

## **“ENFORCEMENT OF FOREIGN AWARDS:**

### **A SUGGESTION FOR AN ASEAN PROTOCOL ON ENFORCEMENT OF AWARDS”<sup>1</sup>**

This paper aims to inform and update members of ALA on the enforcement of foreign awards by Singapore courts. It is also hoped that ALA may take the initiative to encourage our respective state authorities to consider formulating a pan-ASEAN protocol to minimize barriers and improve the process for the enforcement of arbitral awards and interim measures within ASEAN.

## **I. ENFORCEMENT OF FOREIGN AWARDS IN SINGAPORE**

### ***(a) Enforcement Procedure***

In Singapore<sup>2</sup>, the procedure for the enforcement of foreign arbitral awards made in a New York Convention country other than Singapore is set out in Part III of the International Arbitration Act (“IAA”). These awards may be enforced in Singapore either by action<sup>3</sup> or in the same manner as a judgment or order to the same effect, with the leave of the High Court. If leave is granted, judgment will be entered in terms of the award.<sup>4</sup> Such awards are also recognized as binding for all purposes upon the persons between whom they were made, and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore.<sup>5</sup>

Applications for leave to enforce a foreign award made in a New York Convention country must be made within six years after the making of the award.<sup>6</sup> To enforce the award, the applicant must file an originating summons together with an affidavit<sup>7</sup>:

- a. exhibiting the arbitration agreement and the duly authenticated original award or a certified copy thereof;
- b. stating the name and the usual or last known place of abode or business of the applicant and the person against whom enforcement is sought; and
- c. stating that the award has not, or the extent to which it has not, been complied with.

---

<sup>1</sup> Lawrence BOO, The Arbitration Chambers, Singapore

<sup>2</sup> Singapore made the reciprocity reservation set out in Article I(3) of the New York Convention.

<sup>3</sup> Where an action arises out of an award on a salvage award or a claim under a charterparty, it falls within the Admiralty jurisdiction of the High Court and an action *in rem* could be brought. See *Alexander G Tsavlis & Sons Maritime Co v. Keppel Corp Ltd* [1995] 2 SLR 113.

<sup>4</sup> Sect. 19, IAA read with Sect. 29 of the IAA

<sup>5</sup> Sect. 29(2), IAA.

<sup>6</sup> Sect. 6(1)(c), Limitation Act Cap. 163.

<sup>7</sup> Rules of Court (“RC”), Order (“O”) 69A Rule (“r”) 6.

Leave to enforce a foreign award as a judgment or order of the court is often granted *ex parte* and the order so obtained served on the debtor. Within fourteen days after service of the order granting leave or such other period as the court granting leave may stipulate, the debtor may apply to set aside the order.<sup>8</sup> The award shall not be enforced during the pendency of the application and until after it is finally disposed of.<sup>9</sup>

A court hearing the application for enforcement of a foreign award cannot review the case on the merits. It may, however, refuse to grant enforcement of the award in Singapore if the grounds set out in Sect. 31(2) IAA are proven.<sup>10</sup> These grounds are identical to those set out in Art. V of the New York Convention ('NYC')<sup>11</sup>. An appeal against the decision of the High Court on the enforcement of a foreign award can be made to the Court of Appeal.<sup>12</sup>

Following an amendment to the Arbitration Act (Cap. 10) ('AA') which came into effect on 16 May 2003, foreign awards made in countries or territories which are *not* signatories to the NYC may also be enforced in Singapore in the same manner as a judgment or order to the same effect, with the leave of the High Court. If leave is granted, judgment will be entered in terms of the award.<sup>13</sup>

## II. JUDICIAL ATTITUDE TOWARDS ENFORCEMENT

The NYC essentially obliges convention countries to enforce awards made in another Convention country. Enforcement is mandated and refusal to enforce is allowed only in limited situations set out in Art V thereof. Awards sought to be enforced under the NYC must be awards that have not been set aside or suspended. The following Singapore decisions highlight the attitude of the Singapore courts towards enforcement of foreign arbitral awards.

