



Paper on behalf of ASEAN Law Association of Malaysia,

Dato' Syed Ahmad Iddid¹

Salutation.

Mr (or Madam) Chairperson,

Distinguished Guests, Ladies and Gentlemen,

Officials and Delegates.

Usual Topic and today's topic.

The usual topic at several international conferences in the US, Europe, Asia and elsewhere has been on "Recognition and Enforcement of Foreign Arbitral Awards". Year in and year out, speakers bemoan the situation where countries and national courts had refused (and in many instances continue to refuse) recognition of foreign arbitral awards.

But at our Session this morning, we are asked to tackle the more practical topic of "Improving on Enforcement of International Arbitral Awards in ASEAN Countries".

Really all we need is for the State Agencies to execute the orders of the National Courts and ensure that the parties carry out the Orders (or the Awards) into effect. Presto and that is all ASEAN wants. If that can be so simple, I shall say no more!

I thank the Asean Law Association of Malaysia for inviting me to present this Paper and to address you this morning. I also thank those who spoke to me when I invited them. But please note that I am fully responsible for the facts and suggestions made in the Paper. Though one or two statements may appear as criticising certain aspects of the law, the noble intention is for the ASEAN states to learn from one another and improve on the law from time to time

¹ Guest Writer at the Research Management Centre of the International Islamic University Malaysia, and former (i) Director of the Kuala Lumpur Regional Centre for Arbitration (2004-2007) (ii) External Examiner for LL.B and LL.M in the Law Faculty of the University Kebangsaan Malaysia. And (iii) Adjunct Professor in two other Universities in Malaysia and the US on Management and Business.



The UN Convention.

Naturally in any matter of this nature, we must defer to the United Nations (UNCITRAL) Convention on the Recognition and Enforcement of Foreign Arbitral Awards² (concluded in New York in 1958) and so popularly cited as The New York Convention 1958. It was seen as a “great success story of the international commercial arbitration”.

Because of that Malaysia enacted Act 320 or the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985”. But Malaysia repealed this Act (and also the Arbitration Act 1952) when it enacted the current Arbitration Act 2005. (Act 646)³

While I shall input some information from Malaysia and the High Courts of (i) Malaya and (ii) Sabah & Sarawak (as this Paper is a contribution from ALA Malaysia), I shall widen certain areas to encompass other ASEAN States because of the topic.

But put simply, the New York Convention “requires courts of contracting States to give effect to an agreement to arbitrate in a matter covered by an arbitration agreement and also to recognise and enforce awards made in other States (i.e. foreign awards) subject to specific exceptions”.

Challenge to ASEAN States.

I am of the opinion that National Courts must be cognisant of the international norms, customs, styles and requirements in commerce and take these into account whilst making their decisions. Court decisions can have impact on the success of their own country or can bring rather negative perceptions. For this reason, I like to quote from an abstract of a Book in the McGill University:

“Foreign arbitral awards should be recognizable and enforceable. However this is not always the case; they are recognisable and enforceable in some countries but not in others. Those countries that recognise and enforce awards are mostly developed countries whereas those which do not are mainly developing countries”.

This, however way you look at it, is a challenge to ASEAN countries. Are we “developed” or “developing”? And to reinforce the current global calls, Blackfriars when discussing Enforcement of Foreign Arbitral Awards in Nigeria, stated that:

² See Singapore’s “Re-an Arbitration between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte Ltd”. (1996) 1 SLR34

³ Came into force on 15th March 2006.



“Commercial arbitration has become a major attraction in international transactions owing to its speed and effectiveness in resolving commercial disputes. Having obtained the award however, the successful party would have to enforce the award against his adversary”

The willingness of the Courts to recognise and then enforce foreign awards and the ease or difficulty (and so also the timelines of the process of enforcement) are issues of immense impact to every foreigner seeking the assistance of the national court(s).

“The enforcement of foreign arbitral awards involves the very important preliminary decision whether an arbitral award should be qualified as a foreign or domestic award” (from American Journal of Comparative Law Vol. 14).

