International Disputes, the Execution of Foreign Arbitral Awards in the Asia Pacific and Two Case Studies

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I. Introduction

The majority of matters that are arbitrated in the international arena are construction disputes involving claims for damages for breach of contract. The primary reasons for the increasing popularity of arbitration are flexibility, expertise on the arbitral panel, and the attraction of the assumed ease of enforcement in countries that are parties to the New York Convention (the Convention[1]). Not only does arbitration provide a neutral forum for parties engaging in international commerce, but the consensual nature of arbitration, the relaxation of the rules of evidence, the limited availability of cross-examination, and the exchange of written submissions means that arbitration should, hypothetically, offer a just, cheap, and quick resolution to commercial disputes. However, there is a gap between the ideals of efficient justice and the reality of problems with enforcement, especially in countries with weak rules of law.

In a perfect world, the winning party may obtain registration of the arbitral award in a Convention country and seek to enforce the judgment without further delay. Enforcement would depend on the domestic law of countries in which enforcement is sought and on the integrity of that country's government. However, skillful lawyers can derail this procedure and effectively delay enforcement of the judgment for years. Reliable data on the success of arbitration in resolving disputes and the ease with which awards are enforced is scarce. However, a recent study by PricewaterhouseCoopers into the success of the arbitration procedure has indicated that of the cases studied, 25% of cases are settled before an arbitral award is rendered, 7% are settled with a subsequent award by consent and 49% end with voluntary compliance with an arbitral award by the unsuccessful party. On the other hand, 11% of cases end in proceedings for enforcement and recognition, and 8% involved an apparent settlement or an award but were followed by litigation. These results would indicate that while arbitration often results in settlement or voluntary compliance with an award, 19% of cases result in litigation seeking to set aside the award or otherwise avoid enforcement.[2]

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1. Convention for the Recognition and Enforcement of Arbitral Awards (New York Convention) (the Convention), June 7, 1959, 21 U.S.T. 2517, art II.

2. GERRY LAGERBERG AND PROFESSOR LOUKAS MISTELIS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES (2008), *available* at http://www.pwc.co.uk/en_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf (an empirical Study carried out by Queen Mary Law School and PricewaterhouseCoopers on international arbitration users in 2008) at 2.

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This article will look at the process of enforcement and the legislative framework for the enforcement of international arbitral awards in Australia, Singapore, Hong Kong and Indonesia using the case study of the long-running dispute between Malaysia's Astro Group and Indonesia's Lippo Group. The article will also look at how enforcement in these Asia Pacific jurisdictions differs from enforcement in the United States in the context of the *Karaha Bodas* case. Finally, the article will touch upon enforcement in New Zealand, which has been relatively straightforward.[3]

II. The Legislative Framework for International Arbitrations

Arbitrations are governed by a multiplicity of procedural rules, both those of the seat of arbitration and institutional procedural rules chosen by the parties. Not only must parties navigate this duality in order to obtain an award, but they must also tackle the procedural rules of any state in which the judgment creditor seeks to execute the award. Even where the UNCITRAL Model Law on International Commercial Arbitration (chosen by the party)[4] has been enshrined by legislation, different countries balance the competing factors of state sovereignty and party autonomy differently. The by-product of balance is that both enforcement and execution of an arbitral award can be a costly and time-consuming process.

A. Australia

In Australia, the main component of the legislative framework governing the enforcement of foreign arbitral awards is the *International Arbitration Act 1974 (Cth)*, which incorporates provisions of the Convention and the Model Law. Over the past 10 years, Australia has taken an increasingly "pro-enforcement" stance, both in terms of new legislative amendments and judicial decisions. This, however, had not always been the case.

Sections 8(5) and 8(7) of the *International Arbitration Act 1974 (Cth)* list the grounds on which an application for the enforcement of an award may be refused by the court. These are similar to the grounds listed in Arts V(1) and V(2) of the Convention. Section 8(3A), a new amendment to the *International Arbitration Act 1974 (Cth)*, now specifies that the grounds in 8(5) and 8(7) are the only grounds on which enforcement may be refused. This addition was introduced to neutralize a judgment of the Supreme Court of Queensland in *Re Resort Condominiums.*[5] Additionally, the amending act has clarified the public policy exception to enforcement in 8(7)(b), by listing two situations in which enforcement may be refused pursuant to this exception.

In *Re Resort Condominiums*,[6] the Queensland Supreme Court had to determine whether it would enforce an interim award which granted an interim injunction against an Australia company. A U.S. company and an Australian company had entered into a license agreement which

3. The Convention has been adopted in all of these countries.

4. United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985).

5. *Re Resort Condominiums International Inc.* [1995] 1 Qd R 406 (Austl.); *see also* Explanatory Memorandum to the *International Arbitration Amendment Act* 2010 (Cth), [41].

6. *Id.*

contained an Indiana arbitration clause. After a dispute arose between the parties, the U.S. company commenced proceedings in the Indiana court for preliminary injunctive relief to prevent the Australian company from carrying out certain activities in contravention of the license agreement and also a referral to arbitration. Both of these orders were granted. The arbitrator subsequently made an interim arbitration order and award, pursuant to which injunctions were granted on the same basis as determined by the Indiana court.

The Queensland Supreme Court held that an interim order and award did not finally determine the issues submitted to arbitration and as a result, the interim order and award was unenforceable under Australia's *International Arbitration Act 1974 (Cth)*. In deciding that the Court retains a residual discretion to refuse to enforce a foreign award outside the specifically enumerated grounds set out in the *International Arbitration Act 1974 (Cth),* the Court relied upon the differences between Article V(1) of the Convention, and its sister section in the Australian *International Arbitration Act 1974 (Cth).* The Court noted the mandatory language of Article V(1) of the Convention in that "recognition and enforcement of the award may be refused . . . *only* if that party furnishes proof" that one of the grounds in the Article has been satisfied. By contrast, the drafters of 8(5) of the *International Arbitration Act 1974 (Cth)* had not included the word *only* in the section. This omission led the Court to conclude that the national courts of Australia retain a residual discretion in relation to the enforcement of international arbitral awards beyond the enumerated grounds in the *International Arbitration Act 1974 (Cth).*

The Court also held that an interim award should not be enforced on public policy grounds, and that the arbitral tribunal's decision was not in conformity with the enforcing state's public policy. In this instance, many of the orders that were the subject of the interim award would not have been made in a Queensland court. In particular, the Court found it concerning that the interim injunction had been granted without undertakings as to damages or appropriate security. Other issues raised by the Court included possible double vexation, as well as practical difficulties in interpretation and enforcement of the interim award.

In *International Movie Group Inc. (IMG) v. Palace Entertainment Corp. Pty. Ltd.,*[7] a U.S. company (IMG) and an Australian company (Palace) entered into a series of agreements for the licensing and distribution of films in Australia. Each agreement contained a California arbitration clause. A dispute arose and was referred to arbitration in California, and an award, including damages, was rendered in favor of IMG. The form of the orders was curious. The arbitral tribunal ordered that if IMG sold or licensed a particular film in Australia or New Zealand in the future, then any net sums received by IMG from such sales would reduce the amount due to it (the May Wine Clause). IMG sought to enforce the award in Australia but Palace argued that the enforcement of the damages component should be refused on the ground that it was manifestly uncertain and therefore void. The argument was that uncertainty existed because the ultimate amount of damages to be paid may have to be adjusted by reference to future events, which had the potential to extinguish the defendant's liability. It was accepted that the May Wine Clause was uncertain.

7. (1995) 128 FLR 458 (Austl.).

The Victorian Court held that uncertainty was a legitimate basis for refusing to enforce a foreign arbitral award, even though it was not one of the enumerated grounds under Section 8 of the *International Arbitration Act 1974 (Cth)* or under Article V of the Convention. The Victorian Court severed the uncertain part of the award, as it was satisfied that the residue allowed to stand was in no way affected by the rejected part of the award. This decision was affirmed by the Victorian Court of appeal in *ACN 006 397 413 Pty. Ltd. v. International Movie Group (Canada) Inc. and Another.*[8]

In *IMC Aviation Solutions Pty., Ltd. v. Althain Khuder, LLC,*[9] there was a dispute between Althain Khuder, LLC and IMC Mining, Inc. in relation to an iron ore mine in Mongolia. The dispute was governed by an arbitration agreement. Khuder commenced arbitration in Mongolia and was ultimately successful. The arbitral tribunal, however, ordered another entity that had not been a party to the arbitration, IMC Mining Solutions, to pay damages to Khuder on behalf of IMC Mining. In 2010, Khuder made an ex parte application to enforce the award in the Supreme Court of Victoria. Khuder was successful at first instance. At the trial, IMC Solutions had unsuccessfully applied to have the order set aside on the basis that IMC Solutions had not been a party to the relevant arbitration agreement. The trial judge found that IMC Solutions was estopped from arguing (in Australia) that it was not bound by the arbitration agreement, as it had not contested the issue in the tribunal hearing or the verification proceeding in Mongolia.[10]

On appeal, however, IMC Solutions was successful. The Court of Appeal controversially allowed the appeal on the basis that an award creditor must satisfy the Court, on a prima facie basis, that the award debtor had been a party to the arbitration agreement. Once the award creditor establishes a prima facie entitlement to an enforcement order, the award debtor may then apply to have the enforcement order set aside on the grounds set out in §§ 8(5) and (7) of the *International Arbitration Act 1974 (Cth)*. As Khuder had failed to prove on a prima facie basis that IMC Solutions had been a party to the arbitration agreement, Khuder was unable to scale the first hurdle and its application for an enforcement order was rejected.