---

<sup>8</sup> RC O 69A, r 6(4).

<sup>9</sup> RC O 69A r 6(4). The rationale here is to give the debtor the opportunity to contest the enforcement of the award under Art. V of the Convention as the first order would have been obtained *ex parte* without the debtor being heard.

<sup>10</sup> Sect. 31(2) IAA provides as follows:

A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that —

(a) a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him, under some incapacity at the time when the agreement was made;

(b) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made;

(c) he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;

(d) subject to subsection (3), the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration;

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made."

<sup>11</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Award – the "New York Convention" 1958, entered into force on 7 June 1959.

<sup>12</sup> Sect. 29A, Supreme Court of Judicature Act (Cap. 322).

<sup>13</sup> Sect. 46(1) read with 46(3) of the Arbitration Act

***(a) Option to Set Aside at Seat of Arbitration and Option to Resist Enforcement are Alternative, and not Cumulative Rights***

The Singapore High Court in *Newsped International Limited v Citus Trading Pte Ltd*<sup>14</sup> has deviated from general view to say that a party who is faced with the prospect of an award being enforced against him has the option of applying to set it aside in the court where the award was made or wait until the award is sought to be enforced against him in the court where the enforcement is sought. These are alternatives and not cumulative, as the losing party should not be allowed to have ‘two bites at the cherry’.

In that case, Citus had appealed a CIETAC award against it to the Intermediate People’s Court in Beijing on the ground that it was not given the opportunity to challenge a certain China Timber Agreement in the arbitration proceedings (NYC Art V(1)(b)). When the appeal was unsuccessful, CITUS had no choice but to resist the enforcement in Singapore by applying to set aside the *ex parte* order granting leave for enforcement under Sect. 31(2)(c) IAA.

The policy reasons supporting this ruling are such as to disallow a re-litigation of similar issues in different jurisdictions, and the attendant possibility of inconsistent holdings.

Under the NYC before enforcement is sought, recourse may be made against the award in the courts of the primary jurisdiction, *viz* the court where the award was made. If the award is *successfully* set aside, there would be no award to enforce and if there is still the attempt to enforce, Art V(1)(e) of the NYC empowers the enforcing court to refuse enforcement. It does not follow though that an *unsuccessful* application to set aside in the primary jurisdiction would necessarily operate as a bar to resist enforcement in the secondary jurisdiction. Of course practically, a party who was unsuccessful in the primary jurisdiction would necessarily face an uphill struggle in persuading the enforcing court to refuse on the similar grounds. Further, the practice in other jurisdictions has consistently permitted challenges to the enforcement of a foreign award to be made (albeit without much success), even after the court at the place of arbitration had refused to set aside the award (e.g. United States Court of Appeal, Second Circuit, in *Baker Marine (Nig) Ltd v Chevron Corp Inc*<sup>15</sup>; Final Court of Appeal Hongkong SAR in *Hebei Import and Export Corp v Polytek Engineering Co Ltd*<sup>16</sup>; English High Court in *Minmetals Germany GmbH v Ferco Steel Ltd*<sup>17</sup>; English Court of Appeal in *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd*<sup>18</sup>).

While the court in *Newsped International Limited v Citus Trading Pte Ltd* is correct in saying that the decision of the Intermediate People’s Court in Beijing was binding on Citus, it would be inaccurate to extend it to mean that the Singapore High Court acting as the court of secondary jurisdiction under the NYC could not re-look into the allegations and

---

<sup>14</sup> [2003] 3 SLR 1

<sup>15</sup> (1999) ICCA Yearbook XXIV 909

<sup>16</sup> (1999) ICCA Yearbook XXVI 652

<sup>17</sup> [1999] 1 All ER (Comm) 315

<sup>18</sup> [1999] 2 Lloyd’s Rep 65

consider if it is appropriate to refuse enforcement. This decision illustrates the pro-enforcement stance of Singapore courts towards foreign awards.

