Introduction

This paper will draw from two recent arbitration proceedings involving parties from Malaysia, Indonesia, Laos and Thailand and examine the roles that National Courts play when parties in arbitral proceedings refuse to cooperate or perform their obligations when awards have been made against them.

These arbitral proceedings, involving millions of dollars, were determined by the arbitration centres in Singapore (the Singapore International Arbitration Centre) and in Kuala Lumpur (the Kuala Lumpur Regional Centre for Arbitration). Following these initial arbitral proceedings, there were protracted litigation before the courts in Malaysia, Singapore and Indonesia. These arbitral proceedings in two of the main arbitration centres in Asia and subsequent litigation before the National Courts in the ASEAN region provide an excellent opportunity for us to (i) re-examine the role that National Courts, particularly, those in the ASEAN region, play in International Commercial Arbitration; (ii) re-evaluate the effectiveness of the current international instruments such as The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter “The New York Convention”) and the UNCITRAL Model Law on International Commercial Arbitration (hereinafter “The Model Law”); and (iii) consider the possible steps, if any, that may be taken by the member ASEAN states to facilitate and support arbitration in this region.

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The Cases

The first case involved a commercial dispute arising out of a joint venture agreement between a Malaysian media group (the Astro Group) and an Indonesian conglomerate (the Lippo Group). This Astro v Lippo dispute was first heard and resolved in Singapore – by a tribunal set up by the Singapore International Arbitration Centre (SIAC). This was followed by a series of litigation in the courts in Singapore, Indonesia and Hong Kong.

The second case concerned a dispute between the Government of Lao and Thai-Lao Lignite Co Ltd, a company incorporated in Thailand. The dispute arose as a result of a series of mining and project development agreements entered into between the parties. Like the first case, the Government of Lao v Thai-Lao Lignite Co Ltd dispute began with an arbitration determined in Malaysia – by a tribunal set up by the Kuala Lumpur Regional Centre for Arbitration (KLRCA). This was followed by a series of litigation in the courts in Malaysia, the United Kingdom, the United States and France.

These two cases paint a very emblematic scenario that may unfold when parties are embroiled in an international commercial dispute. What is important is not just the accounts that took place in these arbitration and litigation proceedings but the lessons we may learn from these disputes – concerning, in general, the dispute resolution processes or mechanisms that are available to contracting parties and, in particular, how these cases contribute in some positive ways to the perennial debate concerning the benefits of arbitration over litigation.

The Astro v Lippo Arbitration and Litigation – One Step Forward, Two Steps Back?

Surveys conducted by the School of International Arbitration at Queen Mary, University of London in 2006, 2008 and 2013 support the view that arbitration remains as a popular dispute resolution mechanism amongst businesses embroiled in commercial disputes. Like all other business entities, the Astro Group and the Lippo Group must have thought that it was prudent to provide in their Subscription and Shareholders’ Agreement that any dispute between the parties should be resolved by arbitration.

The parties must have considered the option of inserting an exclusive (or non-exclusive) jurisdiction clause conferring jurisdiction on the courts in Indonesia or Malaysia (or any other third country) and decided against such a clause. They must have regarded arbitration as preferable over litigation for reasons best known to them. In the interest of neutrality and fairness, they opted for the Singapore International Arbitration Centre over the Kuala Lumpur Regional Centre for Arbitration or another arbitration centre in 3 See the 2006 International Arbitration Survey - Corporate Attitude and Practices; the 2008 International Arbitration Survey - Corporate Attitude and Practices: Recognition and Enforcement of Foreign Awards and the 2013 International Arbitration Survey - Corporate Choices in International Arbitration: Industry Perspective, available at http://www.arbitrationonline.org/docs/I Astudy_2006.pdf, http://www.arbitrationonline.org/docs/I Astudy_2008.pdf, and http://www.arbitrationonline.org/docs/pwc- international-arbitration-study2013.pdf respectively.
Jakarta. By any description, this should be considered as a reasonable, wise and practical choice.