Is it a foreign Award?

I am tempted to discuss the Malaysian law on when is an award “foreign” but the better judgment is not to waste time and so we shall skip that area. It may, however, be useful to note that the Malaysian Arbitration Act 2005 defines “State”⁴ to mean sovereign State and not a component state⁵ of Malaysia. Hence “international arbitration” is given a fuller treatment in section 1(1) and 1(2) of the Act.

Chapter 8 in the Act 2005, in respect of “Recognition and enforcement of awards”, embraces both domestic and that made in a “foreign State”. And, to my relief, section 38(4) says:

“ For the purposes of this Act, “foreign State” means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958”.

At last we have a firm statement on the sore point of when can an award be foreign! After all, that is the base point of our discussion! And the word “foreign” emphasises that the arbitration was held and had its seat outside Malaysia. (And because we hold this Session in Hanoi, may I just mention that in Vietnam “foreign arbitral awards” also include awards that are made in the territory of Vietnam but not by Vietnamese⁶ arbitrators.)

⁴ Observe this has capital “S” (State)

⁵ This one has small “s” (state)

⁶ See Asialaw Vietnam Analyst March 2009 by Dung Lee.



An interested party posed this question: What happens to an award from an international arbitration (say, held outside Malaysia?) where the seat, as agreed by the parties, is Malaysia – does that come under the category of “foreign award”? If not, does it mean it is not enforceable? { Can Section 3(3) answer this ? }

On an application, in writing, to the High Court⁷, an arbitration award “shall be recognised as binding and be enforced by entry as a judgment in terms of the award or by action”. (Refer to Section 38(1) of 2005 Act). An interesting comparison can be with the Philippines Law where under Chapter 7, B, “a foreign arbitral award, when confirmed by the regional trial court, shall be enforced as a foreign arbitral award and not as a judgment of a foreign court”. But it “shall be enforced in the same manner as final and executory decisions of courts of law of the Philippines”. In India, a foreign award will be deemed a decree of the Indian Court and thereafter will be binding for all purposes.

At this juncture, we may interest our judicial gymnastics as to whether Malaysian Courts have jurisdiction in matters where the seat of arbitration is outside Malaysia. The judge in *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors*, (2008) 5. CLJ 654 said “the 2005 Act is silent” and went on to add that “in conclusion, Parliament may in its wisdom adopt the equivalent of art. 1(2) of the Model Law to expressly provide for the jurisdiction of the courts in matters where the seat of arbitration is outside Malaysia...”.⁸

This difficulty has arisen because section 3(3) of the 2005 Act confines the Act to apply to “international arbitration” where the “seat of arbitration is in Malaysia”! (bearing in mind that Part III does not apply). In a Malaysian case, the Court was not certain over “seat” or “place”. “Seat” has a definitive meaning in international arbitrations and should not be confused with “place of arbitration” or “venue of arbitration” which are the physical locations where the arbitration proceedings or hearings take place.

There are voices that suggest if the Arbitration Act 2005 cannot assist those matters arbitrated outside Malaysia, then it can be useful to consider taking the arbitration under the ICC⁹ and the LCIA¹⁰ or even CIETAC¹¹ Rules. The general approach in India is to support arbitral awards: *Bijendra Nath v Mayank* (1994) 6 SCC 117.

⁷ means the High Court of Malaya or High Court of Sabah & Sarawak (as the case may require).

⁸ Per Badariah Sahamid JC on 9th May 2008.

⁹ International Chamber of Commerce (See its article 28.6)

¹⁰ London Court of International Arbitration (see its article 26.9)

¹¹ China International Economic & Trade Arbitration Commission.

But first, the award must gain recognition.

From the above, we must remember that enforcement can only arrive after the award is recognised. Most ASEAN countries follow the tenor of the New York Convention of 1958.

The grounds spelled out for refusing¹² recognition of an arbitration award are set out in section 39 of the 2005 Act.