In *Traxys v. Balaji,*[11] an arbitral award had been handed down in England. The award creditor from Luxembourg, Traxys, sought to enforce the award in Australia against the Indian award debtor, (Balaji).[12] There was no dispute between the parties as to the existence of a valid contract between them and as to a breach of the contract by Balaji. Balaji had been granted an injunction in the High Court of Kolkata in India to prevent Traxys from enforcing the award in India. However, Traxys had enjoyed some success in England, where the High Court of Justice in England had ordered the enforcement of the award. Traxys was given permission by the English Court to apply for freezing orders against Balaji in Australia by virtue of it owning shares in an Australian company. Balaji opposed this application on three grounds. First, Balaji

8. [1997] 2 VR 31 (Austl.).

9. (2011) 282 ALR 717 (Austl.).

10. It seems that the Mongolian government had attempted to confiscate the passports of the Australian lawyers acting for the award debtor IMC Solutions, which led them to their decision to leave the country and not appear at the arbitration.

11. (2012) 201 FCR 535 (Austl.).

12. *Id.*

argued that to enforce an award in Australia it must be proved that Balaji had established assets in Australia. Second, enforcing the award would have been contrary to public policy. Third, the commencement and maintenance of this proceeding was a breach of the interim injunction granted by the Indian High Court and therefore constituted a serious contempt of that Court.[13]

The Federal Court of Australia was clear in its pro-enforcement stance of international arbitral awards and rejected all three grounds of attack. Traxys was not obliged as a condition precedent of being granted any relief, to prove that Balaji had assets in Australia. First, there was nothing to this effect in the *International Arbitration Act 1974 (Cth).* Second, it was not contrary to Australian public policy to direct the entry of judgment or to make an order in terms of a foreign award in the absence of proof that the award debtor had assets in Australia. Nor was it against Australian public policy to take those steps in the face of evidence which suggests or proves that the award debtor had no assets in Australia. Third, it was not consistent with Australian public policy to decline to enforce the award simply because Balaji had pursued an appeal in India. The Court made it clear that the public policy ground of refusal to enforce an award should not be seen as a catch-all defense of last resort.[14] The Court emphasized that it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement.[15] Judgment was entered in favor of Traxys and the award was enforced.

In *Amcor Packaging (Australia) Pty. Ltd. v. Baulderstone Pty Ltd.,*[16] Amcor and Baulderstone had been in negotiations for the supply by Amcor to Baulderstone of a building to house a paper machine. Amcor had been successful in acquiring the preliminary works and a Delivery Proposal Agreement had been signed. Amcor began performing the work even though a final contract had not been signed, as the parties fell into dispute. Amcor indicated that it might commence proceedings against Baulderstone, which retaliated by seeking to stay the proposed proceedings pursuant to § 8 of the *Commercial Arbitration Act 2011 (Vic)*[17] on the basis that the Delivery Proposal Agreement required disputes that arose out of, or in connection with, it to be referred to arbitration.

The Court stayed the entire proceeding even though the whole dispute did not fall within the ambit of the arbitration agreement.[18] The Court ordered that part of the proposed proceedings as between Amcor and Baulderstone be stayed pursuant to § 8 of the *Commercial Arbitra-*

13. *Id.* at 542–43.

14. *Id.* at 560.

15. This reflects the formulation of public policy in Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie due Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).

16. [2013] FCA 253 (Austl.).

17. Australia has a federal and state system like the United States. Each of the States and Territories have their own domestic arbitration acts which seek to make commercial arbitration more attractive for the resolution of domestic commercial disputes. Apart from the Australian Capital Territory, each of the States and the Northern Territory have enacted uniform domestic arbitration acts which are based upon the UNCITRAL Model Law. Australia's *International Arbitration Act 1974 (Cth),* which governs the enforcement of international arbitral awards in Australia is similarly based upon the UNCITRAL Model Law.

18. *Supra* note 16 at ¶ 47.

tion Act 2011 (Vic).[19] The remainder of the dispute was stayed pursuant to § 23 of the *Federal Court Act 1976 (Cth)* pending the resolution of the arbitration proceedings.[20] The Court construed the arbitration agreement and gave the definition of "Dispute" as defined in the Delivery Proposal Agreement a very broad commercial interpretation.[21] Significantly, the Court held that the existence of additional matters that fell outside the scope of the arbitration agreement was not a ground for staying the arbitration.[22] The Court held that the additional matters could be resolved by the Court following the conclusion of the arbitration.[23]

In *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Castel Electronic Pty. Ltd.*,[24] the Australian courts affirmed their pro-enforcement stance. TCL, a Chinese manufacturer, and Castel Electronics, an Australian distributor, were parties to an agreement for the distribution in Australia of air conditioning units manufactured in China by TCL. The agreement provided for arbitration in the event of any dispute that could not be resolved by mutual agreement. A dispute arose between the parties, as TCL had been selling air conditioning units to other distributors in contravention of the agreement with Castel. The dispute was submitted to arbitration and an award was delivered in favor of Castel. TCL sought to have the award set aside under Articles 34 and 36 of the UNCITRAL Model Law on the grounds that the arbitrators had not accorded TCL procedural fairness in connection with the making of the award.

The Court held that the "a-national independence" of the international arbitral legal order created by the Convention and the Model Law required at least two things from a national court for its efficacy. One is recognition that interference by national courts, beyond the matters identified in the Model Law as grounds for setting aside or non-enforcement would undermine the system. The other is the swift and efficient judicial enforcement and legitimate testing of grounds under Articles 34 and 36. Courts must act prudently, sparingly, and responsibly, but must also act decisively when the grounds enumerated in Articles 34 and 36 are revealed. The system of international arbitration which is enshrined in the Model Law was designed to place independence, autonomy, and authority into the hands of the arbitrators through recognition of the autonomy, independence, and free will of the contracting parties.

The Court was, however, clear that a party would not be allowed to, under the guise of a claim of a denial of natural justice, examine all the factual findings of a tribunal on the pretext that the findings had been made on the basis of no evidence.[25] Prior to reaching this conclusion, the Court had carried out a survey of whether "the no evidence rule" was part of the rules of natural justice in New Zealand, Hong Kong and Singapore and concluded that there had been no authoritative recognition of the "no evidence rule'" as part of the rules of natural jus-

19. *Id.*

20. *Id.*

21. *Id.* at ¶ 29.

22. *Supra* note 20.

23. *See also* Gujarat NRE Coke Ltd. v. Coeclerici Asia 1 (Pte) Ltd. [2013] EWHC 987 (Austl.); Pipeline Services WA Pty. Ltd. v. ATCO Gas Australia Pty Ltd. [2014] WASC 10 (Austl.) (further examples of the pro-enforcement approach of Australian courts. The Court also touches upon the doctrine of non-arbitrability.)

24. [2014] FCA 1214 (Austl.).

25. *Id.* at ¶¶ 54–55.

tice.[26] The Court affirmed that natural justice is comprised of two rules: the adjudicator must be disinterested and unbiased, and the parties must be given adequate notice and the option to be heard.[27]

Finally, the Court held that no international arbitral award should be set aside in Australia as being contrary to Australian public policy unless fundamental norms of justice and fairness are breached. The current position in Australia has moved away from the position taken by the Supreme Court in Queensland in *Re Resort Condominium*[28] and the Victorian Court of Appeal in *Althain Khuder.*[29]

B. Indonesia

Indonesia, a former Dutch colony, attained independence in 1945, but retained large portions of the Dutch Civil Code, which remain in place until new laws are passed to replace them. While Indonesia has ratified the Convention, the law governing enforcement of foreign awards *Arbitration Law, Law No. 30 of 1999*[30] (Arbitration Law), does not incorporate the terms of the Convention into its domestic law.[31] In a move to promote efficiency, the Arbitration Law vests the District Court of Central Jakarta with jurisdiction to issue orders of "*exequatur*" to enforce international arbitration awards, except where the Indonesian State is a party.[32] However, the Arbitration Law does require reciprocity between Indonesia and the country in which the arbitral award was rendered.[33] Furthermore, while the Arbitration Law provides for the refusal of enforcement on the grounds of "public order" ("keteriban umum" or public policy),[34] the Arbitration Law does not define the term, leaving it open to wide judicial interpretation.

