Perhimpunan Advokat Indonesia
11 October, 2016

The essential elements of international arbitration and its yin and yang - steadfast curial support and limited interference - a regional perspective

by John K Arthur
Barrister
Member of the Victorian Bar

The yin & the yang of ICA

- **“The yin & the yang are opposite forces. Yet, they exist together in the harmony of a perfect orb.”** R. A. WISE, Wise Quotes of Wisdom

- **“Yinyang (i)s a process of harmonization ensuring a constant, dynamic balance of all things”.** Internet Encyclopedia of Philosophy (IEP) (ISSN 2161-0002) at http://www.iep.utm.edu/yinyang/

Introduction - international commercial arbitration

- International commercial arbitration (**ICA**) is a consensual and non-curial or *alternative dispute resolution process* for the determination of transnational commercial disputes.
- Arbitration (international and domestic) is readily distinguishable from other forms of ADR and has been described as “litigation in the private sector”.
- ICA is seen to offer many advantages over litigation, including neutrality, expedition, party autonomy, flexibility in procedure, confidentiality, the ability to choose the ‘judge’, its final and binding nature, and a simple and effective process for enforceability of awards. These factors are integral to success of arbitration in an international context.

Introduction - international commercial arbitration

Development of an internationally recognised harmonised procedural jurisprudence:

- ICA has led to the development of an internationally recognised harmonised procedural jurisprudence combining the best practices of both the civil and common law systems, taking into account diffuse cultural and legal backgrounds and philosophies.

- The new jurisprudence is establishing an accepted procedure for dispute resolution which is of benefit to international arbitration, as well as modern jurisprudence generally.

The yin and yang of ICA - steadfast curial support and limited interference

- To be effective ICA requires:
- the support of domestic courts applying domestic laws (*lex arbitri*) which gives effect to the New York Convention (and if applicable a UNCITRAL Model Law (or other suitable) *lex arbitri*);
- but not interference from those courts in the sense of intervening other than that permitted under the *lex arbitri*
- see Art 5 Model Law.

National laws which support ICA

- For **ICA** to operate and be effectual, the consensual process must be supported by national laws such as:
- the law governing the arbitration agreement (including its construction, validity and performance)
- the *lex arbitri* which will give legal force and effect to the process of the arbitration and the supervisory role of national courts supporting it;
- the *lex causa* which is the law governing the substantive contract;
- the national laws which legislate for the enforcement mechanisms of the **NYC** in the place where the award is to be enforced.
- The procedural rules of the arbitration; and
- other applicable rules, non-binding guidelines and recommendations, including UNCITRAL/IBA guidelines.

New York Convention (NYC) and the Model Law

- *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (**NYC**)

See http://www.newyorkconvention.org/

- *UNCITRAL Model Law on International Commercial Arbitration* 1985 (as amended 2006)
- (**Model Law**)

see: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html

New York Convention (NYC)

- The NYC, often described as the most successful instrument in international trade law having 156 state parties, is the keystone of the ICA system.

- It is primarily concerned with two matters:
- • the recognition of, and giving effect to, arbitration agreements;
- • the recognition, and enforcement, of international (non-domestic) arbitral awards.

New York Convention (NYC)

- These two primary concerns of the NYC are achieved by:
- **first**, requiring a court of a contracting state to refer a dispute which comes before it, and falls within the scope of an arbitration agreement to arbitration; and
- **secondly**, enabling the successful party to an arbitration award to easily and simply enforce the award in any country which is a party to the convention in accordance with that country's arbitration laws.