The arbitral tribunal in this case proceeded to hear the claims and awarded the claimants over USD250 million. It would not be incorrect to say that this amounts to one giant step forward for the Astro Group. One may then ask: Shouldn’t this be the end of the matter? Unfortunately for the Astro Group, the answer is in the negative.

In this Astro v Lippo dispute, it should be noted that the Lippo Group had not just refused to perform on the awards made against them but they had also commenced court proceedings in Indonesia to hear the dispute when the matter was being brought for determination before arbitration. In view of the uncooperative conduct of the Lippo Group, the Astro Group was forced to seek recognition and enforcement of the awards in Malaysia, Singapore, Hong Kong and Indonesia. At the same time, the Astro Group had to make numerous applications in the National Courts in various jurisdictions to secure their own interests and these included an application to the Singapore High Court for a worldwide Mareva Injunction against one of the entities in the Lippo Group, an application for a garnishee order against another entity in the Lippo Group in the Hong Kong High Court and an anti-suit injunction to prevent the Lippo Group from taking steps in Indonesia that could potentially undermine proceedings in Hong Kong.

The above developments simply mean that the courts in all these jurisdictions were compelled to get involved, notwithstanding the fact that there was in existence an arbitration agreement and the fact that the dispute had been heard and decided by an arbitral tribunal in Singapore. For purposes of this paper, we will look at just two of these decisions. The first is the judgment refusing recognition and enforcement of the award by the Singapore Court of Appeal in Singapore and the second is the judgment refusing recognition and enforcement of the award by the Supreme Court of Indonesia in Indonesia.

Subsequent Litigation in Singapore

After a Final Award of over USD250 million was made in favour of the Astro Group by the arbitral tribunal in Singapore, the Astro Group proceeded to obtain leave to enforce the various awards in Singapore. Needless to say, the Lippo Group resisted the attempt by the Astro Group to enforce the awards. The Lippo Group’s key contention was that the arbitral tribunal had erroneously allowed a few entities from the Astro Group to be parties in the arbitral proceedings when they were not parties to the arbitration agreement. Hence the awards made in favour of these parties were unenforceable and should be set aside.

The Lippo Group applied unsuccessfully to the Singapore High Court to set aside the enforcement orders. The High Court in Singapore held that the Lippo Group was unable

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to challenge the jurisdiction of the arbitral tribunal under Article 16 of the Model Law. Nor were they able to seek to set aside the award under Article 34 because in both instances they had failed to do so within the time limits.

However, in a well-reasoned albeit lengthy judgment, the Singapore Court of Appeal in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* reversed the High Court’s decision. The Court of Appeal refused the Astro Group leave to enforce all but a small proportion of the awards against the Lippo Group, resulting in the award sum being reduced to approximately USD700,000 – less than 0.3 percent of the original USD250 million sum of the awards.

The above decisions stemming from the *Astro v Lippo* dispute drew our attention to a number of significant issues in the realm of international commercial arbitration. As evident, one relates to the issue of forced joinders of third parties in arbitration and the other concerns the use of active and passive remedies to defeat an arbitral award at the seat and the place of enforcement, respectively. It would be beyond the scope of this paper to discuss and provide a detailed analysis of the issues raised in the Singapore High Court and Court of Appeal by the parties.

Suffice to state at this juncture that the Court of Appeal held that Rule 24(b) of the 2007 SIAC Rules did not confer on the arbitral tribunal the power to join third parties who were not party to the arbitration agreement. Accordingly, the Court of Appeal was of the view

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5. Article 16 of the Model Law reads as follows:

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

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

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

6. Article 34 of the Model Law makes provision for the setting aside of an arbitral award based on any one of six grounds. More importantly, it provides in subsection (3) that an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.


8. Rule 24 of the 2007 SIAC Rules deals with the additional powers of the Tribunal and paragraph (b) states that the Tribunal shall have the power to allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration. Rule 24(b) has been amended and the current 2013 SIAC Rules provides that “upon the application of a party, allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties”.

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that the arbitral tribunal’s exercise of its power under rule 24(b) to join three of the respondents from the Astro Group who were not parties to the Subscription and Shareholders’ Agreement to the arbitration was improper with the corollary that no express agreement to arbitrate existed between the these respondents and the Lippo Group.