Critics have noted a high rate of judicial interference with the enforcement of international arbitral awards on the grounds of public order and territorial sovereignty.[35] For example, Indonesian courts have factored public policy into enforcement of mandatory laws. Specifically, in *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto,*[36] the parties contracted for the sale of Indonesian sugar imports in circumstances where the Indonesian government required that companies hold licenses for such imports. The Indonesian buyer refused to complete the contract, and the

26. *Id.* at ¶ 149.
27. *Id.* at ¶¶ 149–50.
28. *Re Resort Condominiums International Inc.* [1995] 1 Qd R 406 (Austl.).
29. IMC Aviation Solutions Pty. Ltd. v. Althain Khuder LLC [2011] 282 ALR 717 (Austl.)
30. Karen Mills, *Enforcement of Arbitral Awards in Indonesia,* 3 Int. A.L.R 192 (2000), www.arbitralwomen.org/files/publication/4310102632224.pdf (Mills).
31. Junita Fifi, *Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia,* MqJlBLaw 369 (2008) (Fifi).
32. Mills, *supra* note 30, at 4.
33. *See id.* at 6 (stating that any plaintiff seeking to enforce an award must provide a statement from the Indonesian diplomatic mission confirming that the country of the seat of arbitration had diplomatic relations with Indonesia and is a signatory to *the Convention*).
34. Arbitration Law (Art. 66(c), No. 30/1999) (Indon.); Fifi, *supra* note 31, at 369 .
35. Fifi, *supra* note 31, at 371.
36. E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto, No. 271/PDT.G/1999/P/JKT/PST.

seller successfully obtained an arbitral award in London. The buyer brought an action in the District Court of Central Jakarta arguing that the original contract was void *ab initio* for violation of Indonesian public policy. The buyer argued that there had been a violation of domestic law requiring governmental authorization to import sugar. The action succeeded. The Court held that the violation of the domestic law was a violation of public policy. The buyer was also successful on appeal to the Indonesian Supreme Court.[37]

In *Perusahaan Pertambangan Minjak dan Das Bumi Negara* (Pertamina) *v. Karaha Bodas Co., LLC* (Karaha Bodas),[38] an Indonesian company wholly owned by the Indonesian government successfully prevented the enforcement of a $270 million (U.S.) award. The award had been made in Geneva, in favor of two Cayman Island subsidiaries of a U.S.-owned electric company in Indonesia that had its power project in Indonesia canceled in 1998 in the wake of the Asian Financial Crisis. Pertamina had sought unsuccessfully to have the award annulled twice in Switzerland.[39] When Karaha Bodas started seizing assets of Pertamina in the United States, Hong Kong, Singapore and Canada, Pertamina turned to its home venue in Indonesia and petitioned the Jakarta Central District Court to annul the award pursuant to Indonesian law. The Jakarta Central District Court obliged and cited public policy grounds, denial of procedural and substantive fairness, and violation of natural justice as reasons for annulling the award. The Court ruled this way despite the seat of the arbitration's location in Geneva, and not Indonesia. Nevertheless, despite the purported annulment of the award by the District Court of Central Jakarta, the award was later enforced in Hong Kong and the United States.[40]

1. Karaha Bodas in the United States

In the United States,[41] Karaha Bodas successfully sought enforcement of the award in the United States District Court for the Southern District of Texas. This decision was affirmed by the United States Court of Appeals for the Fifth Circuit.[42] An application for a writ of certiorari by the Indonesian government, appearing as amicus curiae in the Supreme Court, was also unsuccessful.[43]

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37. Mills, *supra* note 30 at 10; Pertamina Energy Trading Ltd. v. Karaha Bodas Co., LLC and Others [2007] SGCA 10.

38. Decision of the District Court of Central Jakarta No. 86/PDT.G/2002/PN/JKT/PST.

39. Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 490 (S.D. Tex. 2003).

40. Theoretically, an award can only be annulled by a court in the seat of the arbitration.

41. Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936 (S.D. Tex. 2001) (summary judgment of the arbitral award was granted and final judgment confirming the award was entered); Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 470 (S.D. Tex. 2003) (preliminary injunction sought); Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 367 (5th Cir. 2003) (subsequent appeal).

42. Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004).

43. PT Pertamina (Persero), fka Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, v. Karaha Bodas Co., LLC, 543 U.S. 917 (2004).

However, in addition to seeking enforcement, Karaha Bodas had sought a preliminary injunction to prohibit Pertamina from enjoining Karaha Bodas's attempt to execute the Court's judgment, and to take steps to enforce the arbitral award in the United States or other jurisdictions. Karaha Bodas had also sought an anti-suit injunction prohibiting Pertamina from pursuing its annulment action in Indonesia. The District Court for the Southern District of Texas granted the preliminary injunction on the basis that the injunction entered against Karaha Bodas in Indonesia and the annulment proceeding pending in Indonesia threatened the District Court's jurisdiction to enforce its judgment and petitioner's rights.[44]

On appeal, the U.S. Court of Appeals for the Fifth Circuit held that the District Court had abused its discretion in granting the preliminary injunction. On that issue, the Court reversed the District Court. The Court noted that under the Convention, a court maintains the discretion to enforce an arbitral award even when nullification proceedings are occurring in the seat of the arbitration. American courts and courts of other countries have enforced awards, or permitted their enforcement, despite prior annulment in courts of primary jurisdiction. The Convention only requires awards to be binding on the parties rather than final in order for enforcement to occur in a court of secondary jurisdiction. The Court noted that the Convention does not require recognition in the rendering state before enforcement in a court of secondary jurisdiction is possible.[45] By its very structure, which allows concurrent enforcement and annulment actions as well as enforcement actions in third countries, the Convention envisages multiple proceedings that address the same substantive challenges to an arbitral award.[46]

2. Karaha Bodas in Hong Kong

In *Karaha Bodas Co., LLC* (Karaha Bodas) *v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara* (Pertamina) *(No. 2),*[47] the Hong Kong High Court of First Instance rejected the argument of Pertamina, the party resisting the enforcement of the award on the grounds that the seat of the arbitration had been Indonesia, and that the arbitral award had been annulled. The Court held both as a matter of fact and of law that the seat of the arbitration had been Geneva, Switzerland.[48] During the course of the judgment, Justice Burrell considered that it would have been possible for the *lex arbitri* to differ from the seat of the arbitration. The contract between the parties had specified that the substantive law of the contract was Indonesian,

44. *See* Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 367 (5th Cir. 2003), for an overview of the procedural history.

45. *Id.*

46. *Id.*

47. [2003] 4 H.K.C. 488.

48. Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara [2003] H.K.C. 380 at [18]; *see also* Perusahaan Pertambangan Minyak dan Gas Bumi Negara v. Karaha Bodas Co. LLC (No 2) (Pertamina) [2003] 4 H.K.C. 488.

but that the seat of the arbitration would be Geneva, Switzerland. The contract was silent as to the *lex arbitri*, but Justice Burrell held that the parties could have nominated the *lex arbitri* in their contract.[49]

On appeal to the Court of Appeal, Pertamina sought leave to adduce new documentary evidence, and argued that the Arbitral Tribunal had been guilty of fraud, in that it had rewritten the agreement between the parties and that the award of damages for loss of profit in the sum of $150 million (U.S.) had been arbitrary. The argument in relation to fraud was unsuccessful. The Court of Appeal was not satisfied that Pertamina had established a prima facie case of fraud, bad faith, or lack of good faith, or a case which had a reasonable prospect of success, and it also refused leave to adduce the further documents on appeal.[50] Pertamina was then granted leave to appeal to the Court of Final Appeal.[51] However, the appeal was unsuccessful.[52] Although Karaha Bodas was ultimately triumphant in Hong Kong, the enforcement process in Hong Kong took more than six years to conclude.

C. Hong Kong

Hong Kong was one of the first jurisdictions to adopt the Model Law.[53] Hong Kong's new arbitration legislation, the *Arbitration Ordinance of 2011* (Arbitration Ordinance), makes "the fair and speedy resolution of disputes by arbitration without unnecessary expense"[54] its explicit aim under § 3(1). This objective is based on principles of minimal judicial interference and party autonomy referred to in § 3(2).

In *Paklito Investment Ltd.* (Palkito) *v. Klockner East Asia Ltd.*(Klockner),[55] the parties had entered into a sale and purchase contract, which provided for China International Economic and Trade Arbitration Commission (CIETAC) arbitration. A dispute regarding the quality and

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49. [2003] 4 H.K.C. 488, at 18. In Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 490 (S.D. Tex. 2003), the U.S. District Court for the Southern District of Texas had also found that the *lex arbitri* had been Switzerland on the basis of the general rule that the procedural law of the place of arbitration governs an arbitration. *See also* Philippines v. Philippines International Air Terminals Co., Inc. [2007] 1 SLR(R) 278, in which the Government of Philippines had entered into a construction contract with a private company. The tribunal had applied the doctrine of severability to find that the arbitration agreement was severable from the main contract which had been invalidated by the Philippine's Supreme Court. The proper law of the main contract had been designated as Philippines law in a choice of law clause. An issue for the arbitral tribunal had been the law governing the arbitration procedure and the proper law of the arbitration agreement. The tribunal had decided that the law governing the arbitration procedure and the proper law of the arbitration agreement was the law of Singapore. It had been persuaded by the fact that Singapore had been designated as the place of arbitration because it was a neutral venue for the resolution of disputes. This had outweighed the fact that the proper law of the main contract had been Philippines law, the fact that both parties were Filipino and the fact that the project was carried out entirely in the Philippines. The doctrine of severability has also been applied in New Zealand in Carr v. Gallaway Cook Allan [2014] 1 NZLR 792.

50. [2007] H.K.L.R.D. 1002, at 83–84.

51. [2008] H.K.C. 447.

52. [2008] H.K.C. 1902.

53. *See* David Sandborg, *Arbitration in Hong Kong, in* INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA (Phillip J. McConnaughay & Tom Ginsburg eds., JurisNet, LLC, 2013).

