a permissible ground under Article V(1)(a), the grounds which Article V(1)(c) canvasses are altogether different. Prakash, J. accepted, inter alia, the argument that there was no overlap with Article V(1)(a), which was the proper ground of a challenge by a non-signatory.¹⁵

Prakash, J. also accepted the liberal proposition of law that “this ground of challenge assumed that the tribunal had jurisdiction over the parties and that the excess of jurisdiction should be looked at in relation to the scope of the arbitration agreement and not be

¹⁴ [2006] 3 S.L.R. 174 [hereinafter “*Aloe Vera*”].

¹⁵ *Id.* paras. 64–69.

restricted to the pleadings filed in the arbitration.”¹⁶ But she also accepted the caution that “when the court examined such a challenge, it should be cautious that in doing so it did not go into the merits in the case raised before the arbitrator, including any issue of law.”¹⁷ Pursuant to this, it adopted the position that “that the enforcement process is a mechanistic one which does not require judicial investigation by the court of the jurisdiction in which enforcement is sought.”¹⁸

This is reflective of the U.S. District Court’s approach in *Sarhank Group v. Oracle Corp.*,¹⁹ which permitted enforcement of the award on the basis that it was not called upon to compel arbitration (in which case the court would have had to deal with the validity of the agreement) but simply to enforce an award pursuant to what had been determined to be a valid arbitration.²⁰

Consistent with its pro-arbitration, pro-comity, and thus restricted judicial intervention approach, the court in *Aloe Vera* rejected the approach of the U.S. Second Circuit Court’s decision in *Oracle* and its notion that:

whether a party had consented to arbitrate was an issue to be decided by the court in which enforcement of an award was sought. An agreement to arbitrate must be voluntarily made and the court would decide, based on general principles of domestic contract law, whether the parties had agreed to submit the issue of arbitrability to the arbitrators.²¹

Prakash, J. accepted that:

[t]he approach taken by the appellate court was antithetical to that enshrined in the Convention. It demonstrated an insular attitude to the decisions of foreign tribunals involving American nationals without regard to the fact that the American parties had chosen to do business in a foreign jurisdiction and to make their agreements subject to foreign law and foreign arbitration. It runs counter to international comity and is an attitude that, if followed widely in the U.S., would adversely affect the enforcement of U.S. arbitration awards abroad since the Convention implements a system that enjoins mutuality and reciprocity so that there is a danger of non-U.S. jurisdictions refusing to enforce U.S. awards when their own awards are not recognised in the U.S.²²

It was accepted that the Second Circuit Court’s erroneous approach was due to a misunderstanding of the difference between substantive and procedural arbitrability. The criticism of the Second Circuit’s decision²³ sets out the distinction well:²⁴

In most legal systems, an “arbitrable” matter is one that can be resolved by arbitrators—assuming there is a valid arbitration agreement encompassing it. Under this definition, non-arbitrable matters have historically included criminal laws, family laws and a now-shrinking group of other “public” laws reserved to the courts. By contrast, in U.S. case law an “arbitrable” matter often

¹⁶ *Id.* para. 66.

¹⁷ *Id.*

¹⁸ *Aloe Vera*, *supra* note 14, para. 42. (citing ROBERT MERKIN, *ARBITRATION LAW* (1991) (Service Issue No. 42, December 5, 2005), para. 19.48); Eng. CA in *Dardana Ltd. v. Yukos Oil Co.*, [2002] 2 Lloyd’s Rep. 326.

¹⁹ 404 F.3d 657 (2d Cir. 2005).

²⁰ *Aloe Vera*, *supra* note 14, para. 34.

²¹ *Id.* para. 35.

²² *Id.* para. 38.

²³ Barry H. Garfinkel & David Herlihy, *Looking for Law in All the Wrong Places: The Second Circuit’s Decision in Sarhank Group v. Oracle Corporation*, 20 MEALEY’S INT’L ARB. REP. 18 (No. 6, June 2005).

²⁴ *Id.* at 19.

connotes a matter falling within the scope of the parties' arbitration agreement in any given case (assuming there is no law prohibiting its resolution by arbitrators). In this sense of the term, a non-arbitrable matter can be anything outside the realm of the parties' consent to arbitration.

In *Oracle*, the Second Circuit incorrectly grafted this latter concept of "arbitrability" into Article V(2)(a) of the NYC, even though that provision was plainly intended to cover awards in which "the subject matter of the difference is not capable of settlement by arbitration" because a law in the enforcing state prohibits that class of disputes from being resolved by arbitrators. That is why Article V(2)(a) is listed alongside the exception for "public policy" in Article V(2)(b) and is widely regarded as a specific application of the public policy exception.

This same case also stands for the proposition that Article V(2)(b) looks only at the jurisdiction where recognition and enforcement of the award are sought to determine whether "[t]he subject matter of the difference is ... capable of settlement by arbitration." Accordingly, even if the difference were not capable of arbitration under the law pursuant to which the award was made, it would not have an effect on the Singapore court's decision on whether to enforce it *when Singapore is the enforcing jurisdiction*. Accordingly, the only thing that mattered before the Singapore High Court was whether the subject matter was capable of arbitration under Singapore laws and not whether Arizonian law permitted it.²⁵ The Singapore court held that such non-arbitrable substantive matters must have a "public interest element,"²⁶ and the issue of whether a person is the alter-ego of the company does not have such an element. Accordingly, the party which sought to resist the enforcement of the award failed on this point.