To each his/her own.

But what if the Court is not “arbitration-friendly”?

From records from several countries, one can size up if that country is or is not “arbitration-friendly”. And one source of assessment can be from the number of applications for STAY which the Courts either approved or turned down.

We shall take a sample from the Courts in Malaysia. These appear to show that the Courts lean towards arbitration – but you may want to judge for yourself!

1. I-Expo Sdn Bhd v TNB Engineering Corporation Sdn Bhd (2007) 3 MLJ 53.
Application for stay of proceedings pending the referral of the dispute to arbitration.
Decision: to be heard by succeeding judge!
2. Innotec Asia Pacific Sdn Bhd v Innotec GmbH (2007) 8. CLJ (304).
The Judge, Ramly Ali, observed (at page 309) “that ...this requires a mandatory stay in aid of a foreign arbitration”
3. Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor (2008) 1 MLJ 233.
Stay was granted.
4. Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor (2008) 3 MLJ 872.
Allowing the application for stay, the Judge Aziah Ali, said that “Section 10(1) imposes upon the Court an obligation to stay proceedings....therefore this was not a matter in respect of which the court had a discretion”.
5. Malaysian Newsprint Industries Sdn Bhd v Bechtel International Inc & Another (2008) 5 MLJ 254.

¹² See Justice Zulkefli Makinudin’s article in (2009) 1 CLJ xxxv. “Enforcement of Foreign Arbitral Awards...the extent of Success in its execution as seen from the development of case laws”.

The Judge, Abdul Malik Ishak, stated that “the SAR was right in ordering the stay”. And he went on to observe that “...presumption of confidentiality arises as an implied term...” and “it is now accepted by all and sundry that arbitrations are private and confidential” (see *Ali Shipping Corp v Shipyard Trogir* (1998) 2 All ER 136).

There is uneasiness over our Courts’ inconsistency in dealing with applications for stay in international arbitration cases. Cited are the *Collier’s Case*. See also *Jan de Nul NV v Inai Kiara Sdn Bhd* (2006) 4 AMR 697. In this matter, the ICC and the arbitrator were brought in. An interesting question arose as to who should “insure” the arbitrator.

Two other instances where Courts can support arbitration via their decisions:

- (a) Courts are consistent in deciding when or whether any matter coming to the Court should be under the (now repealed) Arbitration Act 1952 or the current 2005 Act.

Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd (2008) 7.MLJ 757.

On 23rd July 2007 the plaintiff filed the writ of summons. The Judge decided that the matter be under the 1952 Act. There was discussion on the word “deem” and on Parliament’s intention. A reference to the Bahasa Malaysia draft bill was made. Section 51 sub-sections (2) and (3) refer.

A contributor suggests that we also look at *Segamat Parking Services Sdn Bhd v Majlis Daerah Segamat Utara & Anor* (2009) 1 CLJ 942.

- (b) Then we had several, and the trend seems to continue, of applications to dismiss cases on the grounds that “ the agreement to arbitrate ousts the jurisdiction of the ordinary courts”. The Court of Appeal in *Borneo Samudera Sdn Bhd vs Siti Rahfizah bt Mihaldin & Ors* (2008) 6 MLJ 817 stated that “..an agreement to arbitrate does not oust the jurisdiction of the ordinary courts and is therefore not illegal and void”.

But despite this, seasoned lawyers continue to take cases of this nature and argue their “principles” against arbitrations. I hope practitioners can also lean towards upholding arbitrations so that the Courts can decide on enforcement quickly.

Those who have time to spend on more cases can refer to two decisions on inconsistency between arbitration agreement and jurisdiction/governing law clause: should the arbitration agreement be invalid? *Boccard Oil & Gas Sdn Bhd v TNB Engineering and Consultancy Sdn Bhd & Another* (2009) 2 CLJ 583, and *TNB*



Engineering and Consultancy Sdn Bhd & Anor v Bocard Oil & Gas Sdn Bhd (2008) 1 CLJ 452.