***(b) Enforcement should be against correct parties***

The Court of Appeal has made clear that an enforcement action must be directed against the correct party. In *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*<sup>19</sup> Prakash J held that in order to establish *locus standi*, the plaintiff had to show that it had a “real interest” in bringing the action or that there was a “real controversy” between the parties to the action for the court to resolve. Karaha Bodas had obtained an arbitral award in its favour against Pertamina. In an effort to recover the sum of money due to it, it sought an injunction against two parties who allegedly owed money to Pertamina. As both named defendants were strangers to the arbitral proceedings there was no cause of action enabling it the court to exercise jurisdiction against them. The Singapore Court of Appeal concluded that the NYC does not extend to ancillary processes in aid of support of pending enforcement action in another jurisdiction (in this instance in Hong Kong).

The court’s power to grant an injunction in aid of enforcement of an arbitral award has to be exercised judiciously. Where third party interests are affected, the court has to balance the rights of the third party as well as those of the successful party in the arbitration. In *Allied Marine Services Ltd v LMJ International Ltd*<sup>20</sup>, the plaintiff, who had obtained an arbitral award in London, had registered it as an English judgment. The defendant, an Indian company, was said to have a cargo of iron ore on board a ship which was bunkering in Singapore. An *ex parte* injunction was granted to prevent the vessel from leaving Singapore with the cargo on the basis that the cargo should be retained as security to satisfy the plaintiff’s award. The injunction was discharged notwithstanding that security of US\$10,000 was offered by the plaintiff to cover third parties affected by the granting of the injunction. Tan Lee Meng J could not countenance such an order as the plaintiff would be interfering with the business rights of an innocent third party merely by proffering the third party an indemnity.

Singapore courts have, however, extended assistance to facilitate enforcement by granting pre-enforcement discovery to ascertain whether the true party liable could be hidden behind the corporate veil of the party named in the arbitration. In *Asta Rickmers Schiffahrtsgesellschaft mbH & Cie KG v Hub Marine Pte Ltd*<sup>21</sup> the court ruled that when deciding on whether to grant such an application for judicial assistance in pre-enforcement discovery, it would not “dwell into the merits of the case and ... determine, based on what little available evidence, whether there is a good claim or not. The court’s duty is only to ensure that the application was not frivolous or speculative or that the applicants were [not] on a fishing expedition.”<sup>22</sup>

---

<sup>19</sup> [2006] 1 SLR 112

<sup>20</sup> [2006] 1 SLR 261

<sup>21</sup> [2006] 1 SLR 283 at [36]

<sup>22</sup> Adopting the *ratio* in *Kuah Kok Kim v Ernst & Young* [1997] 1 SLR 169 at [59].

### ***(c) Enforcement Process is Mechanistic***

Singapore courts pro-enforcement bias is further reflected in its attitude that the enforcement process is a mechanistic and formalistic one. This is expressed by the High Court in *Aloe Vera of America, Inc v Asianic Food [S] Pte Ltd and Another*<sup>23</sup>. The second defendant in the arbitration proceedings had contended that he was not a party to the arbitration agreement. The arbitrator in his final award found that he *was* a party because he was the alter ego of the first defendant. Application by second defendant to set aside the order granting leave to enforce the award was dismissed by Prakash J. Her Honour held that the court's examination of the documents required under the IAA in an application to enforce an arbitral award was a *formalistic or mechanistic* one and did not require judicial investigation by the court as to whether the arbitral tribunal's finding that the second defendant was a party to the arbitration agreement was correct. Prakash J affirmed that a court cannot review the case on the merits before the arbitration tribunal.

The decision also signifies the first endorsement by a Singapore court of the concept of a non-signatory party to the arbitration agreement against whom arbitration maybe invoked. The use of the concept of *alter ego* and the lifting of the corporate veil in Singapore often requires a high degree of proof of fraud when such allegation is made in court proceedings. By refraining from interfering with the finding of the tribunal, the court in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* cast its lot in favour of the independence and autonomy of the tribunal. This signifies the Singapore court's commitment to the support of international arbitration and Singapore's strict adherence to its treaty obligations under the NYC.