The issue has frequently come before the Indonesian courts, particularly with regard to bankruptcy proceedings, where there is a clash between the jurisdiction of the Indonesian bankruptcy court ("Commercial Court") and the arbitral tribunal. The authors of a treatise pertaining to arbitration in Indonesia express "surprise" that Commercial Court competence even becomes an issue with regard to arbitration,²⁷ considering that "the Bankruptcy Law leaves little doubt as to the matter [of whether bankruptcy is arbitrable]."²⁸ The trend in international literature is also strongly in favour of the view that such matters are considered to be non-arbitrable.²⁹

On a separate note, it has been proposed that Article V(1)(c) will apply to cases where "the arbitrators have seriously ignored in their analysis, the application of the terms of the contract, as pleaded by the parties" and that "if an arbitrator ignores express provisions in a contract, it can be argued that he fails to deal with the differences between the parties."³⁰

²⁵ Arizonian law did not permit *alter ego* questions to be arbitrated.

²⁶ *Aloe Vera*, *supra* note 14, para. 72.

²⁷ Sebastian Pompe & Marie-Christine van Waes, *Arbitration in Indonesia*, in ICCA, *supra* note 9, at 127.

²⁸ *Id.*

²⁹ ICCA, *supra* note 9, at 127 (quoting Vesna Lazicas stating that "the issues listed above [bankruptcy declarations and closing, SP/MCS] as examples are so obviously 'pure' matters of bankruptcy law that no explanation seems to be necessary in connection with the question of arbitrability—they are outside the reach of arbitration").

³⁰ Albert Jan van den Berg, *Failure by Arbitrators to Apply Contract Terms from the Perspective of the New York Convention*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOR OF ROBERT BRINER 63 (Gerald Aksen et al. eds., 2005).

V. PROCEDURAL DUE PROCESS³¹

Parsons & Whittemore Overseas Co. v. Société Générale de l'Industries du papier sees Article V(1)(b) as “essentially sanctioning the application of the forum state’s standard of due process.”³² It is worth pointing out that Singapore, like New Zealand, has incorporated such sentiments into the International Arbitration Act under the concept of breach of natural justice,³³ but has restricted it only to situations where the court has jurisdiction to set aside the award in the first place. Its absence as a ground for non-recognition or enforcement of an international commercial arbitral award is conspicuous. It might also be worth noting that these two countries do not view the breach of natural justice provision so much as a modification of the Model Law but rather as an emanation and clarification of the scope of public policy.³⁴

Singapore has adopted the approach that these arbitrability provisions should not be used surreptitiously for judicial review of the award on the merits. In *Luzon Hydro Corp. v. Transfield Philippines Inc.*,³⁵ Prakash, J. took the consistent restrictive approach and held that (para. 20):

Whatever its grounds for dissatisfaction and however well founded that may be (a matter that was not, and could not be, argued before me) Luzon had to accept the tribunal’s decision, as under the Act there was no avenue for appeal. I could not permit it to mount what appeared to be a “back-door” appeal by attacking the manner in which the tribunal had made use of [the expert] when there is no evidence but only speculation that [the expert] had overstepped his bounds.

The case of *Soh Beng Tee v. Fairmount*,³⁶ is instructive as to how the Singapore Court of Appeal views procedural due process under the concept of natural justice as a ground of challenge to an arbitral award.³⁷ The Court of Appeal held that the onus was on the party challenging an arbitration award as having contravened the rules of natural justice to establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.³⁸

The court also set out a summary of the following principles culled from a review of case law, legislative intent and academic opinion:³⁹

³¹ This is to be contrasted with substantive due process. Thus, while procedural due process deals with what processes are “due,” substantive due process in contrast is seen as a source of unenumerated fundamental rights arising from the constitutional provisions granting due process.

³² 1 Y.B. COM. ARB. 205 (1976).

³³ See s. 24(b).

³⁴ The Philippines has also adopted this route but through the judicial rather than legislative forum.

³⁵ [2004] 4 S.L.R. 705 (HC).

³⁶ [2007] S.G.C.A. 28 [hereinafter “*Fairmount*”].

³⁷ This is particularly so as the relevant provisions under the Arbitration Act were *in pari materia* to the Singapore Act.

³⁸ *Fairmount*, *supra* note 36, para. 26. See the earlier case of *John Holland Pty. Ltd. (fka John Holland Construction & Engineering Pty. Ltd.) v. Toyo Engineering Corp. (Japan)*, [2001] 2 S.L.R. 262, where the same approach was adopted in respect of the argument that enforcement of the award was contrary to Singapore’s public policy.

³⁹ *Fairmount*, *supra* note 36, para. 64.

- (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.

Despite the case being one arising from a domestic arbitration, the Court of Appeal emphasized that these principles also applied to international arbitrations, since the relevant provisions under the Arbitration Act and Singapore Act were *in pari materia*.

VI. ENFORCEMENT AND RECOGNITION

The orthodox understanding of public policy as a ground to impugn an arbitral award is that it is narrow. In *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*,⁴⁰ the Hong Kong Court of Final Appeal held that:

[T]he object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced (*Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Imperial Ethiopian Government v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (1976)). In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of art. V, notably art. V(2)(b) relating to public policy, have been given a narrow construction. It has been generally accepted that the expression “contrary to

⁴⁰ [1999] 2 H.K.C. 205.

the public policy of that country” in art. V(2)(b) means “contrary to the fundamental conceptions of morality and justice” of the forum. (*Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l’Industrie du papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974) at 974 (where the Convention expression was equated to “the forum’s most basic notions of morality and justice”).