On the other key question of whether an application under Article 16(3) of the Model Law to set aside an arbitral award on jurisdiction is the only route available to a party seeking to raise an objection against an arbitral award on grounds of lack of jurisdiction, or, alternatively, whether a party can also raise jurisdictional objections at the time of enforcement proceedings, the Court of Appeal was of the opinion that Article 16(3) of the Model Law does not provide a “one-shot remedy”. One commentator has interpreted the judgment of the Court of Appeal as one that “confirms Singapore’s commitment to the philosophy of ‘choice of remedies’ contained in the Model Law”.

It is not easy to find fault with the reasoning of the Court of Appeal in this case. However, what may be disconcerting to parties in future arbitral proceedings is the fact that the handing down of an award by an arbitral tribunal does or may not signal the end of the dispute resolution process. As the litigation in Singapore involving the Astro v Lippo dispute demonstrates, the process itself may be far from over. As for the Astro group, the decision of the Court of Appeal meant it was one step backward for them.

Subsequent Litigation in Indonesia

An attempt by the Astro Group to enforce the awards against the Lippo Group in Indonesia proved equally in vain. By September 2013, the Astro Group had announced that it had failed to enforce the awards against the Lippo Group in Indonesia, having had an appeal to the Indonesian Supreme Court dismissed on grounds that the awards were (i) contrary to public order, (ii) interfered with Indonesian judicial process, and (iii) violated the sovereignty of Indonesia.

It is apparent that the Lippo Group had succeeded in resisting the recognition and enforcement of the awards by Astro before the Indonesian Supreme Court on a totally different ground, namely the ground of public policy.

That the ground of public policy is recognized as one of the grounds for setting aside or for challenging the recognition and enforcement of an arbitral award is beyond doubt. Both the New York Convention and the Model Law state this categorically. It should however be noted that this ground is not interpreted in a liberal manner in most

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10. See *Astro Nusantara International BV v PT Ayunda Prima Mitra* [http://putusan.mahkamahagung.go.id/putusan/73d70652df9f8dd8f1dc240f600650d3](http://putusan.mahkamahagung.go.id/putusan/73d70652df9f8dd8f1dc240f600650d3).
11. See Article V(2)(b) of the New York Convention and Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law.
Once again, it will be beyond the ambit of this paper to critically examine and discuss the application of this ground by the National Courts across jurisdictions and the justification of the Indonesian Supreme Court in refusing recognition and enforcement of the awards obtained by the Astro Group against the Lippo Group based on the facts of the case before it.

But as the resulting litigation in Indonesia shows, the end of arbitration proceedings may just signal the beginning of a protracted and costly litigation. Whichever way one looks at it, this decision meant that it was another big step backward for the Astro group.

The Government of Lao v Thai-Lao Lignite Co Ltd Arbitration and Litigation – It’s a Win but also a Draw

Like the parties in the Astro v Lippo dispute, the Government of Lao and Thai-Lao Lignite Co Ltd must have considered and thought that it was sensible to opt for arbitration and to choose a neutral place, in this case, Malaysia, as the seat of arbitration. Like the Astro v Lippo arbitration, the Government of Lao v Thai-Lao Lignite Co Ltd arbitration proceeded smoothly and concluded with an award of more than USD56 million made in favour of Thai-Lao Lignite Co Ltd by the arbitral tribunal. Regardless of how one views the outcome of this arbitral proceedings, Thai-Lao Lignite Co Ltd had won and the Government of Lao had lost. But as we will see in the resulting court proceedings that follow in a number of jurisdictions, it would become obvious that, at least for now, it is a draw.

As Malaysia was the seat of arbitration, an action to set aside the arbitral award was instituted before the High Court in Malaysia. Ironically, like the Astro v Lippo dispute, this case also involved a party who was not a party to the arbitration agreement. In their application to set aside the arbitral award, the Government of Lao relied primarily on the jurisdictional ground. This ground is premised on the twin elements of the tribunal exceeding its jurisdiction on the one hand and exercising its jurisdiction wrongfully on the other, that is, against a non-party. What became the central issue with a vital consequence on the outcome of the case was whether the law governing the arbitration agreement was Malaysian law or New York law.