### ***(d) Breach of Rules of Natural Justice***

As the grounds for refusal of enforcement of foreign awards are similar to those for setting aside of 'international' awards made in Singapore, court decisions on setting aside proceedings would similarly be instructive on Singapore court's treatment in enforcement actions.

The term "breach of the rules of natural justice" although added separately as a ground for setting aside Sect. 24 of the IAA is merely an interpretation of the term 'public policy' under Art 34 of the Model Law on International Commercial Arbitration found in the First Schedule to the IAA. It has given rise to several judicial pronouncements.

In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*<sup>24</sup>, PT Asuransi had sought to set aside a ruling of the tribunal in a second related arbitration between the parties that it had no jurisdiction. One of the grounds was that PT Asuransi was not given full opportunity to present its case and/or was otherwise unable to present its case in that it was not aware that the tribunal would be making findings that were critical to the jurisdiction issue. This final ground though was rejected by Prakash J, holding that there was no evidence that PT Asuransi did not fully appreciate what was being put against it as it had copies of all

---

<sup>23</sup> [2006] SGHC 78

<sup>24</sup> [2006] 1 SLR 197

submissions made by Dexia Bank. The fact that the tribunal had made an issue of and finding on a point that was never raised by either party, viz, PT Asuransi's purported non-participation in the first arbitration, was not determinative of its final conclusion, and therefore any breach of natural justice that might have occurred because the tribunal did not notify PT Asuransi that it considered this to be a point in issue, did not prejudice the applicant. As to the fact that no oral hearing was held even though it had been earlier directed, the court pointed out that neither party requested for one after the filing of written submissions. The earlier direction for oral hearings had long passed and it would not be reasonable in the changed circumstances, and in the absence of a request from parties, to say that PT Asuransi was entitled to an oral hearing. It thus can be seen that such a breach is not so easily found by the courts.

In a firmly-worded decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*<sup>25</sup>, the Court of Appeal sets out some guiding principles. Although this is a decision dealing with Sect 48 AA, the principles espoused would be directly relevant in to arbitration awards made in Singapore as well as the foreign awards sought to be enforced in Singapore. In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*, Fairmount alleged that an award in favour of Soh Beng Tee ought to be set aside because it was a breach of the rules of natural justice for the arbitrator to have failed to consider that the time for performance in the Building Contract was at large. The Court of Appeal unanimously held that there was no such breach because the issue of time was 'live' throughout the proceedings. The Court, after the examination of numerous English, Australian, and New Zealand judgments, went on to elaborate that "international practice has now radically shifted in favour of respecting and preserving the autonomy of the arbitral process in contrast to the earlier practice of enthusiastic curial intervention (at [59])." Six principles were then concisely and usefully set out:

1. **Submitted Issues:** Parties to arbitration have a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. An arbitrator should not base his decision(s) on matters not submitted or argued before him. Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.
2. **No Technical Challenges:** 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 has been made.
3. **Minimal Curial Intervention:** The policy of minimal curial intervention recognises the autonomy of the arbitral process by encouraging finality, and parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts. A court will not intervene merely because it might have resolved the matters differently.
4. **Real Basis:** The balance in preserving the integrity of the arbitral process and ensuring adherence to the rules of natural justice is preserved by strictly adhering

---

<sup>25</sup> [2007] 3 SLR 86

to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the AA and IAA. In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. Only where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously.

5. **Independent judgment:** Where parties propose diametrically opposite solutions, the arbitrator is not bound to adopt an either/or approach. He is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.
6. **Read Generously:** It is not the function of the court to assiduously comb an arbitral award microscopically in attempting 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.

This decision sets the benchmark for the tests to be applied in every case where an award, whether in the international or domestic regime, is challenged on the allegation of a breach of natural justice.