Similarly, the Singapore court’s formulation is of:

instances where the upholding of an arbitral award would “shock the conscience” (see *Downer Connect Ltd. v. Pot Hole People Space Ltd.*),⁴¹ or is “clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public” (see *Deutsche Schachbau v. Shell International Petroleum Co. Ltd.* [1987] 2 Lloyds’ Rep. 246 at 254, per Sir John Donaldson MR), or where it violates the forum’s most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l’Industrie du papier (RAKTA)*, 508 F.2d, 969 (2d Cir. 1974) at 974.⁴²

A. NOTEWORTHY PRACTICES AND COURT RULINGS

Malaysia has suffered a “hiccup”⁴³ with regard to enforcement of foreign arbitral awards, in its Court of Appeal case of *Sri Lanka Cricket v. World Sport Nimbus Pte. Ltd.*⁴⁴ The court decided that gazette notification under section 2(2) of the New York Convention Act was a compulsory requirement for enforcement of a Convention award under that Act. Thus, despite Singapore being a party to the NYC, an award handed down in that state was refused recognition or enforcement.⁴⁵ Instead, the parties were urged to have the award registered in Singapore as a judgment before seeking its enforcement in Malaysia under the Reciprocal Enforcement of Judgments Act 1958. Owing to its round-about and cumbersome nature, this was not a satisfactory solution. Furthermore, because the matter was settled before it went to the Federal Court, by virtue of this being a Court of Appeal decision, the case remains binding on all Malaysian high courts.

However, the new Malaysian Act does not appear to require gazetting of accession to the New York Convention before an award under the NYC can be enforced.⁴⁶ On that basis, there ought henceforth to be no problems enforcing a Convention award from elsewhere. However, on another view, the Malaysian Act has not specifically identified the foreign states which are party to the NYC, and which states are reciprocating countries with Malaysia, nor has there been gazetting of the countries concerned. This simply opens up an attempt to enforce a foreign arbitral award to the arguments set out in *Nimbus*, and with potentially the same result of non-enforcement.⁴⁷

⁴¹ CIV 2003-409-002878, May 19, 2004, para. 136 [hereinafter “*Downer Connect*”].

⁴² *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank S.A.*, [2007] 1 S.L.R. 597, para. 59 [hereinafter “*PT Asuransi*”].

⁴³ ARBITRATION IN ASIA, *supra* note 8, at 606.

⁴⁴ (2006) 3 A.M.R. 750.

⁴⁵ ARBITRATION IN ASIA, *supra* note 8, at 606.

⁴⁶ David Howell, *Developments in International Commercial Arbitration in Asia*, Fulbright & Jaworski L.L.P., available at <www.fulbright.com/images/publications/Publication%20-%20Howell.pdf>.

⁴⁷ Dato Cecil Abraham, *Arbitration in Asia*, ASIA-PACIFIC ARB. REV. 50-51 (2007).

Vietnam has a unitary system for domestic civil judgments and awards in that both are enforced in the same manner.⁴⁸ It starts with an application and submission of all relevant documents⁴⁹ to the Ministry of Justice, which will then forward the dossier to the relevant provincial court within seven days from the receipt of the documents. Regardless of the court's decision, it may be appealed to the Supreme Court within fifteen days of the decision and a decision will be rendered within one month.⁵⁰

The 2003 Ordinance on Commercial Arbitration was "a significant development," not least because, in contrast to the former provisions, it clarified and expanded the definition of commonly used arbitration terms. Thus, while Vietnamese law "traditionally had a narrow definition of 'commercial activities' compared with the usual international concept ... Vietnam [has now] adopted this broad definition of 'commercial' that covers virtually any economic or business transaction."⁵¹

Nonetheless, it has been noted that "[n]otwithstanding that Vietnam is a party to the New York Convention and the provisions of the Civil Procedure Code, there have been very few successful attempts to enforce foreign arbitration awards through the Vietnamese courts and the system remains largely untested."⁵²

In contrast, under Article 68 of the Arbitration Act, Indonesia only permits appeals if the lower court refuses to uphold the enforcement of the award. Furthermore, the appeal goes directly to the Supreme Court. A successful enforcement application ends the matter at the Central Jakarta District Court. Notwithstanding the restrictive approach to what constitutes a non-domestic award under Indonesian law, "to date, there have been very few domestic awards which the courts have declined to enforce."⁵³

In Singapore, it appears that resistance to enforcement and an application for setting aside the arbitral award are separate and exclusive remedies after the case of *Newspeed International Ltd. v. Citrus Trading Pte. Ltd.*⁵⁴ Citrus found its application to resist the enforcement of a Chinese award dismissed after it made substantially the same arguments in its application to set aside the award before the Chinese courts.

Professor Lawrence Boo,⁵⁵ while acknowledging the sound policy reasons behind such an approach, has, nonetheless, criticized the case in the following terms:⁵⁶

[w]hile the court in *Newspeed International Ltd. v. Citrus Trading Pte. Ltd.* is correct in saying that the decision of the Intermediate People's Court in Beijing was binding on Citrus, it would be inaccurate to extend it to mean that the Singapore High Court acting as the court of secondary jurisdiction under the New York Convention could not re-look into the allegations and consider if it is appropriate to refuse enforcement. The scheme of the New York Convention is such as to

⁴⁸ ICCA, *supra* note 9, at 467, (citing Ordinance on execution of civil judgments, enacted January 14, 2008).