54. *See* Arbitration Ordinance, (2011) Cap. 609, 2, § 3(1) (H.K.).

55. [1993] 2 H.K.L.R. 39.

quantity of the goods arose, and CIETAC appointed an expert to speak on those issues. Klockner objected to this decision. When Klockner received a copy of the report, it informed CIETAC of its intention to make submissions on the report. However, before receiving these submissions, CIETAC rendered an award in favor of Paklito. Paklito applied for enforcement of the award and Klocker opposed the application on the basis of § 44(2)(c) of the Arbitration Ordinance, namely, that it had been prevented from presenting its case to CIETAC. It also relied on the public policy defense set forth in § 44(3) of the Arbitration Ordinance.

The Court exercised its discretion to refuse the enforcement of the award. The Court rejected the public policy defense, noting that it should be construed narrowly and enforcement may be denied on this basis only where such enforcement would violate the forum state's "most basic notions of morality and justice."[56] However, the Court held that a fatal procedural irregularity had occurred during the arbitral proceedings. Klockner had been prevented from presenting its case, and had been denied a fair and equal opportunity to be heard. Klockner should have been provided with the opportunity to comment upon or adduce evidence to rebut the view of the court-appointed expert. A serious breach of due process had occurred and the enforcing court, taking heed of its own principles of fairness and due process, could not be expected to ignore such a breach.

In *Hebei Import & Export Corp v. Polytek Engineering Co. Ltd.*,[57] Polytek, a Hong Kong-based company, had sold defective equipment to Hebei, a Chinese company that had then sold the defective equipment to a third party. Hebei referred the matter to arbitration before CIETAC, and the tribunal found in its favor. Polytek applied to the People's Court in Beijing to have the award set aside but failed. Hebei was granted leave in Hong Kong to enforce the award. Polytek applied to have that order set aside, but was unsuccessful. Polytek was successful in the Court of Appeal, and Hebei then appealed to the Hong Kong Court of Final Appeal.

The main issue was whether Polytek had been unable to properly present its case, so as to result in a serious breach of natural justice, arising from the fact that the chief arbitrator and experts appointed by the tribunal at the request of Polytek had inspected the defective equipment at the user's premises in the presence of Hebei's technicians, but in the absence of Polytek's. Polytek argued that it had not received proper notice of the inspection, and had not had the opportunity to attend or to brief its own experts of the manufacturer of the equipment. Polytek also alleged that it had been denied a further hearing following the inspections even though it had been given an opportunity to make further submissions on the experts' reports and that it had been denied an opportunity to call the manufacturer to give evidence on the report's findings.[58]

In relation to each of these alleged irregularities, Polytek had not raised any objection during the course of the arbitration. Polytek also argued that the chief arbitrator was biased as a result of alleged communications with Hebei. Finally, Polytek argued that the apparent bias on

56. *See* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie due Papier (RAKTA), 508 F.2d 969 (1974) (reflecting the same formulation of public policy).

57. [1999] 2 H.K.C. 205.

58. *Id.* at 34.

the part of the tribunal would violate the most basic notions of justice and morality in Hong Kong.

The Court of Final Appeal held that an unsuccessful party may challenge the enforcement of awards by either applying to the courts at the seat of arbitration to set aside an award, or by waiting for the successful party to attempt to enforce the award and raising an objection at that stage. A party is not bound to elect between these two remedies. Polytek was entitled to rely upon the public policy ground in the court of enforcement. In theory, a failure to raise the public policy ground in proceedings to set aside an award cannot operate to preclude a party from resisting the enforcement of the award on that ground in the enforcing court in another jurisdiction. However, a party may be precluded by its failure to raise a point before the court of supervisory jurisdiction if it wants to raise that point later before the court of enforcement. Failure to raise such a point may amount to an estoppel or a want of bona fides, which is enough to justify the court enforcement of an award.[59]

The Court of Final Appeal rejected the challenge of Polytek, and was not satisfied that Polytek had been unable to present its case. Further, the Court held that Polytek had lost its right to complain about non-compliance with procedural issues. Any challenge to non-compliance with procedural rules should have been done during the course of the arbitration, and not concealed for later use. The Court of Final Appeal accepted that a party should have an opportunity to present its case and to vie for an award before a tribunal that was neither influenced nor seen to be influenced by private communications. Unfortunately, the failure of Polytek to object to the alleged irregularities that had occurred during the course of the arbitration gave rise to the foundation for its complaint of a violation of public policy. Consequently, the Court of Final Appeal exercised its discretion to enforce the arbitral award.

In *China Nanhai Oil Joint Service Corp. Shenzhen Branch* (China Nanhai) *v. Gee Tai Holdings Co. Ltd.* (Gee Tai),[60] Gee Tai opposed enforcement on the ground set out in § 44(2) of the Arbitration Ordinance. Gee Tai argued that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. The Arbitration Agreement had provided for disputes to be submitted in Beijing. However, China Nanhai had submitted the case for arbitration in Shenzhen. CIETAC maintained separate lists of arbitrators for Beijing and Shenzhen, but the Court enforced the award despite this.

The Court held that on a true construction of the Convention, Klockner had been under a duty of good faith which it had not fulfilled and that estoppel was a fundamental principle of good faith.[61] It also ruled that the party resisting enforcement was estopped from raising this point as it had been aware that the composition of the tribunal might be wrong but had chosen to fight the case without making any formal submission to either CIETAC or the tribunal. In these circumstances, the Court did not have to exercise its discretion to refuse enforcement of the award, since Gee Tai Holdings was estopped from relying on the incorrectly constituted tri-

59. *Hebei*, [1999] 1 H.K.L.R.D. 665 (H.C.F.A) (citing Paklito Investment Ltd. v. Klockner East Asia Ltd. [1993] 2 H.K.L.R. 39, at 48–49).

60. [1994] 3 H.K.C. 375.

61. [1994] 3 H.K.C. 375, 376.

bunal. Gee Tai Holdings had gotten what it had bargained for, namely three Chinese arbitrators under CIETAC Rules.[62] It is clear that in Hong Kong, a court will only refuse enforcement of an award if the defendant's rights have been violated in a material way.[63] Relying upon technical objections will not satisfy defendants, although it will allow the defendant to delay the inevitable, as the challenge to enforcement works its way to the Court of Final Appeal.

D. Singapore

Singapore's *International Arbitration Act* (Cap. 143A, 1995) (Singapore IAA) adopts the Model Law as the foundation of its legislative framework for international arbitration, reflecting its status as a hub of international financial and commercial activity. The provisions of the Singapore IAA[64] and the Model Law,[65] which limits the potential for courts to interfere in the enforcement process, encapsulates Singapore's preference for minimal curial intervention in international arbitration.[66]

Courts in Singapore have affirmed the finality of arbitral awards in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA.*[67] In that case, the Singapore Court of Appeal held that there is no appeal for an error of law or fact made in an arbitral decision where the seat was Singapore. Errors of law or fact do not engage the public policy of Singapore under Article 34(2)(b)(ii) of

62. [1994] 3 H.K.C. 375 at 388.

63. *See* Pacific China Holdings Ltd. v. Grand Pacific Holdings Ltd. [2012] 3 H.K.C. 498. The Court of Appeal noted the uncontroversial approach of the Court that in an application to set aside an award pursuant to § 34C(4) of the Arbitration Ordinance, the Court was concerned with the structural integrity of the arbitration proceedings. The remedy of setting aside was not an appeal and the court would not address itself to the substantive merits of the dispute, or to the correctness of otherwise of the award, whether concerning errors of fact or law: at [7]. The Court of Appeal held that except in the most egregious cases so that one could say that a party has been denied due process, the wide discretion of arbitrators and the flexibility of the arbitral process has been confirmed by national courts which regularly reject the procedural arguments of disappointed parties: at [55]. Only a sufficiently serious error could be regarded as a violation of art 18 of art 34(2)(a)(ii) and an error would only be sufficiently serious if it had undermined due process: at [95]. A party who had had a reasonable opportunity to present its case would rarely be able to establish that he had been denied due process. How a court might exercise its discretion in any particular case would depend on the view it took of the seriousness of the breach. Some breaches might be so egregious that an award would be set aside although the result could not be different. The burden is on the applicant to show that he had or might have been prejudiced: at [106].

64. *See* International Arbitration Act, (1995) Cap. 143A, § 6(2).

65. *See* UNCITRAL, Model Law on International Commercial Arbitration, Arts. 12, 13, 16(2), 24, 34(2), June 21, 1985.

66. *See* Lih Shyng Yang & Leslie Chew, *Arbitration in Singapore, in* INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA (Phillip J. McConnaughay & Tom Ginsburg eds., JurisNet, LLC, 2013).