The Singapore court is also very cautious that an allegation of breach of natural justice ought not be used as a backdoor attempt to seek judicial trespass into the merits of the award. In *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc*<sup>26</sup>, the setting aside challenge was launched principally on the allegation of breach of natural justice. The tribunal had dealt with the question of the separability of the arbitration clause from the contract in which it was contained without allowing the parties to address the tribunal fully. The Government of the Republic of Philippines ('GOP') submitted that its challenge to jurisdiction was premised on the concession agreements pursuant to which the arbitration was commenced being "null and void *ab initio*" (see [21] of the judgment) such that the arbitration clause too was void. The GOP pointed out that the tribunal's discussion on separability in the Partial Award had, in its view, prejudged the issue of arbitral jurisdiction before it was argued. Judith Prakash J, however, rejected the application. In the court's view, the GOP was merely attempting to seek a review of the merits of the tribunal's decision. The GOP's submissions were replete with discussions of separability. The concept of separability as a distinct feature in international arbitration would necessarily be involved in any discussion on the choice of law.

---

<sup>26</sup> [2007] 1 SLR 278

The closely related issue of treating parties equally was more recently raised in *Dongwoo Mann+Hummel Co Ltd ('Dongwoo') v Mann+Hummel GmbH ('M+H')*.<sup>27</sup> Dongwoo sought to set aside an award in favour of M+H under s24 IAA and Art 34 of the Model Law. His complaints included one in which it alleged that various documents which it had requested for were shown only to the tribunal but not presented to Dongwoo. This was because M+H had objected to such disclosure to Dongwoo on the basis that they contained proprietary information belonging to a major customer and was bound to a covenant of confidentiality. Dongwoo also claimed that the tribunal in making the award was infected by the information in the documents and had thereby deprived Dongwoo of the opportunity to be heard. Further, the tribunal had not drawn any adverse inference against M+H for its flagrant disregard of the discovery order, breaching the obligation to treat the parties with equality. The High Court thus made clear that a failure to produce documents *per se* does not automatically mean that a party has been unable to present his case, as a ground for setting aside. If after hearing parties' arguments, the tribunal decided wrongly that it was not appropriate to draw any adverse inference, it would then be a mere error of fact and/or finding of law, which cannot be a ground for setting aside the award under Art 34(2)(a)(ii) of the Model Law.

### ***(e) Role of Experts***

An arbitrator's duty of adjudication is a non-delegable one. He must apply his own mind to the issues and make his findings and rulings in his award. Most procedural rules allow the tribunal to appoint experts to assist them on technical or legal aspects of the dispute. The use of experts and tribunal advisers, however, must be properly measured and controlled such that the arbitral tribunal retains the decision-making responsibility and does not abdicate its adjudicatory function both as to fact and law to the experts or advisers. Even then, the Courts have been quick to enforce an award if the grounds on which the above is alleged are weak.

In the setting aside case of *Luzon Hydro Corp v Transfield Philippines Inc*<sup>28</sup>, Luzon applied to set aside the award under Art 34(1) of the Model Law on the ground that the arbitral procedure was not in accordance with the agreement of the parties or that a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of a party had been prejudiced. The principal allegation made by Luzon was that the tribunal had delegated to the expert so much of its functions that it had effectively abdicated its decision-making responsibility. Luzon pointed out that the expert had taken an active part in the hearing by asking questions which arose out of his personal expertise and experience. Luzon also complained that they were deprived of the opportunity to comment on the views of the expert as required by the ICC and the Model Law, as there was no written report from the expert although the scope of the work done was made known to the parties.

The High Court took a strict stance, holding that the parties were aware of the terms of engagement of the expert. They would be entitled to a written report if one was made. As

---

<sup>27</sup> [2008] 3 SLR 871

<sup>28</sup> [2004] 4 SLR 705

no written expert report was submitted, there was nothing that would oblige the tribunal to disclose confidential communications between the tribunal and the expert. She held that the communications between the expert and the tribunal were confidential in the same way as communications amongst the tribunal members were confidential and unless there was strong and unambiguous evidence of irregularity in the manner in which the arbitration was conducted, no aspersions should be cast on what the tribunal did or said that it did. Disagreement with the opinions of the expert and the arbitral tribunal's findings cannot be grounds to set aside the award.