⁴⁹ Information regarding the status of the applicant and respondent, details of the request of the application, a certified copy of the foreign arbitral award, together with a copy of the arbitration agreement; *see* ARBITRATION IN ASIA, *supra* note 8, at 1119.

⁵⁰ Civil Procedure Code, arts. 372 and 373.

⁵¹ ICCA, *supra* note 9, (citing art. 2(3) of the Ordinance).

⁵² ARBITRATION IN ASIA, *supra* note 8, at 1121.

⁵³ *Id.* at 475.

⁵⁴ [2003] 3 S.L.R. 1.

⁵⁵ Deputy Chairman and CEO of the Singapore International Arbitration Centre (SIAC).

⁵⁶ LAWRENCE BOO GEOK SENG, 2 ARBITRATION: ANNUAL REVIEW OF SINGAPORE CASES, para. 3.34 (2001).

allow a successful party under an arbitral award to seek enforcement in any of the Convention countries where the assets of the debtor may be found. It does not limit the number of countries the party may seek such enforcement from so long as the debt remain unsatisfied. As such it is theoretically possible for an award to be allowed enforcement in one jurisdiction and refused in another or vice versa. Again, in practical terms when an award is refused enforcement in one jurisdiction, the burden gets heavier when enforcement is then sought in another jurisdiction as the latter would naturally seek to be avoid inconsistency in rulings.

There is now some uncertainty as to whether enforcement and setting aside are cumulative or exclusive after the case of *Aloe Vera*, which attempted to judicially explain *Newspeed International Ltd. v. Citrus Trading Pte. Ltd.*⁵⁷ Prakash, J. noted (para. 53) that “Woo JC observed that a party faced with an arbitration award against him had two options—either to apply to the courts of the country where the award was made to set aside the award, or to wait until enforcement was sought and then attempt to establish a ground of opposition. He considered that these options were alternatives and not cumulative.” She further decided⁵⁸ that she had no problems with that observation because it was based on observations of Kaplan, J. in the Hong Kong case of *Paklito Investment Ltd. v. Klockner East Asia Ltd.*⁵⁹

Prakash, J. interpreted their comments as meaning:

that a party seeking to challenge a Convention award had two courses of action open to him: he could apply to the supervising court to set aside the award and he could also apply to the enforcement court to set aside any leave granted to the opposing party to enforce the award. That is all that was meant. Neither judge said that the two courses of action were identical and could be based on similar grounds. It is axiomatic that an application to a supervisory court to set aside an award has to be based on one of the grounds which the jurisdiction of that court provides for such an order. In a jurisdiction applying the Model Law, an award by the arbitral tribunal on jurisdiction may be challenged in court and, at common law too, an award may be overturned by the supervisory court on the basis that the tribunal did not have jurisdiction. It is also axiomatic that an application to an enforcement court to resist a grant of leave to enforce must be based on one of the grounds the jurisdiction of that court provides for such setting aside. It is not necessary nor is it logical that the grounds for both types of application would be identical. It is a question of what the law of the respective jurisdictions provides for. As was pointed out by Sir Anthony Mason NPJ in the *Hebei* case ... at 229:

Under the Ordinance [the Hong Kong equivalent of the Act] and the Convention, the primary supervisory function in respect of arbitration rests with the court of supervisory jurisdiction as distinct from the enforcement court ... But this does not mean that the enforcement court will necessarily defer to the court of supervisory jurisdiction.

The Convention distinguishes between proceedings to set aside an award in the court of supervisory jurisdiction (arts. V(1)(e) and VI) and proceedings in the court of enforcement (art. V(1)). Proceedings to set aside are governed by the law under which the award was made or the law of the place where it was made, while proceedings in the court of enforcement are governed by the law of that forum. The Convention, in providing that enforcement of an award may be resisted on certain specified grounds, recognises that, although any award may be valid by the law of the place where it is made, its making may be attended by such a grave departure from basic concepts of justice as applied by the court of enforcement that the award should not be enforced.

⁵⁷ [2003] 3 S.L.R. 1.

⁵⁸ *Aloe Vera*, *supra* note 14, para. 54.

⁵⁹ [1993] 2 H.K.L.R. 39.

She thus reasoned (para. 56):

The fact that the Award may be final in Arizona does not therefore mean that Mr Chiew is excluded or precluded from resisting enforcement in Singapore. He may still resist enforcement of the Award provided that he is able to satisfy one of the Convention grounds under s. 31(2) of the Act. The grounds on which enforcement of an award may be resisted under the Act, however, are not the same grounds that would entitle Mr Chiew to set aside the Award in the jurisdiction of the supervisory court. Whilst Mr Chiew's options may be cumulative, that does not mean that the bases on which the options may be exercised are or must be identical. Mr Chiew could have challenged the Award in Arizona on the basis that the Arbitrator had no jurisdiction to make the Award because Mr Chiew was not a party to the arbitration agreement. He may be able to resist enforcement here if he can establish that the arbitration agreement was "not valid under the law to which the parties have subjected it" within the meaning of that phrase in s. 31(2)(b). He is not, however, entitled to object to the initial grant of leave to enforce on the basis that the Arbitrator erred in holding that he was a party to the arbitration. As the enforcement court, I can only permit Mr Chiew to resist enforcement if he is able to establish one of the grounds set out in s. 31(2) of the Act. Except to the extent permitted by those grounds, I cannot look into the merits of the Award and allow Mr Chiew to re-litigate issues that he could have brought up either before the Arbitrator or the supervisory court. As Mason NPJ also pointed out in the *Hebei* case, a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point before the court of enforcement. This is because failure to raise such a point may amount to an estoppel or a want of bona fides such as to justify the court of enforcement in enforcing an award. This, in fact, is what happened to the Government of Lithuania in the *Svenska Petroleum* case.