67. *See* [2007] 1 SLR 597.

the Model Law, and cannot not be set aside under Article 34(2)(a)(iii) of the Model Law.[68] In making this finding, the Singapore Court[69] declined to follow the Supreme Court of India in *Oil & Natural Gas Corporation alt v. SAW Pipes Ltd.*,[70] where the Supreme Court of India held that an arbitral award that was inconsistent with the provisions of the *Indian Arbitration and Conciliation Act,*[71] and therefore wrong in law, was "patently illegal" and liable to be set aside on the ground that it was in conflict with Indian public policy. This error of law was contrary to Indian public policy as contemplated by the *Indian Arbitration and Conciliation Act.*[72] The Singapore Court subscribed to a narrow scope of public policy. The Court held that public policy should only operate in instances where the upholding of an arbitral award would "shock the conscience'"or is "clearly injurious to the public good or . . . wholly offensive to the ordinary reasonable and fully informed member of the public" or where it violates the forum's most basic notion of morality and justice.[73] It decided that this would be consistent with the concept of public policy, as can be ascertained from the preparatory materials to the Model Law.[74] The Court also affirmed that a negative jurisdictional ruling does not constitute an arbitral award for the purposes of Article 34 of the Model Law, as one was not a decision on the substance of the dispute.[75] The mere titling of a document as an award does not make it an award as defined by the Act.[76]

It is interesting that until the recent *Astro* decision[77] there had been some conflict in the Courts of Singapore as to whether an award debtor may resist an award, not only by bringing an action at the seat of the award, but also by fighting an application by an award creditor to enforce an award. In *Newspeed International Ltd. v. Citus Trading Pte. Ltd.*,[78] the Singapore High Court held that these options were "alternatives and not cumulative," indicating a strict approach to the finality of awards and limiting the possibility of re-litigation. In this case,[79] the High Court explained the decision of *Paklito Investment Ltd. v. Klockner East Asia Ltd.*[80] on the basis that although the court had decided that it was not necessary for the defendants to appeal to the Chinese court before seeking an order from the Hong Kong court, the defendants could

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68. *See id.* at 621[57]. Similarly, in *Government of the Republic of the Philippines v. Philippine International Air Terminals Co Inc.* [2007] 1 SLR 278, the court held that an application to set aside an award is not a review on the merits of the decision. An arbitral award is not liable to be struck down on application in the courts because of allegations that it was premised on incorrect grounds whether of fact or of law. This is by virtue of the exclusivity of the grounds for setting aside awards in Art. 34 of the Model Law, except for the narrow grounds set out in § 24 *(Singapore) IAA*. Setting aside proceedings must take place at the seat of arbitration under § 8 (*Singapore*) *IAA* (*see also* Arts. 1(2) and (6) of the Model Law).

69. *See Philippines*, 1 SLR(R) 597 at 620[56] and 621[57].

70. *See* Oil & Natural Gas Corp. alt v. SAW Pipes Ltd., A.I.R. 2003 S.C. 2629 (India).

71. *See* Indian Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

72. *See id.*

73. *See also* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie due Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).

74. *See Philippines*, 1 SLR(R) 597 at 622[59].

75. *See id.* at 624[66].

76. *See id.* at 625[70].

77. *See* PT First Media TBK v. Astro Nusantara International BV & Others (2013) SGCA 57 (Singapore).

78. Newspeed Int'l Ltd. v. Citus Trading Pte. Ltd. (2003) 3 SLR 1.

79. *See id.*

80. *See* Paklito Investment Ltd. v. Klockner East Asia Ltd. (1993) 2 HKLR 39 (Hong Kong).

proceed to a Chinese court and, if unsuccessful, make a claim in the Hong Kong court.[81] It is clear that the decision of the Hong Kong Court of Final Appeal in *Karaha Bodas*[82] had not been brought to the attention of the Singapore High Court in *Newspeed*. Nevertheless, the recent *Astro*[83] decision makes it clear that the remedies are cumulative rather then alternatives.

The doctrine of non-arbitrability has also been recently dealt with in detail by the Singapore High Court in *Silica Investors Ltd. v. Tomulugen Holdings Ltd. & Others*[84] in the context of whether a minority oppression claim was arbitrable. In essence, the "non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by "private" arbitration should not be given effect."[85] Examples of statute-based relief that would invariably affect third parties or the public at large can only be granted by the courts in the exercise of their powers conferred upon them by statute, including an order to wind up a company.[86]

The High Court surveyed the Courts in England,[87] Australia[88] and Canada[89] and looked at the pros of each of the approaches taken by the three jurisdictions. The Singapore High Court correctly decided that an arbitral tribunal has no power to make orders that are binding on "third parties." It is interesting that the Court construed § 12(5) of the Singapore IAA,

81. *See* Newspeed, 3 SLR(R) 1 at 6[26].

82. *See* Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357 at 367 (5th Cir. 2003).

83. *See* PT First Media TBK v. Astro Nusantara International BV & Others [2013] SGCA 57 (Singapore).

84. *See* Silica Investors Ltd v. Tomulugen Holdings Ltd & Others [2014] 3 SLR 815.

85. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 768 (Kluwer Law International, 3rd Ed, 2009); *see also* Silica Investors Ltd v. Tomulugen Holdings Ltd & Others [2014] 3 SLR 815. at 842[102]–[103].

86. *See* Silica Investors Ltd v. Tomulugen Holdings Ltd & Others [2014] 3 SLR 815 at 839[94]–[95].

87. *See* Fulham Football Club (1987) Ltd. v. Richards [2011] 2 W.L.R. 1055. Here, the approach in England allows all minority oppression claims to go for arbitration. If the arbitral tribunal is of the view that a winding up or buy-out order is appropriate, then the parties can go to court to obtain the necessary orders, but if not, the award takes effect in the normal way. In the former case, the court adopts the findings and remedies proposed by the arbitrator and merely proceeds to enforce the same by making the appropriate orders, e.g., a winding up or a buy-out order or cancel or vary a resolution; *see also* Silica Investors Ltd v. Tomulugen Holdings Ltd. & Others [2014] 3 SLR 815 at 848[121(b)]. This is to be contrasted with the earlier decision of Exeter City Association Football Club Ltd. v. Football Conference Ltd. [2004] 1 WLR 2910 where the judge held that all minority oppression claims are not arbitrable and which was overruled by the later decision of Fulham Football Club (1987) Ltd. v. Richards [2012] Ch 333.

88. The position in Australia is that minority oppression claim is arbitrable, insofar as the remedies sought are inter partes and not in rem: Silica Investors Ltd v. Tomulugen Holdings Ltd & Others [2014] 3 SLR 815 at 836[75]–837[84].

89. There are two approaches in Canada. One approach is that a minority oppression claim is arbitrable and the arbitral tribunal has the power to grant all the remedies or reliefs that are available to the courts: Silica Investors Ltd. v. Tomulugen Holdings Ltd. & Others [2014] 3 SLR 815 at 838[88]–[89]; The other approach in Canada, as exemplified in ABOP LLC v. Qtrade Canada Inc. (2007) 284 DLR (5th) 171, is to adopt a two-stage approach by leaving the arbitral tribunal to make all the necessary findings of fact and whether there has been unfair prejudice or commercial unfairness and where the tribunal finds there was oppression, then the oppressed minority shareholder can carry on with the minority oppression claim before the court and it is for the court to make the appropriate orders, including the winding up: Silica Investors Ltd. v. Tomulugen Holdings Ltd. & Others [2014] 3 SLR 815 at 838[90]–[91] and 848[121(a)].

which provides that the arbitral tribunal "may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court narrowly."[90] The Singapore High Court adopted the approach of New Zealand that § 12(5) of the Singapore IAA cannot be construed as conferring upon arbitral tribunals the power to grant all statute-based remedies or reliefs available to the High Court. The Singapore Court held that § 12(5) has a more limited purpose and an arbitral tribunal cannot exercise the coercive powers of the Court or make awards *in rem* or bind third parties who are not parties to the arbitration. The Singapore High Court concluded that some statutory claims may straddle the line between arbitrability and non-arbitrability depending upon the remedies that are sought.[91] In the context of minority oppression claims, the arbitrability of the remedy sought could affect the arbitrability of the claim.[92] At the end of the day, while the Singapore High Court did not lay down a general rule, the High Court was of the view that most minority oppression claims would not be arbitrable. This is a function of the fact that it is unlikely that all relevant parties, including third parties whose interests may be affected, may be parties to the arbitration and, secondly, the nature of the remedy sought.[93]

E. New Zealand

In New Zealand, *The Arbitration Act 1996* governs the enforcement of international arbitral awards. A party may apply to the High Court of New Zealand to have an arbitral award enforced like a domestic judgment in terms of the award. Section 34 of *The Arbitration Act 1996* deter-

90. The Singapore High Court adopted the approach of New Zealand which has a similar section in their legislation, that subject to the agreement of the parties, an arbitral tribunal will be able to apply any provision of any of the contracts statutes or any other relevant enactment conferring powers on the court, except so far as its application by the arbitral tribunal may be excluded by considerations of arbitrability or public policy: Silica Investors Ltd. v. Tomulugen Holdings Ltd. & Others [2014] SGHC 101 (Sing.) ¶¶ 106-107.

91. Silica Investors Ltd. v. Tomulugen Holdings Ltd. & Others [2014] SGHC 101 (Sing.) ¶¶ 112–114.

92. *Id.* at ¶ 120.