This decision has spawned some discussion on whether the court had effectively imposed a confidentiality bar that prevented Luzon from accessing evidence to support its application to set aside the arbitration award. One arbitrator<sup>29</sup>, schooled in the English tradition thinks that this decision would be considered a serious irregularity under English law as it offends the notion that "justice ... should manifestly and undoubtedly be seen to be done"<sup>30</sup>. A leading civil law practitioner<sup>31</sup> however defended the judge's decision and criticised the English cases as inducing "arbitrators to concentrate on making a demonstration that 'justice' is 'manifestly and undoubtedly seen to be done', emphasising the façade of 'procedural' justice at the expense of the substance of their decision". The final word on this is being awaited from the Court of Appeal.

#### ***(f) Confidentiality and Enforcement***

An attempt to argue that a breach of the confidentiality obligation would justify intervention by the court against enforcement of the award was flatly rejected by the court in *International Coal Pte Ltd v Kristle Trading Ltd*<sup>32</sup>. The court ruled that confidentiality should not be used in an effort to thwart or hinder effective enforcement of otherwise valid awards in the courts. The plaintiffs in that case attempted to sue the successful party in arbitration for breaching their covenant of confidentiality. The learned judge accepted that, as a matter of law, an obligation of confidentiality is implied in arbitration proceedings due to the private nature of such proceedings. Yet once recognition was granted to an award and judgment entered, it enters the public domain and no privacy can attach to enforcement proceedings attendant on the judgment. Similarly, if a party to the arbitration had divulged information about the arbitration to some other party, it cannot then raise any objection should the other party to the arbitration responded to those disclosures.

#### ***(g) Public Policy***

Sect.31(4)(b) IAA and Art 34 of the Model Law allow the Singapore courts to refuse enforcement of a foreign award on the grounds of public policy. The first attempt before a Singapore Court to resist enforcement of a foreign award was made in *Re An Arbitration between Hainan Import & Export Corp v Donald & McCarthy Pte Ltd*. Justice Prakash in that case soundly rejected this ground of resisting enforcement ruling that "...public policy did not require that this court refuse to enforce the award obtained by the plaintiffs. There was

---

<sup>29</sup> Hew R Dundas, Chartered Arbitrator, London

<sup>30</sup> Per Lord Hewart CJ in *The King v Sussex Justices* [1924] 1 KB 256 at 259

<sup>31</sup> Dr Michael Schneider, attorney-at-law, Switzerland

<sup>32</sup> [2009] 1 SLR 945

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 award of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist'.<sup>33</sup> The Court of Appeal in *American Home Assurance Co v Hong Lam Marine Pte Ltd*<sup>34</sup> impliedly affirmed that issues of illegality may be determined by the Tribunal and is not to be lightly interfered by the Courts<sup>35</sup>.

More recent decisions confirm that Singapore courts have chosen to adopt a narrow interpretation of public policy. In *P T Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* <sup>36</sup>, Prakash J made it clear that not every breach or non-compliance with the law would be considered as conflict with public policy of Singapore. She put it aptly that while the public policy of a state may be given effect to in legislation, it does not follow that '... every law has to be regarded as public policy so that if it can be shown that any finding in an arbitration award constitutes a breach of such law, that arbitration award would have to be set aside on the ground of public policy' [29].