Professor Boo's criticism still applies. While it might be sound from a policy basis, it is not apparently so from a legal standpoint. It is unclear that the doctrine of *res judicata* or estoppel necessarily applies to prevent a party from relying on the same ground which he has previously used in a setting aside application to resist enforcement of an arbitral award. This is because the applications are on different grounds and also in different jurisdictions. The grounds found in the New York Convention for the refusal of enforcement of the award are replicated in the grounds for setting aside under the Model Law. There is nothing on the face of the NYC to prevent a party from relying on the same ground to challenge the award in different proceedings. As noted above, the scheme of the NYC is such that it is theoretically possible for an award to be allowed enforcement in one jurisdiction and refused in another.

B. SCOPE AND SCOURGE OF PUBLIC POLICY

The following discussion relies heavily on court decisions involving the setting aside of arbitral awards. This approach is adopted because the grounds for setting aside arbitral awards under Article 34 of the Model Law are identical to the grounds for a refusal to enforce and recognize a foreign arbitral award under Article V of the New York Convention.

Singapore's robust pro-arbitration approach can be observed through the judgments of its courts. In *Dongwoo Mann+Hummel Co. Ltd. v. Mann+Hummel GmbH*,⁶⁰ Chan Seng

⁶⁰ [2008] S.G.H.C. 67 [hereinafter "*Dongwoo*"].

Onn, J. emphasized⁶¹ what Bingham, J. said in *Zermalt Holdings S.A. v. Nu-Life Upholstery Repairs Ltd.*,⁶² that as a 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 read an 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.

This is consonant with the consistent narrow interpretation of public policy, as a ground to refuse recognition or enforcement. In *PT Asuransi*, the Singapore Court of Appeal defined and explained the scope of public policy (para. 59).⁶³

Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the *upholding of an arbitral award would "shock the conscience"* (see *Downer Connect ...* at [136]), or is "*clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public*" (see *Deutsche Schachbau v. Shell International Petroleum Co. Ltd.* [1987] 2 Lloyd's Rep. 246 at 254, per Sir John Donaldson MR), or *where it violates the forum's most basic notion of morality and justice*: see *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du papier (RAKTA)*, 508 F.2d, 969 (2d Cir. 1974) at 974. (original emphasis)

On the question of errors of fact or law impugning the award, the court in *PT Asuransi* held that:⁶⁴

The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, per se, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s. 24 of the Act and Art. 34 of the Model Law ... In the present context, errors of law or fact, per se, do not engage the public policy of Singapore under Art. 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art. 34(2)(a)(iii) of the Model Law.

The court in *Dongwoo* adopted the above approach and decided that:⁶⁵

If after hearing full arguments from both parties, the tribunal decided wrongly that it was not appropriate to draw any adverse inference, *it would then be a mere error of fact finding and/or of law, which cannot be a ground for setting aside the award*. An error of fact or law made by the tribunal does not come within the ground for setting aside under Article 34(2)(a)(ii) of the Model Law. (emphasis added)

It was also in view of this narrow interpretation of public policy that the High Court in *V.V. & Anor v. V.W.*⁶⁶ rejected the argument that a disproportionate costs award in an arbitration could ever be injurious to the public good or shocking to the conscience and

⁶¹ *Id.* para. 151.

⁶² [1985] 2 E.G.L.R. 14, para. 14.

⁶³ *PT Asuransi*, *supra* note 42, para. 59.

⁶⁴ *Id.* para. 70.

⁶⁵ *Dongwoo*, *supra* note 60, para. 70.

⁶⁶ [2008] S.G.H.C. 11.

therefore a violation of public policy, because it was a matter of private litigation, a one-off incident as between the parties and therefore did not import matters of public interest.

There are limits to the extent arbitration can wall off mandatory legal provisions. The Singapore Court of Appeal has recognized that certain mandatory provisions, even those derived from the common law, can and do apply to arbitral proceedings so as to impugn an arbitration agreement. In contrast to the decision of the High Court in *V.V. & Anor v. V.W.*,⁶⁷ the Court of Appeal held in *Otech Pakistan Pvt. Ltd. v. Clough Engineering Ltd. & Anor*,⁶⁸ that the doctrine of champerty applied as much to impugn an agreement for arbitration as it did for litigation. In doing so, it held that the “purity of justice and the interests of vulnerable litigants are as important in such proceedings as they are in litigation. Thus the natural inference is that champerty is as applicable in the one as it is in the other.”⁶⁹ Furthermore:

[t]he law of champerty stems from public policy considerations that apply to all types of legal disputes and claims, whether the parties have chosen to use the court process to enforce their claims or have resorted to a private dispute resolution system like arbitration. In our judgment, it would be artificial to differentiate between litigation and arbitration proceedings and say that champerty applies to the one because it is conducted in a public forum and not to the other because it is conducted in private. The concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation.⁷⁰

The court took pains to reiterate that “that the principles behind the doctrine of champerty are general principles and must apply to whatever mode of proceedings is chosen for the resolution of a claim.”