93. *Id.* at ¶¶ 140–42.

mines the circumstances in which enforcement of an arbitral award may be avoided.[94] Paragraphs (1) to (4) of Article 34 of the First Schedule of *The Arbitration Act* 1996 closely follow Article 34 of the Model Law. Paragraphs (5) and (6) were added upon the recommendation of the Law Commission. Paragraph (6) defines what constitutes a contravention of public policy. The approach to enforcement has proved to be relatively straightforward. Curiously, New Zealand courts have held, contrary to ordinary international arbitration principles that an error of law or fact may constitute a breach of natural justice and thereby is a contravention of public policy.[95]

In *Downer-Hill Joint Venture v. Government of Fiji*,[96] Downer-Hill had been engaged by the government of Fiji to carry out road maintenance in Fiji. Following the completion of the works, Downer-Hill claimed substantial amounts in additional payments owed, and initiated ICC arbitration in accordance with the relevant contract. Downer-Hill then sought to have the award set aside on four principal grounds, including conflict with public policy. The govern-

94. Section 34 of the Arbitration Act of 1996 (N.Z.):

> Application for setting aside as exclusive recourse against arbitral award
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).
>
> (2) An arbitral award may be set aside by the High Court only if—
>
> (a) the party making the application furnishes proof that—
>
> (i) a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this schedule from which the parties cannot derogate, or, failing such agreement, was not in accordance with this schedule; or
>
> (b) the High Court finds that—
>
> (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or
>
> (ii) the award is in conflict with the public policy of New Zealand . . .
>
> (6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if—
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred—
>
> (i) during the arbitral proceedings; or
>
> (ii) in connection with the making of the award.

95. *See* Downer-Hill Joint Venture v. Gov't of Fiji [2005] 1 NZLR 554 (HC).

96. *Id.*

ment of Fiji sought to have the setting aside proceedings struck out on the ground that they disclosed no reasonable cause of action and/or were time barred. The government also contended for a wide interpretation of public policy.

The High Court held contrary to ordinary principles of international arbitration principles that a serious and fundamental error of law or fact could result in an award being contrary to the public policy of New Zealand because breaches of natural justice had occurred in connection with the making of the award. However, such a threshold was high and mere mistake would not suffice. It had to be shown that the factual finding complained of was not based on any logically probative evidence. There would also need to be some element of illegality, or the enforcement of the award would have to involve injury to the public good or abuse the integrity of the court. An unsubstantiated finding of fact by itself would not be sufficient to render an award contrary to public policy. In order for an award to be set aside it must be shown that even if such a breach of natural justice had occurred the award was contrary to public policy. To warrant the intervention of the court, there must be the likelihood that the identified procedural irregularity resulted in a "substantial miscarriage of justice."[97]

New Zealand's broad approach to what constitutes a breach of public policy has been revisited and the approach narrowed in *Amaltal Corp. Ltd. v. Maruha (NZ) Corp. Ltd.*[98] In that case, Amaltal and Maruha were joint venturers under a shareholders agreement in a third company, Ceebay. Maruha was the New Zealand subsidiary of a Japanese corporation established as the vehicle for that corporation's investment in New Zealand fishing quota. A dispute arose concerning the management and ownership of Ceebay, which led to arbitration. Following the arbitration proceedings, the arbitrator directed that Amaltal transfer its shares in Ceebay to Maruha in accordance with relief provisions in the shareholders agreement. Amaltal unsuccessfully applied for leave to appeal. It also applied under Article 34 of the First Schedule to *The Arbitration Act* to have the award set aside. Counsel for Amaltal argued that the relief provisions operated as penalties, and because the common law rule against penalty clauses in contracts reflected a substantive public policy against private fines, the award, in purporting to enforce penalty provisions, was contrary to public policy.

The High Court did not accept that the broad equitable concept of public policy as applied to contracts between individuals was the same as the "weightier notion" of the public policy of New Zealand that is referred to in Article 34, which implied more in the nature of "sovereign importance." The High Court dismissed the application.

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97. *Id.* at ¶¶ 83–84.

98. [2004] 2 NZLR 614 (CA).

On appeal, the Court of Appeal discussed the legislative history of Article 34 and examined the narrow reading given to public policy in the United States,[99] England,[100] and Canada[101] in the sense that public policy covered only "fundamental principles of law and justice in substantive as well as procedural respects."[102] The Court of Appeal held that it was limited to considering for review issues that raised a "fundamental principle of law and justice" and found that the power to strike down a penalty clause is not a rule which can properly be characterized as so fundamental as to constitute "public policy" in the sense in which those words have been used in art 34 or the sources from which that article was drawn.[103]

III. The Astro Litigation—A Case Study

This case study demonstrates that a party may still avoid enforcement in countries that are ostensibly pro-arbitration and pro-enforcement. In the long running dispute between Malaysia's Astro Group and Indonesia's Lippo Group, Lippo has effectively avoided the enforcement of an award rendered from the highly respected Singapore International Arbitration Centre (SIAC) in 2009 in favor of Astro. To date, enforcement proceedings in the UK, Hong Kong, Singapore and Indonesia have failed to yield results. This is partly due to the refusal of Indonesian courts to enforce the award, transferal of assets overseas by Lippo and a challenge to the jurisdiction of the arbitral tribunal in the Singapore courts.

A. Astro v. Lippo—The Facts

The ongoing dispute between a group of Malaysian companies called Astro,[104] controlled by Ananda Krishnan, and the Lippo group, controlled by Indonesia's Riady family, arose out of a failed joint venture between Astro and Lippo's First Media. In October 2004, Astro, seeking to establish a satellite television service (known as Direct Vision) in Indonesia, suggested a joint

99. Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) where it was held that enforcement of foreign arbitral awards might be denied on the basis of that defense "only where enforcement would violate the forum state's most basic notions of morality and justice."

100. Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. Shell Int'l Petroleum Co. Ltd. [1990] 1 AC 295, 315 where it was held that although considerations of public policy could never be exhaustively defined, it had to be shown that there was some element of *illegality* or that the enforcement of the award would be clearly injurious to the public good or, possibly, that it would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the power of the state are exercised.

101. Boardwalk Regency Corp. v. Maalouf (1992), 6 O.R. 3d 737, 743 (Ont. C.A.) where it was held that the common ground of all expressed reasons for imposing the doctrine of public policy was "essential morality" in that it must be "more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with the forum state's system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred."

102. Amaltal Corp. Ltd. v. Maruha (NZ) Corp. Ltd. [2004] 2 NZLR 614 (CA) at [43].

103. *Id.* at [59]. Note that this was not the approach taken in Kimberly Construction Ltd. v. Mermaid Holdings Ltd. [2004] 1 NZLR 386 (CA) 403 in which the Court held that "Public policy is capable of covering a wide variety of matters and it is neither necessary nor desirable in this case to attempt to define the circumstances in which [the relevant provision] is capable of being invoked."

104. The companies involved in this dispute are: (1) Astro Nusantara International BV, (2) Astro Nusantara Holdings BV, (3) Astro Nusantara Corporation NV, (4) Astro Multimedia NV Astro Overseas Ltd. (5) Astro All Asia Networks PLC, (6) Measat Broadcast Networks Systems Sdn Bhd, (7) All Asia Multimedia Network FZ-LLC. Astro Nusantara Int'l BV & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 (Sing.).

venture with Lippo due to Indonesian laws prohibiting foreign-owned and incorporated companies from entering the Indonesian telecommunications market.[105] In March 2005, the two groups executed a series of Subscription and Shareholders Agreements (the Agreements). The Agreements were subject to a series of conditions precedent that had to be fulfilled within three months before the parties would be bound to proceed with the transactions contemplated. One of these conditions precedent was the conclusion of service agreements between Astro and Lippo's First Media.[106] While the agreement contemplated the provision of services, equipment, and finance ("support services") by three Astro group companies (Suppliers),[107] these Suppliers were never made a party to the agreement.

In anticipation of the execution of service agreements,[108] the Suppliers began to provide support services to Direct Vision at the request of First Media in December 2005.[109] First Media began operations in February 2006.[110]

In the meantime a series of other deals had been struck. These included:

- the purchase by Ananda Krishnan's telco flagship company Maxis of a controlling 51% interest in Lippo's Indonesian mobile phone company Natrindo in March 2005;
- Lippo and Astro also jointly acquired Singapore's premier property and hotel company, OUE.[111]
- in April 2007 a further deal was struck in which Ananda Krishnan's Maxis, bought out Lippo's remaining 44% interest in Natrindo for $124 million (U.S.).[112]
- using assets gained from these transactions, in June 2007 Ananda Krishnan sold a 25% interest in Maxis and a 51% interest in Natrindo to Saudi Telecom, a Saudi Arabian corporation, for $3.05 billion (U.S.).[113]

By August 2007 the service agreements still had not been executed and after many failed attempts at re-negotiation the parties began to explore their exit options.[114] Despite this, the

105. Astro Nusantara Int'l BV and Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 (Sing.) ¶ 20.

106. Astro Nusantara Int'l B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 402, ¶ 3 (C.F.I.).

107. These were Astro All Asia Networks PLC, Measat Broadcast Networks Systems Sdn Bhd and All Asia Multimedia Network FZ-LLC. Astro Nusantara Int'l BV & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 (Sing.) ¶¶ 22–23.

108. The date for the execution of these documents had been pushed back to mid-July 2009: *Id.* at ¶ 23

109. *Id.* at ¶ 24.

110. *Id.*

111. Leslie Lopez, *Astro's Troubles With Lippo Turn Ugly*, THE EDGE MALAYSIA (May 3, 2012), http://www.theedgemalaysia.com/highlights/212810-astros-troubles-with-lippo-turn-ugly.html.