In the *Aloe Vera* case the same judge further alluded that "woven into the concept of public policy as it applies to the enforcement of foreign arbitration awards is the principle that courts should recognise the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice" [40]

An attempt was also made in one case to suggest that disproportionate costs ordered by a tribunal are contrary to the public policy and therefore justify judicial intervention. In *VV v VW* <sup>37</sup>, the plaintiffs sought to set aside the award on costs on the grounds that (a) the degree to which the legal costs exceeded the amount in dispute violated Singapore public policy; (b) the arbitrator lacked jurisdiction to award costs on the counterclaims; and (c) the arbitrator breached the requirements of natural justice by relying on his own knowledge of what constituted standard legal fees in international arbitration. The court rejected this argument and held that there is no legal basis to suggest that there was a principle of proportionality between the claim amount in dispute and the legal costs awarded in international arbitration. The learned ruled that Singapore courts do not have authority to ensure that costs in arbitrations conform to any given principle (whether proportionality or otherwise). The learned judge said that "[t]here is no public interest involved in the legal costs of parties to one-off and private litigation" [31]. Her Honour further made clear that natural justice requirement does not require the arbitrator to seek the parties' positions on every issue before making a conclusion. The assessment of costs is entirely an opinion of reasonableness and not strictly fact-finding. Courts in England and Singapore rely on their own judgment when setting hourly rates and taxation costs. International arbitrators should have the same ability to rely on "their general knowledge and experience as well as on the precedents cited to them by counsel" [56].

---

<sup>33</sup> [1996] 1 SLR 34 at 461.

<sup>34</sup> [1999] 3 SLR 682

<sup>35</sup> Chew, Leslie. "The Public Policy Ground to Refuse the Enforcement of an Arbitral Award Under the International Arbitration Act (Cap 143A) – Two Recent Decisions." Law Gazette, December 2006 (4).

<sup>36</sup> [2006] 1 SLR 197

<sup>37</sup> [2008] 2 SLR 929

The Singapore courts have over a 5-year period (2004-2008) enforced 35 ‘international’ arbitral awards with Singapore as the seat of arbitration and 27 foreign awards with seats outside Singapore. No foreign or international awards have yet to be refused enforcement in Singapore.

### III. AN ASEAN PROTOCOL ON ENFORCEMENT OF AWARDS?

Most members of ASEAN<sup>38</sup> are parties to the NYC. Yet, there is no certainty that enforcement of foreign arbitral awards in the courts of ASEAN member states are consistent with the principles laid down in the Convention. In fact some of the cases referred to earlier had met with a different fate before other ASEAN jurisdictions<sup>39</sup>.

As a body supportive of better understanding, growth, and development, perhaps certain steps could be made to ASEAN laws to ensure more coherent and consistent enforcement regimes for foreign awards amongst ASEAN member states. In this regard, Article VII of the NYC permits courts of the Convention states to offer a more favourable enforcement environment. It states -

#### Art VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

A protocol amongst ASEAN states to facilitate a more favourable enforcement regime would be fully consistent with our obligations under the NYC. This Protocol could complement the New York Convention in several respects, including:

- a. clarifying the writing requirement;
- b. incorporating guidelines for enforcement of interim measures; and
- c. standardizing the method of authentication and certification of awards.

It could also consider the possibility of adopting English as the common working language for enforcement documentation.

---

<sup>38</sup> Lao PDR and Myanmar are not parties to the Convention.

<sup>39</sup> E.g. In Indonesia, the award made in Geneva in Karaha Bodas Company LLC (“KBC”) vs Perusahaan Pertambangan Minyak dan Gas Bumi Negara (“PERTAMINA”) & PT PLN (Persero) (“PLN”) No.86/PDT.G/2002/PN.JKT.PST was nullified by the Jakarta District Court; similarly in the Philippines, the Court of Appeal also nullified the award made in the case involving *Luzon Hydro Corp v Transfield Philippines In CA-GR SP NO 94318* (2006); Court of Appeals, Manila; Decision of Hormachuelos PA, Tolentino AG and Lanzanas EA; 26 November 2006.

### **(a) Writing Requirement**

The 2006 Amendment to the UNCITRAL Model Law ('MAL Amendment') has made a change in the writing requirement for a valid arbitration agreement. While maintaining that the written form is still notionally required, the 2006 MAL Amendment now provides for two options, a broadening of the definition of 'writing' to such an extent that no writing is in fact required or the expressed omission of writing altogether. This new approach is not fully aligned with the writing requirement under Art II(1) and (2) of the NYC.