If Malaysian law were to apply, the award made in favour of the non-party to the arbitration agreement could not be allowed to stand. This is based simply on the concept of privity of contract. However, if New York Law were to apply, the non-party could derive the benefit from the award made in its favour. This is premised on the “intended third party beneficiary” concept. The concept of an ‘intended beneficiary’ is an exception to the privity rule.

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12 For a discussion of the application on this ground, see for example, ChoongYeow Choy and Warren Ganesh, Public Policy Considerations in Arbitral Proceedings in Selected Common Law Jurisdictions (2014) Hong Kong Law Journal 179-205.
The High Court in Government of the Lao People’s Democratic Republic v Thai-Lao Lignite Co Ltd was thus required to decide whether it was New York law or Malaysian law that governed the arbitration agreement. Those who are familiar with this area of international commercial arbitration will be aware that if the parties had agreed that it should be the former, the court in Malaysia would have given effect to the agreement. On the other hand, if the parties had agreed that it should be the latter, the court would have held that Malaysian law governed the arbitration agreement. Courts give credence to the fundamental concept of party autonomy as all international arbitrations primarily arise out of contractual relationships.

In this case, the existence of an arbitration clause was not in dispute. The seat of arbitration had also been clearly identified. New York law was clearly identified and agreed as the law that should govern the substantive or main contract. However, it is a fundamental point in international commercial arbitration that the main contract can be separated from the arbitration agreement. Thus, agreeing that New York law shall govern the main contract did not answer the question of which law should govern the arbitration agreement. What this meant was that the High Court in this case (and many other cases before this) had to second guess which law was intended by the parties to apply to the arbitration agreement.

Essentially, the courts in the common law jurisdictions have adopted one of the following two approaches. One such approach is to hold that the law governing the arbitration agreement is the law of the seat of arbitration. The other approach is to hold that the law governing the arbitration agreement should be the same as the law governing the main contract.

In this case, the High Court in Malaysia held that since the parties had stipulated Malaysia to be the seat of arbitration, the parties had chosen the law of Malaysia as the law governing the arbitration agreement. Based on the finding that Malaysian law applied, the award was set aside. This paper will not seek to discuss the correctness of the approach adopted by the High Court in Malaysia for to do so would again be to digress from the scope of this paper. Two observations are germane at this juncture. The first is that parties in arbitration proceedings cannot escape from court intervention. This may happen through either their own doings or through inevitable consequences. Second, no agreement, no matter how carefully drafted, can provide for all eventualities and eliminate all uncertainties. One can safely be certain that uncertainties can always arise and this will require National Courts to intervene and to decide for the parties, such as the one as illustrated in this case concerning which law should govern an arbitration agreement.

Subsequent Litigation in London, New York and Paris

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The Government of Lao v Thai-Lao Lignite Co Ltd dispute also saw the matter litigated before the National Courts in England, the United States and France. Although the award was set aside by the High Court in Malaysia, Thai-Lao Lignite Co Ltd sought to enforce the award in these other countries. The award was recognized and enforced in the United States and in England by the London and New York courts but disallowed in France by the court in Paris.

**Role of National Courts in Arbitral Proceedings**

It is trite that the existence of an arbitration clause does not and cannot oust the courts of their jurisdiction. Parties are not estopped from going to the courts even though they have opted for arbitration. While National Courts can exist without the assistance, control and interference of arbitral tribunals, arbitral tribunals are always subject to the ubiquitous clutches of judicial control.

It is generally accepted that the stages at which intervention by the courts may become necessary are (1) prior to or at the beginning of the arbitration, (2) during the arbitral proceedings, and (3) at the end of the arbitration. Intervention by the courts is desirable, necessary and unavoidable.\(^\text{15}\) The resulting series of litigation from the disputes involving Astro v Lippo and the Government of Lao v Thai-Lignite Co Ltd amply underscore this point.

The challenge is to ensure that the principles enshrined in the international instruments such as the New York Convention and the Model Law and the grounds provided in these instruments are applied appropriately and consistently. Such a challenge is indeed overwhelming, to say the least.