112. *Id.*

113. *Id.* (Malaysian press reported that the Riady family was infuriated that they were not made a party to this Saudi deal. It has been speculated that this was to become the antecedent of the joint venture's failure, as the Riady family reportedly demanded from Astro the sum of $250 million in return for the remaining shares in their joint venture.).

114. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 at ¶ 25 (Sing.).

Suppliers continued to provide support services for First Media while threatening to withdraw these services should First Media and Astro fail to reach an agreement. Inevitably, a dispute arose between First Media and Astro, with Astro[115] arguing that its affiliates[116] were under no obligation to continue to provide funding to Direct Vision. In August 2008 the Suppliers invoiced First Media for the support services and demanded repayment of the cash advanced.[117]

Clause 17 of the Agreement between the parties required that all disputes in connection with or in relation to the joint venture be referred to arbitration.[118] Lippo, however, attempted to bring several court actions in tort in Indonesia, on the basis that there had been an oral joint venture preceding the Agreement.[119] Astro however commenced arbitration in October 2008 in Singapore. Astro sought to have the Suppliers joined to the arbitration along with declarations that there was no binding joint venture and no continuing obligation to provide support services, and injunctive relief to restrain proceedings in Indonesia.[120] In the award of May 7, 2009, pursuant to SIAC's institutional rules, the Suppliers were joined to the proceedings and injunctive relief was ordered, restraining the Indonesian proceedings.[121] In a further partial award of October 3, 2009 the Tribunal found for Astro, declaring that the Agreement was the only effective joint venture contract between the parties. The tribunal also found that the conditions precedent of the Agreement had never been fulfilled and that as there was no continuing joint venture, Astro was not obliged to continue to provide support services to First Media.[122]

In a final award on February 16, 2010 the tribunal unanimously awarded Astro $300 million (U.S.) in damages, interest and costs and dismissed the counter claims. However, the dispute did not end here.

In the latter half of 2010 Astro commenced enforcement proceedings for the SIAC Awards in Malaysia,[123] Singapore,[124] Indonesia[125] and Hong Kong[126] with some initial success.

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115. Astro Nusantara International B.V. and Astro Nusantara Holdings B.V.

116. Astro All Asia Networks PLC, Measat Broadcast Networks Systems Sdn Bhd and All Asia Multimedia Network FZ-LLC.

117. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 at ¶ 26 (Sing.).

118. *Id.* at ¶ 27.

119. *Id.* at ¶ 26.

120. *Id.* at ¶ 27.

121. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 at ¶¶ 30–31 (Sing.); Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C 402 at ¶ 5, ¶ 17 (C.F.I.).

122. Astro Nusantara International B.V. and Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 at ¶ 33 (Sing.).

123. *Id.* at ¶ 34.

124. *Id.* at ¶¶ 34–35

125. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2010] IDMA 1404.

126. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 402 at ¶ 7 (C.F.I.).

In December 2010 judgment was entered in terms of the award in the Hong Kong High Court.[127] In March 2011, Astro, in ex parte proceedings, also obtained orders for the enforcement of the awards in Singapore.[128] However in August 2011 Lippo sought to have these enforcement orders set aside in Singapore on the grounds that there had been no valid service of the enforcement orders under Indonesian law.[129] Lippo also argued that the Suppliers had no arbitration agreement with First Media, therefore the tribunal had no jurisdiction to join these parties to the arbitration. This was in spite of the fact that First Media had not raised these objections within the limitation periods prescribed by Articles 16 and 34 of the Model Law. These grounds were rejected by the Singapore High Court in October 2012.[130] Lippo has appealed the decision.

Meanwhile, in the Hong Kong proceedings First Media and Across Asia used a series of dubious awards and judgments from Indonesia to frustrate attempts to execute the award.[131] The proceedings began because, First Media loaned $44 million (U.S.) to its parent company and controlling shareholder Across Asia.[132] Astro commenced proceedings in Hong Kong for a garnishee order (also known as a "Third Party Debt Order")[133] against Across Asia, which was granted in 2011 and required Across Asia to pay $44 million (U.S.) into the court, to be held pending the outcome of the Singapore setting aside proceedings.[134]

To combat this Lippo developed a series of tactics to delay or completely avoid the payment of money into the court. The most obvious was by appealing the garnishee order to the Hong Kong Court of Appeal in August 2012, arguing amongst other things that as the award may also be enforced in Indonesia this would lead to double payment.[135] The Court rejected this argument. Other delaying tactics were adopted which ultimately led the High Court to postpone the determination of a timetable.[136]

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127. *Id.* at ¶ 7 and ¶ 26 (Hong Kong was the domicile of parent company Across Asia Ltd., who owned a 55.1% share in First Media.).

128. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C.A. 351 at ¶ 6.

129. *Id.* at ¶ 6, Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 at ¶ 36 (Sing.). It will become significant in 2015 in the Hong Kong Court of First Instance in Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2015] HKEU 330 at ¶¶ 5–7 that Lippo has never sought to have the Awards set aside in a Singaporean court acting in its supervisory capacity.

130. *See generally* Astro Nusantara International BV & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212.

131. Astro Nusantara International BV & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 2070 (C.F.I.); Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2013] H.K.C. 332 (C.F.I.).

132. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 402 at ¶ 9 (C.F.I.).

133. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 351 at ¶ 21 (C.F.I.) (described as "a proprietary remedy which operates by way of attachment against the property of the judgment debtor, the property so attached being the chose in action which represented the garnishee's debt to the judgment debtor.").

134. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 402 at ¶ 9 (C.F.I.).

135. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C.A. 351.

136. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 2070 at ¶ 8 (C.F.I.).

The delaying tactics continued and thwarted the enforcement of the arbitral awards and the orders of various Hong Kong courts for many years. In spite of their reservations about the Indonesian proceedings, the Hong Kong High Court refused Astro's application for an order compelling Across Asia and First Media to appeal the Bankruptcy Order.[137]

Astro announced in September 2013 that it had also lost its appeal in enforcement proceedings in Indonesia. According to Astro's announcement the Indonesian judgment placed strong emphasis on state sovereignty, citing "public order," interference with the Indonesian judicial process, and the violation of the state and legal sovereignty of Indonesia as reasons for refusing to enforce the Singapore Awards.[138]

On October 31, 2013, the Singapore Court of Appeal, the ultimate court of appeal in Singapore, held that SIAC did not have the jurisdiction the join the suppliers to the arbitration.[139] Sunders Menon CJ held that the framework created by the Model Law allows parties to have a choice of remedies.[140] Lippo was therefore able to rely on the jurisdictional challenge as a "passive" defense even though it was raised after Astro had commenced enforcement proceedings.

On *de novo* review of the original tribunal's jurisdiction, the Court held that exercise of jurisdiction of SIAC to join the suppliers to the arbitration without the consent of Lippo had been improper.[141] While other companies in the Astro group who had been parties to the agreement were not precluded from recovery pursuant to the award, the suppliers were denied the sum that had been awarded to them by SIAC.[142]

As a result of the Singapore Court of Appeal's judgment of October 31, 2013, on 24 January 2014 Lippo was granted a stay of execution on the Garnishee Order Absolute in Hong Kong.[143] In the absence of a judgment debt to form the basis of the Garnishee Order, the Court held that was the just outcome under the circumstances. Leave to appeal from the stay of execution has been denied by both the Hong Kong High Court[144] and the Court of Appeal.[145]

On February 17, 2015, the Court of First Instance in Hong Kong afforded to the Suppliers a win.[146] Despite the judgment of the Singapore Court of Appeal[147] and the views of the

137. *Id.* at ¶ 7.

138. Shaun Lee, *Update on Astro-Lippo Dispute: Astro's Appeal to Indonesian Supreme Court Fails*, Singapore International Arbitration Blog, http://singaporeinternationalarbitration.com/2013/09/11/update-on-astro-lippo-dispute-astros-appeal-to-indonesian-supreme-court-fails/.

139. PT First Media TBK v. Astro Nusantara International B.V. [2013] SGCA (Sing.).

140. *Id.* at ¶ 71.

141. *Id.* at ¶ 224.

142. *Id.* at ¶ 227.

143. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2014] H.K.C 136 at ¶ 8 (C.F.I.).

144. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2014] H.K.C.U. 727.

145. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2014] H.K.C.U. 1546.

146. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2015] HKEU 330.

147. *Supra* notes 129 and 139. It was significant to the Hong Kong Court of First Instance that the Awards had never been set aside in Singapore and the Awards remained in force in Singapore.