The options proposed in the MAL Amendment allow the legislature of different countries to adopt<sup>40</sup>. There has been much pressure from certain interests group especially arbitrators and arbitration practitioners who prefer to see more cases referred to arbitration by relaxing the requirement for writing. Adoption by ASEAN countries of the different standards for the written will surely lead to greater diversity instead of harmony. A common ASEAN approach however would augur well for more predictable outcome in the enforcement of ASEAN awards. A properly researched and considered approach should be undertaken before ASEAN legislatures bow to such pressure and enact laws adopting any of the new approaches to the writing requirement for arbitration agreements. Questions relating to the deprivation of the right to access to justice and possibility of creating more litigation over the existence of the arbitration agreement in the course of enforcement proceedings must necessarily be examined.

### **(b) Interim Measures in Support of Foreign Arbitrations**

Singapore courts have been empowered by law to make interim measures in aid of arbitration and such steps are not considered to be incompatible with the applicant's intention to proceed with the arbitration. In an arbitration which falls under the IAA, this power includes the making of restraining orders (injunctions) as well as ordering a party to do a positive act (mandatory injunction): s 12(7) of the IAA. The exercise of these powers has however been limited to support only arbitrations in Singapore following a ruling by the Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA*<sup>41</sup>, that Sect. 12(7) of the IAA would not apply to give the court the power to make interim orders in aid of an arbitration which has its seat outside Singapore. While there were earlier judicial decisions that had taken a more liberal approach<sup>42</sup>, the Court of Appeal's decision renders such assistance no longer possible. The 2006 MAL Amendment has recommended a new Art 17J which reads:

"A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."

---

<sup>40</sup> UN Document A/6/17, Annex A, adopted by GA Resolution No 61 /33 on 4 December 2006 at the 64<sup>th</sup> plenary meeting.

<sup>41</sup> [2007] 1 SLR 629

<sup>42</sup> Belinda Ang Saw Ean J's decision in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854; Tay Yong Kwang J in *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856; Chan Seng Onn J in *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR 1000

Although Singapore has introduced legislation<sup>43</sup> to extend the power of Singapore courts under its IAA to order interim measures to arbitration wherever seated, again a more consistent approach by courts of ASEAN states would be welcomed.

***(b) Standardization of the Authentication and Certification of Awards***

A party seeking to enforce an arbitral award outside Singapore will be required, under Article IV (1) of the NYC, by the foreign court before which enforcement is sought, to tender a -

- a. A duly authenticated original award or a duly certified copy thereof; and
- b. The original arbitration agreement or a duly certified copy thereof.

Courts of different jurisdictions interpret these provisions differently and may require certain formalities to be adhered to before taking cognizance of the awards sought to be enforced. While common law jurisdictions tended to take a more liberal approach in construing the formal requirements for authentication and certification, civil law jurisdictions tended to take a stricter approach. These differences in relation to the authentication/certification requirements are a source of delay, confusion, and inefficiency that can be readily corrected if a uniform system is agreed upon especially within ASEAN. These could be easily achieved by agreeing on a short list of authorized authenticating agencies in each ASEAN state. This would obviate the tedious need for notarization, legalization and consular authentication. Such authenticating agencies could also act as a 'closed registry' for registration of arbitral awards made in each state. A closed registry means that it is opened only for inspection by the parties to the arbitration or such persons with the consent of the parties.

This modest 3-point proposal is not intended to replace the NYC. The proposed steps should supplement and would facilitate a more transparent and harmonious environment for enforcement of awards within ASEAN.

---

<sup>43</sup> International Arbitration (Amendment) Bill 2009: draft Bill available on line at : [http://app2.mlaw.gov.sg/LinkClick.aspx?fileticket=Euuu0\\_U4cdk%3d&tabid=204](http://app2.mlaw.gov.sg/LinkClick.aspx?fileticket=Euuu0_U4cdk%3d&tabid=204)