A case that was argued on points raised in Putrajaya Holdings and Bocard before a Melaka High Court JC was in favour of the arbitration agreement not being inconsistent with jurisdiction/governing law clause. But till today the learned JC has not given her grounds of decision

Judge of High Court of Malaya has warned!

Syed Ahmad Helmi J in Malayan Banking Berhad v Ng Man Heng (2005) 1 CLJ 833 cautioned Malaysians that “ in applications for registration of foreign judgments¹³ the Courts must be slow to refuse registration on tenuous ground as it will lead to our judgments not being accorded reciprocity by the courts of the reciprocating countries”.

And a similar judgment had been pronounced in Singapore when it was said: “The principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced...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” in Re-an Arbitration between Hainan Import & Export v Donald & McCarty (1996) 1 SLR 34.

And in a recent Singapore case, this philosophy was again emphasised: “ the principle of international comity enshrined in the New York Convention that strongly inclines courts to give effect to foreign arbitration awards” Aloe Vera of America v Asianic Food (2006) 3 SLR 174.

With such promptings, cajoling, advice and healthy grounds, we could expect – not just hope! – that our Courts would support the recognition of foreign arbitral awards. And so may our foreign trade and investments increase and prosper.

But our expectations are now to be hidden in cold-storage!

This was on account of the Court of Appeal’s decision in the Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Lanka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd) (2006) 3 MLJ 116,

¹³ In our session, we include foreign arbitral awards.



One senior lawyer prefers to call this the “Sri Lanka Cricket fiasco” and another has described the decision as placing “the enforcement of foreign arbitral awards in Malaysia in disarray”. I sincerely hope my friends in other ASEAN states will take serious note of this decision and help your Courts¹⁴ to think through and deep...before they decide the next case on “enforcement of foreign awards”. This is the crux of today’s paper for your attention.

The Sri Lanka Cricket Board attempted to register¹⁵ in Malaysia an arbitral award handed down in Singapore.

This was refused¹⁶. Wonder of wonders, some might say. But do give the Court of Appeal their due. Ground for refusal: Malaysia had not gazetted the reciprocating countries as required under section 2(2) of the New York Convention Act 1985. The position is now governed by section 38 in particular section 38(4) of the 2005 Act which provides a different formulation.

The Court then “advised” (and some used “taught”) the parties to register the award as a judgment in Singapore and then enforce it as a judgment under REJA (or Reciprocal Enforcement of Judgments Act 1958)¹⁷. Those in the international arbitration community would say this was/is “Quite a cumbersome process”.

India is on similar ground. Even if a country is a signatory to the New York Convention, it does not ipso facto mean that an award handed down in that country would be enforceable in India. There has to be a further notification by the Central Government.

I checked if the decision would go to the Federal Court but sadly this matter ended at the Court of Appeal on 14th March 2006.

¹⁴ Dr Pierre a Karrer, whom I met in Cologne , is of the view that “training state judges and educating lawyers about the New York Convention is essential everywhere”. I want to thank the PhilJA (Philippine Judicial Academy) for inviting me to address their Court of Appeal judges on this.

¹⁵ In Japan, arbitral awards made in or out of Japan have the same effect as final and conclusive judgments and the enforceability of such awards is guaranteed under the Arbitration law. To date there has been no case where Japanese Court did not approve of and enforce foreign arbitral awards.

¹⁶ Another Singapore award was enforced in Australia: *Transpac Capital Pte Ltd v Buntoro* (2008) NSWSC 671. Two of China’s awards were also enforced recently: *China Sichuan Changchong Electric Co Ltd v CTA International Pty Ltd* (2009) FCA 397, and *Xiaodong Yang v S & L Consulting Pty Ltd & Anor* (2008) NSWSC 1051.

¹⁷ What if the party is not from Singapore and is not signatory under REJA?