**Promoting Arbitration through the Model Law and NYC**

The United Nations General Assembly, in its resolution 40/72 of 11 December 1985, recommended “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”.\(^\text{16}\) In a note prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL), it emphasized the point that “The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national

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\(^{16}\) Own emphasis.
laws”. The secretariat further added that the Model Law “reflects a worldwide consensus on the principles and important issues of international arbitration practice”.

Since the New York Convention addresses the issue of recognition and enforcement of foreign arbitral awards, its objectives are more focused. The principal aim of the New York Convention is that foreign and non-domestic arbitral awards “will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards”.

An ancillary aim of the New York Convention is to “require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal”.

Thus, it is obvious that the two most important international instruments on international commercial arbitration seek to facilitate and promote arbitration through the harmonization of the “laws” of international commercial arbitration and to ensure that the principles and important issues of international arbitration practice are clearly appreciated and applied consistently across all jurisdictions. Despite the existence of a consensus by states in the international domain on the principles and important issues pertaining to international arbitration practice and the availability of a template and guidelines to assist states in enacting their local arbitration laws, uncertainties, disparity and divergence amongst states will continue to exist and dominate the practice of international commercial arbitration. This is due in part to following dual overriding reasons.

The first may be attributed to the fact that all states are not obliged to accept and apply the provisions in the Model Law and the New York Convention in toto. The Model Law remains as merely a model law. States are known to apply the Model Law with modifications. Likewise, the New York Convention, even if ratified, is accepted with reservations. Second, and perhaps more importantly, is the fact that the many of the established principles, such as those that call for arbitration agreements and arbitral awards to be recognized and enforced by the courts in all jurisdictions are not couched in absolute terms. For example, in relation to the enforcement of arbitration agreements, a party seeking to avoid the obligation to refer a dispute to arbitration is at liberty to raise various grounds to resist an application for a stay of proceedings before a National

18. ibid.
Similarly, the principle calling for the recognition and enforcement of arbitral awards are subject to exceptions.\(^\text{22}\)

Although these grounds or exceptions are said to be few and are strictly construed, they are nevertheless available to a party seeking to challenge the enforcement of an arbitration agreement or award. Once these grounds are invoked by a party to an arbitration agreement, National Courts are required to intervene, interpret and examine if any of these grounds apply to the facts of the case before them. This is where inconsistent approaches by National Courts or the erratic application of the established principles by National Courts may be inexorable.

**The Way Forward for Member ASEAN States**

Each ASEAN member state can play its role in promoting and facilitating arbitration through legislation and by supporting its arbitration centres, such as the case in Malaysia and in Singapore. While parties to an agreement may choose arbitration as the mechanism for resolving any disputes arising between them, they are in no position to ensure that the entire dispute resolution process is confined within a particular jurisdiction or that the arbitral proceedings are free from court intervention. The very nature of international commercial arbitration is such that the entire dispute settlement process cannot be confined to the boundaries of a single state or jurisdiction and the courts cannot be sidelined.

Regardless of the presence of an arbitration agreement or clause, parties to an international commercial contract are always at liberty to commence an action in any National Court that has jurisdiction over the dispute involving the parties. In order to preempt such a move, the other party to the dispute may seek an anti-suit injunction or an anti-arbitration injunction in any of the National Courts that has jurisdiction over the parties or subject matter of the dispute. Hence, while a party may be able to challenge the jurisdiction of a particular National Court or persuade the particular National Court from hearing the dispute, it cannot prevent the other party from instituting an action at a National Court in a given jurisdiction.

While the place for an application for the setting aside of an award will be based on the seat of arbitration and thus can be predicted or to an extent be “controlled” by the parties, there is a degree of uncertainty in this area of the law. It has been successfully argued that an arbitral award may be set aside at a place outside the seat of arbitration, namely at the National Court where the law governing the main contract applies.\(^\text{23}\)

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\(^{21}\) It is trite that a court is not obliged to enforce an arbitration agreement and thus grant an order for a stay of proceedings if the court is satisfied that the arbitration “agreement is null and void, inoperative or incapable of being performed”. This is merely one of several grounds that may be relied on by a party seeking to challenge the enforcement of an arbitration agreement.