In *Aloe Vera*, the High Court rejected the public policy argument which was raised to resist enforcement of a foreign arbitral award. It was argued on behalf of the party resisting the award that it was against public policy to enforce an award made on the basis of the *alter ego* theory, because the arbitrator’s decision had pierced the corporate veil without any supporting evidence. Further, in his preliminary award to join the party as a party to the arbitral proceedings, the arbitrator stated that he was not making a finding based on the *alter ego* point but merely on a wide reading of a clause. Later, in the substantive award, the arbitrator found the party to be the *alter ego* of the respondent to the arbitration without giving any reasons and in the party’s absence. It was argued that, if this had been the subject of the arbitrator’s preliminary ruling, the party might have challenged it in the foreign court on the basis that *alter ego* was not an arbitrable issue. As a result of the course of events, the party was deprived of this opportunity and this was alleged to be a breach of natural justice. It was also contended that the enforcement of foreign arbitral awards that seek to bind non-signatory Singapore citizens to such awards would be contrary to Singapore’s public policy.

⁶⁷ *Id.*

⁶⁸ [2006] S.G.C.A. 46.

⁶⁹ *Id.* para. 34.

⁷⁰ *Id.* para. 38.

Prakash, J. resoundingly rejected the arguments and reiterated her approach from an earlier case. She held that (para. 75):

The approach that I take to arguments that an award from a Convention country should not be enforced because it would be against public policy to do so was well expressed in the passage from the *Hebei* case that I cited ... above. Such an award must be enforced unless it offends against our basic notions of justice and morality. In *Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald & McArthur Pte. Ltd.* [1996] 1 SLR 34, I held that the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. I have not changed my mind since then.

In *Re An Arbitration Between Hainan Machinery Import & Export Corp. and Donald & McArthur Pte. Ltd.*, Prakash, J, also rejecting an argument made on the ground of public policy in the course of resisting the enforcement of a foreign arbitral award, said:

In my view, public policy did not require that this court refuse to enforce the award obtained by the plaintiffs. There was no allegation of illegality or fraud and enforcement would therefore not be injurious to the public good. As the plaintiffs submitted, the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad. I could see no exceptional circumstances in this case which would justify the court in refusing to enforce the award of the commission.⁷¹

In the subsequent case of *John Holland Pty. Ltd. (fka John Holland Construction & Engineering Pty. Ltd.) v. Toyo Engineering Corp. (Japan)*,⁷² the claim that the arbitral award was contrary to Singapore's public policy failed because:

[n]o particular policy has been identified, however, as having been embarrassed by the award. The contention that public policy covers situations in which there has been a "fundamental irregularity in respect of the law" is, with respect, not very helpful. A fundamental irregularity in itself cannot render an award bad. A public policy must first be identified, and then it must be shown which part of the award conflicts with it.⁷³

The end result can be summed up as the Singapore High Court did in *Government of the Republic of the Philippines v. Philippine International Air Terminals Co., Inc.*,⁷⁴ where the court pointed out that:

[A]n arbitral award is not liable to be struck down on application in the courts because of allegations that it was premised on incorrect grounds whether of fact or of law. An application to set aside an award made in an international arbitration is not an appeal on the merits and cannot be considered in the same way as the court would consider the findings of a body over whom it had appellate jurisdiction.⁷⁵ (emphasis added)

It is worth pointing out the slight dissonance between the above case and the High Court's citation of *Downer Connect* in the recent *Dongwoo* case. On the one hand, the

⁷¹ [1996] 1 S.L.R. 34 para. 45.

⁷² [2001] 2 S.L.R. 262.

⁷³ *Id.* para. 25.

⁷⁴ [2007] 1 S.L.R. 278.

⁷⁵ *Id.* para. 38.

Singapore courts have been staunch in their refusal to allow errors of law or fact to impugn an arbitral award. On the other, *Downer Connect* was subsequently relied on in the case of *Downer-Hill Joint Venture v. Government of Fiji*,⁷⁶ which refers to *John Holland* and apparently stands for the proposition that a sufficiently egregious error of law may be grounds for refusal to enforce an arbitral award.⁷⁷ Of course, this problem is readily reconcilable when it is recalled that *Downer Connect* was cited in *Dongwoo* solely for its proposition that the scope of public policy is narrow and only comes into play when the arbitral decision or award “shocks the conscience.”

In *Downer Connect*, Randerson, J. dealt with a submission by Downer that the arbitrator had made findings not supported by evidence or which were contrary to the evidence. He said (para. 117):

In view of my conclusions, it is unnecessary to consider in detail whether a challenge to factual findings (if that is what they were) is a permissible ground upon which to set aside an award under Article 34. It could only be so if the challenge could be brought under the umbrella of Article 34(2)(b)(ii) as being in conflict with the “public policy of New Zealand.” It is of course well established that a finding must be based on some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding is not logically self-contradictory: *Mahon v. Air New Zealand* [1984] 1 AC 808, 820–821 (PC) per Lord Diplock. But it is a much larger step to conclude that an error by an arbitrator in that respect is sufficient to render an award contrary to public policy.