According to a source, “possibly because of the decision in Sri Lanka Cricket, foreign parties may no longer seek to enforce arbitral awards in Malaysia.” Only time can tell. What if the foreigners may have no other choice?

Can there be some warmth coming?

There is another matter at the Federal Court pending decision in Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd, now CAV (pending decision). The Court of Appeal decision is in Alami Vegetable Oil Products Sdn Bhd (Perayu) v Lombard Commodities Limited (Responden) in Civil Appeal no: W-02-449-2005. (2009) 4 CLJ 700. and (2009) 3 MLJ 289. The High Court had ordered the enforcement of an English arbitration award. Alami Vegetable appealed against that decision. And now the Court of Appeal unanimously, “for reasons adumbrated”, allowed the appeal. This revolves around the same issue as in the Sri Lanka Cricket or the “reception of the NY Convention”. One of the Court of Appeal judges in the Sri Lanka Cricket, the dominant member¹⁸, is now sitting in the Federal¹⁹ Court to decide on the Lombard Commodities.

(Merely as an aside, you learn more of what “precedent, “per incuriam” “may vs shall” mean in the Alami Vegetable decision. In my opinion, the CA in that matter was concerned that its decision should not “overturn” the other CA’s decision nor that it be seen to be at variant with the other. The Court sternly added that :

“ if the award is to be enforced in Malaysia as provided for in section 3(1) of the Act by way of action, it is mandatory for the Yang di-Pertuan Agong to declare by way of gazette notification that the United Kingdom is a party to the New York Convention. Here the Yang di-Pertuan Agong elects not to make an order in the gazette”. Did the Yang di-Pertuan Agong “elect not to” or that the Government by default has not? Cannot there be “judicial notice”?)

I am not a betting man but you can bet on the outcome! (unless the Judges read my Paper before they arrive at the decision, then feel for the NY Convention and consider that foreign arbitral awards require a treatment in consonance with international norms!). With all due respects, I do not wish to influence the Court in any way. This is merely an

¹⁸ I understand that the Judge had drafted Order 1A Rules of the High Court which denies preliminary objections for non-compliance of the Rules if substantial injustices were not raised.

¹⁹ The other two are Justice Arrifin (Chief Judge of Malaya) and Justice Hashim (Vice President of ALA Malaysia)



academic exercise for the improvement of “enforcement of foreign arbitral awards²⁰ in ASEAN”.

Section 38 of the 2005 Act does not take the NY Convention countries²¹ under its wings. So the situation may still continue. And so this area of ASEAN does not appear to be “arbitration-friendly”.

Though I have taken the Malaysian law into our discussion, as this Paper is from ALA Malaysia, I can guess that similar situation may occur in several ASEAN states (and also in other Asian countries). We can say this is not totally a Malaysian affair but permeates across boundaries.

I look forward to getting information on this topic from the 9 other ASEAN jurisdictions for our mutual benefit. Though some of our countries may practise Common Law and the others the Code de Civil, justice or the search for and attaining justice cannot be different!

As for the enforcement of a Malaysian arbitral award in another NY Convention State, see *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* (1999) 2 CLJ 788. The award was in due course successfully enforced in Finland by Messrs Azman Davidson but not before it went to the Finnish Supreme Court.

The Asia-Pacific Arbitration Review 2007 (with the Global Arbitration Review) suggested that the Malaysian Arbitration Act 2005 incorporate provisions which are similar to sections 99-100 of the English²² Arbitration Act 1996 or provisions similar to Section 27 of the Singapore International Arbitration Act Cap 143.

Why not embrace the NY Convention?

Would it not be easier to gazette the Convention countries? (or start with reciprocating countries)? To facilitate in your further research I have printed out the recent UNCITRAL²³ report on the status of the 1958 New York Convention. This offers us the names of all the

²⁰ The UN Secretary-General, to celebrate 50th Year of the NY Convention, stated: “...Enforcement of Foreign Arbitral Awards is the cornerstone of Rule of Law in Global Trade Relations”.