Hong Kong Court of Appeal[148] that "it [would] indeed be remarkable if, despite the Singapore Court of Appeal judgment on the invalidity of arbitration awards, Astro [would] still be able to enforce a judgment here based on the same arbitration awards that were made without jurisdiction,"[149] the Court of First Instance was persuaded that the awards should be enforced against First Media.[150] The Court did not exercise its discretion to extend the time for First Media to apply to set aside the Hong Kong Orders and Hong Kong Judgment with the consequence that they remain undisturbed. The Court also held in obiter that even if an extension of time had been granted, First Media would be precluded from relying upon § 44(2) of the Arbitration Ordinance to resist enforcement of the awards.[151]

In handing down this decision the Hong Kong Court of First Instance confirmed its pro-enforcement stance.[152] The attitude of the Court was that enforcement of a Convention award is mandatory unless a case under § 44(2) or (3) of the Arbitration Ordinance is made out.[153] In that instance, the Court has discretion to permit or refuse enforcement. Interestingly, the Court held that the fact that an arbitral award has been refused enforcement by a court in another jurisdiction, even one whose law governs the arbitration agreement or the procedures of the arbitration, is not a ground for resisting enforcement of the arbitral award in Hong Kong under the New York Convention, because different jurisdictions have different rules, laws and regulations governing enforcement of arbitral awards.[154] Whether a ground has been made out for refusing to enforce a Convention award under § 44(2) and (3) of the Ordinance is a matter governed by Hong Kong law and is to be determined by a Hong Kong Court.[155]

IV. The Lessons to Be Learned

In Australia, as well as many nations with a common law system, multiparty construction and complex commercial litigation is very time consuming, document intensive and almost prohibitively expensive for all but the most sophisticated of players. As long as there are lawyers involved in dispute resolution, there will always be opportunities to avoid and delay enforcement of Arbitral Awards and Judgments as the case may be. At the end of the day however, the lure of enforcement in Convention countries as well the promise of neutral adjudication, particularly where the alternative is adjudication in a country where the rule of law may not be respected, will always make international arbitration a viable alternative. It is suggested that the solution may lie at the precontractual stage. Players who enter into construction contracts with an international flavor should do their due diligence prior to contracting to be aware of the risks and potential exposure.

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148. *Supra* note 145.

149. *Id.* at ¶ 6.

150. *Id* at ¶ 7.

151. *Id.*

152. *Id.* at ¶ 73.

153. *Id.*

154. *Id.*

155. *Id.*

One such risk is the presence and levels of corruption. Zurich Insurance has developed an iPad application called the Zurich Risk Room that looks at various macroeconomic imbalances like current account deficit, fiscal risks, government budget balance, government debt, gross national savings, inflation, trade balance as well as development indicators like brain drain, capacity for innovation, corruption, income inequality, pay and productivity, state failure and wastefulness of government spending, to allow you to make an assessment of the risk of trading with a company either based or holding assets in that country. By way of illustration, according to the Zurich Risk Room, corruption in Hong Kong is 0.06, Singapore is 0.04, Indonesia is 0.73 and Australia is 0.03.[156] Looking at these results, it should come as no surprise that enforcement of arbitral awards in Indonesia has not been a clear-cut affair in both the *Astro* and the *Karaha Bodas* cases.

In Indonesia, arbitral awards that do not involve the State may be enforced via an ex parte application. However arbitral awards that involve a State party require a court hearing as a precursor to enforcement. Although the *Astro* litigation did not involve a State party, the issue that arose was whether Indonesian courts would support arbitration in cases where simultaneous court proceedings had also been commenced in an Indonesian court by the Indonesian party. That case indicates that Indonesian courts take the view that their court processes take precedence over the arbitral process even if it is the contractually agreed mechanism for dispute resolution. This approach appears to be confirmed in the *Karaha Bodas* and the *Astro* cases. In both cases, Indonesia avoided enforcement of the arbitral awards by ostensibly enforcing its nation's public policy. Further, in Indonesia, as illustrated in the *E.D.& F. Man (Sugar) Ltd. v. Yani Haryanto*[157] case, it seems that enforcement of an award that would contravene a domestic law also constitutes a violation of Indonesia's public policy. It is no surprise therefore that Indonesian courts have been criticized for their wide judicial interpretation of what constitutes public policy, refusing enforcement on the grounds of public order, territorial sovereignty and mandatory laws.

By contrast, pro-enforcement nations like the United States, Australia, New Zealand, Hong Kong and Singapore have narrowly construed what constitutes a violation of their nation's public policy. Those nations have endorsed the view first promulgated in the United States in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie due Papier (RAKTA)*[158] that public policy will not be violated unless the forum state's most basic notions of morality and justice are violated.

In Australia, in *TCL Air Conditioner (Zhangstan) Co. Ltd. v. Castel Electronic Pty. Ltd.*,[159] the Federal Court undertook a comprehensive review of the approach of other nation courts in the common law world and then confirmed its pro-enforcement stance. In Australia, it now seems clear that public policy would only be violated if the most basic notions of morality and

156. With 0 being the minimum and 1 being the maximum.

157. E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto [1999] 271/PDT.G (Jakarta).

158. Parsons & Whittenmore Overseas Co. v. Societe Generale de L'Industrie due Papier, 508 F.2d 969 (2d Cir.1974).

159. TCL Air Conditioner (Zhangstan) Co. Ltd. v. Castel Electronic Pty Ltd. [2014] FCR 1214 (Austl.).

justice are violated. This is consistent with the approach of the Supreme Court of Hong Kong in *Paklito Investment Ltd. v. Klockner East Asia Ltd.*[160] In that case, the Supreme Court of Hong Kong rejected the public policy defense raised and held that the public policy defense would only succeed in instances where enforcement would violate the forums states "most basic notions of morality and justice."[161] Similarly, the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*[162] rejected the public policy defense. The Singapore High Court construed the defense narrowly and held that it would only apply in situations where enforcement would "*shock the conscience*" or would be "*wholly offensive to the ordinary reasonable and fully informed member of the public* [. . .]"[163] New Zealand has in relatively recent times, similarly come to favor this approach. In *Amaltal Corp. Ltd. v. Maruha (NZ) Corp. Ltd.*,[164] the Court of Appeal held that public policy covered only fundamental principles of law and justice in substantive and procedural aspects.

V. Conclusion

The recent cases demonstrate that except for Indonesia, strong statutory provisions inserted to promote expediency and ease of enforcement have been introduced and upheld by the Singapore, Hong Kong, New Zealand and Australian courts. Despite the strong judicial stance on enforcement, the intent of the legislation can be thwarted or at least delayed for many years by skillful lawyers using delay tactics, which exploit the appeal processes of the courts. This is a fact of life that cannot be avoided regardless of whether arbitration or court proceedings are the mechanism used for dispute resolution. Both the *Astro* and the *Karaha Bodas* cases illustrate that there can be a significant disparity between the aims of international arbitration and its costly and time-consuming reality. This is however, no different to the disparity between the ideals of just, cheap and quick justice and the realities of litigation.

It is undeniable that Singapore and Hong Kong, the financial hubs of South East Asia, have strong legal systems and little quantifiable corruption. Those countries have established that their national courts are pro-enforcement of arbitral awards and pro-arbitration. As such, a party may trade with ease with Singapore and Hong Kong, confident in the knowledge that should the parties fall into dispute, an arbitral award that arises from that dispute would be enforced in those countries in accordance with the ethos of the Convention and the Model Law.

Nevertheless, developing countries provide many opportunities for investment, and it is unrealistic to suggest that parties should not trade with developing countries. According to the 2013–2014 United Nations Report, titled "Achieving Development Results in Asia and the Pacific,"[165] the Asia Pacific region has been the most economically dynamic region in the world in recent decades. The region's share in the world economy has increased from 14% in 2000 to

160. Paklito Investment Ltd. v. Klockner East Asia Ltd. [1993] 2 H.K.L.R. 39.

161. *Id.* at ¶ 8.

162. PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2007] 1 SLR(R) 597 (Sing.).

163. *Id.* at ¶ 59.

164. Amaltal Corp. Ltd. v. Maruha (NZ) Corp Ltd. [2004] 2 NZLR 614 (CA).

165. U.N. Development Programme, *Achieving Development Results in Asia and the Pacific* at 9 (2013–2014).

25% in 2012, and the United Nations expects that by 2030 the region will host about two-thirds of the world's middle class.

The United Nations Development Programme, which publishes an annual Human Development Report, identified in its 2013 report[166] that by 2020, the estimated combined output of China, India and Brazil would surpass the aggregate production of the United States, Germany, United Kingdom, France, Italy and Canada.[167] The 2013 United Nations Development Programme report also states that the "rise of the South" goes well beyond those economies, as more than 40 developing countries have made greater human development gains in recent decades than what was predicted. According to the United Nations, countries such as Indonesia, Mexico, Bangladesh, Tanzania and Yemen all registered significant growth, while nations such as Afghanistan and Pakistan had some of the fastest growth rates in the world, with 3.9% and 1.7% over the past 12 years, respectively.[168]

With such levels of growth, the temptation is undeniably to exploit the economic growth in China, India and Indonesia. However, all three countries have significantly higher levels of corruption than Australia, Singapore and Hong Kong. Due diligence should therefore be done prior to investment in those countries to understand their domestic laws and policies as well as assess the risks of trading with these countries. If a party decides that it is willing to take on the risk of trading with these countries then it should put in place financial arrangements to secure payment. For example, this can be in the form of escrow accounts as well as satisfying itself that its trading partner has assets in secure and stable countries where the rule of law is a given. Another means of managing the risk is to agree that all disputes be referred to arbitration in Hong Kong or Singapore as international arbitration can provide a neutral and relatively cost effective dispute resolution forum for the parties. When functioning at its optimal levels, international arbitration and the enforcement process can offer a flexible means to achieve a just, cheap, and quick solution.

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166. U.N. Report, *The Rise of the South: Human Progress in a Diverse World* (2012–2013).
167. *Id.*
168. *Id.*