However, it must be remembered that Singapore followed New Zealand in expressly providing for breach of natural justice as a ground for the setting aside of an award.⁷⁸ This can be found in section 24 of the Singapore IAA which provides that:

Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if— ...
(b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

The equivalent provision in New Zealand is Article 34(6)(b) read with Article 34(2)(b)(ii) of the First Schedule to the Arbitration Act 1996. The provisions provide that:

⁷⁶ [2005] 1 N.Z.L.R. 554 (HC) [hereinafter “*Downer-Hill*”].

⁷⁷ More specifically, the headnotes for *Downer-Hill* read: “[a] serious and fundamental error of law or fact could result in an award being contrary to the public policy of New Zealand because breaches of natural justice had occurred in connection with the making of the award. However, such a threshold was high and mere mistake would not suffice. In order to set aside an award for erroneous factual findings it had to be shown that the factual finding complained of was not based on any logically probative evidence. It had also to be shown that even if such a breach of natural justice had occurred the award was contrary to public policy. This required it to be shown that a substantial miscarriage of justice would result if the award stood because the impugned finding was fundamental to the reasoning or outcome of the award. Such a breach of public policy would be obvious (see [83], [84]).” However, among the common law countries, it should be noted that the Indian Supreme Court decision in *Oil and Natural Gas Corp v. SAW Pipes Ltd.*, 2003 (5) S.C.C. 705 does stand for such a proposition.

⁷⁸ In a similar vein, s. 68 of the English Arbitration Act 1996 provides for challenge of the award on grounds of “serious irregularity affecting the tribunal, the proceedings or the award.” Its genesis was s. 23 of the English Arbitration Act 1950 providing for impugning the award on the basis of arbitrator misconduct. The term was described by Atkin, J. in *Williams v. Wallis and Cox*, [1914] 2 K.B. 478, 485 as “not really amount[ing] to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice.”

- (2) An arbitral award may be set aside by the High Court only if— ...
 - (b) The High Court finds that— ...
 - (ii) The award is in conflict with the public policy of New Zealand. ...
- (6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if— ...
 - (b) A breach of natural justice occurred—
 - (i) During the arbitral proceedings; or
 - (ii) In connection with the making of the award.

There is, nonetheless, a substantial difference between the two pieces of legislation. Under section 6 read with clause 5 of the Second Schedule to the Arbitration Act 1996, an international arbitration held in New Zealand may be subject to appeals to the High Court on points of law with the leave of the court if the parties so agree. Singapore, on the other hand, does not have such a provision and it is uncertain if parties can agree to an arbitration award being subject to appeal.⁷⁹

The court in *Downer-Hill* found its power to impugn an award because of fundamental errors of fact based on the proposition that such errors were contrary to New Zealand's public policy, because breaches of natural justice had occurred in connection with the making of the award.⁸⁰ The court referred to *Re Erebus Royal Commission; Air New Zealand v. Mahon*⁸¹ for the requirement that "a factual finding be based on some logically probative evidence. Provided there is such evidence, its assessment is entirely the province of the arbitrator: art. 19(2) in the First Schedule to the Act." The public policy requirement in Article V(2)(b), however, imposed a high threshold and thus narrows an already narrow doctrine. The court held that, even if an *Erebus* breach of natural justice had occurred:

[t]o warrant interference there must be the likelihood that the identified procedural irregularity resulted in a "substantial miscarriage of justice": *Honeybun v. Harris* [1995] 1 NZLR 64 at 76. That entails the impugned finding being fundamental to the reasoning or outcome of the award. The Court of Appeal suggested in *Amaltal* (at para [47]) that the arbitrator's findings of fact should not be reopened unless it was "obvious" that what had occurred was contrary to public policy.⁸²

In this light, the Philippines has a very broad notion of public policy despite ostensibly being a Model Law state. In *Luzon Hydro Corp. v. Hon. Rommel O. Baybay & Transfield Philippines, Inc.*, the facts were that the arbitrator, having rendered his final award, decided that costs should follow the event. The Court of Appeals, in reversing the trial judge's decision, decided that this approach to costs was not part of Philippine law or principles and thus it was a violation of public policy that a bona fide litigant should not

⁷⁹ The U.K. position under Arbitration Act 1996 is almost identical to the New Zealand position in that it also provides for appeals of law arising from an arbitral award to the High Court. Unless the parties exclude the operation of s. 69, it allows for appeals of law to the court with its leave.

⁸⁰ *Downer-Hill*, *supra* note 76, para. 84.

⁸¹ [1983] N.Z.L.R. 662, 671.

⁸² *Downer-Hill*, *supra* note 76, para. 84.

have to bear the costs of the other party and thus be made to pay a premium on top of its own solicitor's costs if litigating a valid claim. Accordingly the award was set aside, despite the fact that it was an ICC arbitration in Singapore.⁸³ This approach violates the *Parsons* approach of a narrow conception of public policy.

Additionally, the same case makes clear that *Wilko v. Swan*'s "manifest disregard of the law"⁸⁴ has also been held to be part of Philippine law in setting aside or refusing to recognize or enforce an arbitral award on grounds of public policy. But unlike the United States, which has decided that "manifest disregard of the law" is to be limited to domestic arbitrations,⁸⁵ the Philippine Court of Appeals makes no such distinction. This case is presently before the Philippine Supreme Court and has yet to be decided.