²¹ Read Mealey’s Executive Summary of October 2008 on “Enforcement of Foreign Arbitral Awards And the New York Convention – The Singapore Experience”. (received from Mr Oon Chee Kheng)

²² I recall that Mr GH Tee submitted volumes to me whilst I was Director of the KLRCA urging the Malaysian Government to adopt the Act! (But KLRCA Rules were based on UNCITRAL).

²³ United Nations Commission on International Trade Law.



States (or countries) and the dates of (i) coming into force, (ii) ratification, accession or succession.

I am happy to be able to add that, on the invitation of the Secretary to the UNCITRAL, I attended the sessions²⁴ (of the Working Groups in New York and Vienna and of the Commission in New York) with the objective of improving the Arbitration Rules. We completed our work and I am happy that various states/countries embrace the amendments at once.

You will be reminded that a “Convention” is an instrument that is binding under international law on states (and other entities with treaty-making capacity) that choose to become a party to that instrument. Malaysia appears in the UNCITRAL Status Report under “Ratification, Accession or Succession” for 5th November 1985 and “Entry into force” only on 3rd February 1986. Should there be any need for the state to pass domestic legislation in order for the terms to be implemented?

I am sure many amongst us have observed that if both disputing parties in any arbitration are honourable and keen to get to the truth, the fair and just award(s) will be accepted. There are, however, the few who want to delay the outcome (or more often to delay the payments they are ordered to make), and these then resort to court actions. But if the discerning judges are knowledgeable and can see through the ruse, the decision can be worthwhile.

Conclusion:

I do not wish to make any pronouncements but rather enable you, Ladies and Gentlemen, to dissect my Paper and consider the factors from as many aspects and angles as you choose. And perhaps compare with your home situation or with other countries in Asia. Then perhaps we can help ASEAN achieve its objective in this General Assembly: “ASEAN Charter: taking ASEAN to New Heights”. And at the same time we can help our States²⁵ to “improve on the enforcement of international commercial Arbitral Awards”.

²⁴ I hope to meet Prof Lawrence Boo here at ALA in Hanoi. We attended the UNCITRAL sessions and Lawrence did so much for the SIAC thanks to the full support of the Singapore Courts and Government

²⁵ I must place on records the assistance of Tuan Syed Adam Alhabshi (who had collected materials on this topic whilst he served in the KLRCA) and of the following senior practitioners who conversed on various aspects: Mr (and Ir) Oon Chee Kheng (of his own law firm), Mr (and Sr) Lim Chong Fong (of Azman & Davidson), Mr Lam Ko Luen (of Shook Lin & Bok), Tuan Haji Zainal Abidin bin Jamal (of his own law firm and Director, Maybank), and Mr Wang Kuo Shing (of his own law firm). These are very successful counsel and arbitrators. Additionally my thanks also go to Sr Noushad Ali Naseem bin Ameer Ali (now pursuing his Ph D in New Zealand), Ir Chong Thaw Sing, Ar Dato’ Kevin Woo, Ir H T Ong (of Entrust)



If my Paper can start all of us thinking, a wee bit, and encourage you to help your Judges and Courts (and the legal practitioners and those in the law agencies and Attorney General's Chambers) to understand and appreciate what arbitration is or should be (in conformity with international standards and in tandem with the Convention), and to support arbitration as envisaged under UNCITRAL, then we together have succeeded.

And I thank you for your gracious support.

Dato' Syed Ahmad Iddid,

19 Jalan 19/32,

46300 Petaling Jaya,

Selangor DE, Malaysia.

(Fax & Phone: +(603) 7958.5355.)

< presiding_arbitrator@yahoo.co.uk >

questwriter.rmc@iiu.edu.my

Attachment: an UNCITRAL status report on countries within the NY Convention.

Group), Ir PE Chong and Ir Dr Gue See Saw (of his own consultancy), all of whom (though not lawyers) are recognized as ASEAN-wide arbitrators. I am happy that we had sat on some of the arbitration matters together!