\(^{22}\) It is generally accepted that a party seeking to set aside an arbitral award may rely of any one of 6 grounds and for as the challenging the recognition and enforcement of an arbitral award, there are 7 grounds. These grounds are provided for in Article 34(2) and Article 36(1) of the Model Law.

\(^{23}\) See for example the Indian Supreme Court's 2007 decision in *Venture Global Engineering v Satyam Computer Services Trading Ltd* Supreme Court of India, Civil Appeal No 309 of 2008 (arising out of SLP
Finally, where a winning party will take the award to for purposes of recognition and enforcement is anybody’s guess.

It is noteworthy that all the 10 ASEAN member states have ratified the New York Convention and are thus Convention states. Of the ASEAN member states have local legislation based on the Model Law. This augurs well for international commercial arbitration in the ASEAN region. However, as the National Courts in the ASEAN member states may be required to intervene in arbitral proceedings from time to time, how these National Courts approach the perennial issues and interpret or apply the principles of international commercial arbitration to any given case will have a profound effect on the practice of international commercial arbitration in this region.

It is granted that problems with regard to non-performance and the need to enforce an arbitral awards may only arise in about 10% of all cases determined by arbitration. In the remaining 90% of the case when parties cooperate, there is hardly an issue. Be that as it may, the 10% of cases are not to be taken likely and the challenges posed in these cases should be addressed. As demonstrated in the Astro v Lippo and the Government of Lao v Thai-Lignite Co Ltd disputes, these claims and disputes are by no means insignificant. The stakes run into the millions of dollars.

In view of the foregoing, a number of questions are apt for consideration. Foremost is the question of whether there should be a regional or ASEAN instrument to ensure that the law and practice of international commercial arbitration can be harmonized and applied consistently in the National Courts in this region. It could then be asked that what can a regional treaty or an ASEAN Model Law on International Commercial Arbitration achieve that the New York Convention or the UNICITRAL Model Law have not be able to accomplish?

It must be remembered that the international community has reached a consensus that certain grounds or exceptions must continue to exist to allow for parties who have agreed to insert a dispute resolution clause agreeing for a dispute to be referred and resolved by arbitration or who are embroiled arbitral proceedings to resort to National Courts. Hence, it does not appear as desirable to shut National Courts out altogether or in any way to “instruct” National Courts in the decision making process.

Take for example the ground of public policy. The public policy ground is preserved under the Model Law, the New York Convention and many of the domestic arbitration laws. The contours of arbitrability are and cannot be defined with precision and

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are ultimately to be shaped by the courts. It has been said that public policy is a judicial control devise and how courts interpret this notion will have a considerable impact on the legislative intent and policy of promoting arbitration. It has been noted in one case that “the public policy in the same country may be different at different times.” Therefore, it should not come as surprise that “the public policy in one country, even at the same point in time, may be different from that of another country.”

To further compound the complexity of the concept as outlined above, there are the different types of public policy. Domestic public policy and international public policy can be regarded as the traditional categories. However, it has also been recognized that the European Union public policy is a separate and independent category. An emerging category is known as or commonly referred to as transnational public policy. It has been argued that transnational public policy is the true international public policy or world public policy. Should there be an ASEAN public policy?

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27. Be that as it may, the discretion of the courts may be curbed or controlled to a certain extent. For example, in the case of Australia, s 39(2) of the International Arbitration Act 1974 requires the court to have regard to (a) the objects of the Act; and (b) the fact that: (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and (ii) awards are intended to provide certainty and finality when considering the public policy ground for purposes of recognition of foreign awards under s 8 of the said Act. For a discussion of the above, see the judgment of the Federal Court of Australia in Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011) 277 ALR 415.


29. Ibid.

30. For a discussion on the distinction between national public policy and international public policy, see for example, Marks and Betancourt, “Rethinking Public Policy and Alternative Dispute Resolution: Negotiability, Mediability and Arbitrability” (2012) 78 Arbitration 19.