Indonesia also has had a problematic public policy scope insofar as it is a broad one that deviates from the more common narrow understanding of public policy of:

instances where the upholding of an arbitral award would "shock the conscience" (see *Downer Connect* ... at [136]), or is "clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public" (see *Deutsche Schachbau v. Shell International Petroleum Co. Ltd.* [1987] 2 Lloyds' Rep. 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notions of morality and justice: see *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974) at 974.⁸⁶

In *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto*,⁸⁷ the Indonesian court held that a violation of domestic law, in this case a requirement of an authorization for the importing of sugar by a government agency, constituted a violation of public policy that mandated the non-recognition and enforcement of the foreign arbitral award. This was despite the fact that (a) it was the buyer (Indonesian party) who flouted the rule and sought non-recognition and enforcement; and (b) this award arose out of a dispute coming out of a subsequent settlement agreement and not the original illegal export and purchase agreement.

Similarly, in the *Bankers Trust* cases, the concept of public order was given a broad scope. While one of the cases was pending in the South Jakarta District Court, the other dispute had concluded by arbitration in London. That final award was sought to be enforced in the Central Jakarta District Court. The Central Jakarta Court rejected the application on the basis that it would be against Indonesia's "public order" to decide on this enforcement issue while the dispute was still awaiting another domestic civil court's adjudication. The court stated that "the arbitral award would cause public disorder if enforced if there was a decision to the contrary issued by the South Jakarta District Court."⁸⁸ It has been noted that the problem with this analysis is that, unlike a court

⁸³ *Cf. Luzon Hydro Corp. v. Transfield Philippines Inc.*, [2004] 4 S.L.R. 705 (HC).

⁸⁴ 346 U.S. 427, 436, 74 S. Ct 182, 187, 98 L. Ed. 168 (1953).

⁸⁵ See *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 Fed. Supp. 160 (S.D.N.Y. 1987); *Yusef Ahmed Alghanim & Sons v. Toys 'R' US Inc.*, 126 F.3d 15, 20 (2d Cir. 1997).

⁸⁶ *PT Asuransi*, *supra* note 42, para. 59.

⁸⁷ Cited and discussed in Karen Mills, *Judicial Attitudes to Enforcement of Arbitral Awards and Other Judicial Involvement in Arbitration in Indonesia*, 68 J. CHARTERED INST. ARBITRATORS 106 (2002).

⁸⁸ *Pompe & Van Waes*, *supra* note 27, at 125.

judgment, which is “not final and binding until all appeal mechanisms have been exhausted ... an arbitral award is final and binding and all that is left to the court is to enforce it, but not to review it.”⁸⁹

The issue with these broad approaches is that it allows virtually any error of law or fact to constitute a violation of public policy and hence grounds for refusal of recognition or enforcement or to set aside the award. This virtually destroys the point behind arbitration being single layered, i.e., without further appeals, much less subject to the appellate jurisdiction of the domestic judiciary.

Malaysia presents an interesting case. Its courts have, in the solitary case before them, avoided heresy only by a narrow whisker. In the case of *Harris Adacom Corp. v. Perkom Sdn. Bhd.*,⁹⁰ the Malaysian High Court held that it would be contrary to public policy to recognize an award coming from an arbitration between a Malaysian party and an Israeli party because trade with Israel was prohibited. However, in permitting the application to enforce the award, the Malaysian High Court decided that the applicant company was in fact *not* an Israeli company but was instead a U.S. one which had a 68 per cent stake in a subsidiary company engaging in business in Israel. The problem nonetheless remains that if its finding had been that the plaintiff were in fact an Israeli company, it would apparently have declined jurisdiction on the grounds that enforcing the award in favour of an Israeli company would be against Malaysia’s public policy.

VII. CONCLUSION

It would appear that great strides have been made to promote arbitration as a form of alternative dispute resolution, at least on the statutory front. In some countries, the judiciary is still struggling to come to terms with their role vis-à-vis the enforcement and recognition of foreign arbitral awards. While part of the problem might stem from newly enacted legislation that requires careful consideration and judicial interpretation and its resultant conflicts with old case law interpreting the prior statutes, the other part of the problem appears to lie with an attitude that is nervous about arbitration. While some of it might be attributed to a lack of familiarity with the process and relevant international consensus, the rest unfortunately appears to be founded on misplaced sentiments of visceral judicial parochialism.

⁸⁹ Karen Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration*, Presentation for the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur, February 28 to March 1, 2003, at 29.

⁹⁰ [1994] 3 M.L.J. 504.

Guide to Authors

The Editor will be pleased to consider contributions provided they are not, or have been, submitted for publications elsewhere. The following is a brief guide concerning the submission of articles which may be of assistance to authors.

1. Articles must be presented in their final form, in English. They should be double spaced with wide margins for ease of editing. Please provide the text in Microsoft Word or Word Perfect, and deliver to the General Editor at editorjoia@kluwerlaw.com
2. Special attention should be given to quotations, footnotes and references which should be accurate, complete and in accordance with the Journal style sheet, which is available online at www.kluwerlawonline.com/JournalofInternationalArbitration.
3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
4. Please ensure a brief biographical note giving details of the professional/academic status of the author(s) is provided.
5. Due to strict production schedules it is not possible to amend texts after acceptance or send proofs to authors for correction.
6. The submission of a text indicates that the author consents, in the event of publication, to the automatic transfer of all copyrights to the publisher of the Journal of International Arbitration.