New York Convention (NYC) - interpretation

- The NYC as an **international treaty** is interpreted by reference to the rules of interpretation of international law codified in Arts. 31 and 32 *Vienna Convention on the Law of Treaties: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*: Art 31(1).
- "*Context*" comprises, in addition to the text (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

New York Convention (NYC) - interpretation

- There shall be taken into account, together with context, any subsequent agreement, or practice, and any relevant international law rules: Art 31(3) and a special meaning given to a term if it is established that the parties so intended: Art 31(4). Recourse may be had to supplementary means of interpretation where the interpretation under article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable: Art 32.
- Accordingly the NYC is interpreted in light of its object and purpose to promote international commerce and the settlement of international disputes through arbitration.
- *Note:* approach in Indonesia and civil law countries: A Brief on Arbitration in Indonesia, M Husseyn Umar, p. 52ff

The Model Law

- The next most influential international legal instrument in the present context is the:

- **United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration** commonly known as the **Model Law**

- The **Model Law** is not legally effective on its own but is simply a template for legislation for an arbitration law (a *lex arbitri*) which may be enacted by individual states.

Model Law countries

- Model Law countries include many Asian countries:
- Australia; Bangladesh; Brunei; Cambodia, China (Hong Kong and Macau); India; Japan; Malaysia; Myanmar; New Zealand; Philippines; Republic of Korea; Singapore; Sri Lanka and Thailand
- Notable exceptions in Asia are the first and fourth most populous countries in the world, the PRC and Indonesia.

The arbitration agreement – the foundation of the arbitral process

- The foundation of the arbitral process is the **arbitration agreement** by which the parties refer their disputes to arbitration.

- Once a binding arbitration agreement is entered into:
- the parties will be subject to it so that if a dispute arises which falls within its scope, the dispute must be resolved by arbitration (if a party requires it).

- The arbitration agreement's terms will bind the parties, as well as the arbitrator appointed pursuant to it.

The arbitration agreement – the foundation of the arbitral process (cont'd)

- Unless settled by agreement, the arbitral process will culminate in an award capable of enforcement with curial assistance.

- An essential quality of the arbitration agreement is that it is considered to be a contract independent of the contract in which it is contained. Accordingly the arbitration agreement survives termination of the contract.

The arbitration agreement – the foundation of the arbitral process (cont'd)

- On this basis, first:
- the arbitral tribunal has jurisdiction to rule on its own jurisdiction even if the underlying contract has been terminated or is set aside: Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd at [165]–[166];
- secondly, the invalidity of the substantive contract will not necessarily mean that the arbitration clause is invalid: Comandate Marine Corp v Pan Australia Shipping Pty Ltd at [219]
- The separability principle is reflected in Art 10(f) and (h) of the Indonesian Arbitration Law

The arbitral award

- The object and purpose – indeed, the culmination – of the arbitration process is the making of a binding and enforceable **award** by the arbitral tribunal.
- The essential requirements of an **award** will be set by the particular *lex arbitri* engaged: Art 32 of the Model Law sets out the requirements for an arbitral award in terms of form and contents. In Indonesia, Art 54 of the Indonesian Arbitration Law sets out the requirements for an arbitration award under the Law.
- An award' s precise requirements will be determined by the arbitration agreement (incorporating any arbitration rules) as modified by the *lex arbitri*.

Enforcement of awards

- Under the NYC and the Model Law, as well as the Indonesian Arbitration Law, a simple procedure is provided for the enforcement of international arbitral awards:

- Art. IV(1) NYC
- Art 35(2) Model Law
- s. 9(1) Australian *International Arbitration Act* 1974 (Cth.)
- Arts 65-67 Indonesian Arbitration Law

Setting aside or non-enforcement/recognition of an ICA award - introduction

- One of the fundamental principles of ICA is that judicial intervention in ICA is limited to maintaining the *integrity* of the arbitral process and is confined to matters akin to *jurisdictional error*.
- Courts will not interfere with the merits of an arbitral award or even for an error of law.
- This is the case in Indonesia: See Arts 3(1) and 11 of the Indonesian Arbitration Law.
- No appeal or cassation to the Supreme Court, against a decision of the Chairman of the Central Jakarta District Court to recognise and enforce an award, but only from a decision refusing to do so: Art 68

Setting aside or non-enforcement/recognition of an ICA award

- The grounds which may justify court interference are contained in:
  - Articles V(1)(a)-(e) and V(2)(a) and (b) of the NYC and Articles 34 and 36 of the Model Law

These grounds are well known and are as follows:

- *a party to the arbitration agreement .. was under some incapacity, or the agreement was not valid under applicable law*: Art V(1)(a) NYC; Arts 34(2)(a)(i); 36(1)(a)(i) of the Model Law;

- *the party making the application (or against whom the award is invoked) was not given proper notice of the arbitral proceeding, or was otherwise unable to present his case*: Art V(1)(b) NYC; Arts 34(2)(a)(ii) and 36(1)(a)(ii);

Setting aside or non-enforcement/recognition of an ICA award

- *the award deals with a dispute not contemplated by, or falling within the submission to arbitration, or contains a decision on a matters beyond the scope of the submission to arbitration:* ***Art V(1)(c) NYC and Arts 34(2)(a)(iii) and 36(1)(a)(iii)****;*
- *composition of the arbitral tribunal or the arbitral procedure was not in accordance with arbitration agreement, or applicable law:* ***Art V(1)(d) NYC; s 8(5)(e), and Arts 34(2)(a)(iv) and 36(1)(a)(iv))****; and*
- *the award has not yet become binding, or has been set aside or suspended:* ***Art V(1)(e) NYC; s 8(5)(f), and Art 36(1)(a)(v)****.*
- *An award may also be set aside, or refused recognition or enforcement by a court if it finds that: (a) the subject-matter of the dispute is not capable of settlement by arbitration under the law of that State; or (b) the award is in conflict with the public policy of that State:* ***Article V(2)(a), (b) NYC and Articles 34(2)(b)(ii), 36(1)(b) of the Model Law.***

Setting aside or non-enforcement/recognition of an *ICA* award

- These grounds in common with the others are legislated for in the *lex arbitri of* **Model Law** Countries: ***for example***
- s. 8(7)(b) *International Arbitration Act* 1974 (Cth); ss. 32(1)(b) and 34(1)(b) Arbitration Act (No. 11 of 1995) (Sri Lanka); ss. 34(2)(b)(ii) and 42(2)(b) *Arbitration and Conciliation Act* 1996 (India); s. 37(1)(b)(ii) *Arbitration Act* 2005 (Malaysia); s. 31(4)(b) *International Arbitration Act* (Singapore)*;* ss. 40(2)(b), 44 and 45 *Arbitration Act* B.E. 2545 (Thailand); Arts 44(1)(viii) and 45(2)(ix) Japanese *Arbitration Law*; Art 36 2. (b) *Arbitration Act of Korea*; ss. 43(1)(b)(iii) and 46(1)(b)(ii) Arbitration Act, 2001 (Bangladesh); s. 7 *Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act*, 2011 (Pakistan); s. 46(c)(ii) Arbitration Law 2016 (Myanmar); s 36(1)(b)(ii) and (3) *Arbitration Act* 1996 (NZ); s. 68(2)(g) *Arbitration Act* 1996 (UK); *cf* Art 260 of the *Civil Procedure Law of the PRC*; Arts 62(2) and 66(c) of the Arbitration Law 1999 (Indonesia)

Setting aside or non-enforcement/recognition of an ICA award

- These provisions have not been implemented in Indonesia where the only ground to refuse recognition and enforcement of an award is confined to a violation of public policy: Art 66(c)
- However, an application may be made to nullify the award within 30 days of the delivery and registration of the award with the Central District Court's clerk: Art 70

Procedural fairness - Art 18 Model Law - the “unable to present its case” ground

- Public policy is an important feature of procedural fairness: Art 18 34(2)(a)(ii) and 36(1)(a)(ii) Model Law: the fundamental procedural fairness/“unable to present its case” ground. The public policy exception may be superfluous given the “unable to present its case” ground: Bermann, p. 70.The two grounds very similar both relating to natural justice/procedural fairness but conceptually different: “public policy” concerned with contraventions of “fundamental principles of justice and morality” while “unable to present its case” ground on whether the party seeking to set aside the award has been accorded procedural fairness (which is narrower)

The "contrary to public policy" ground

- Awards may be contrary to *public policy* where there is illegality, or where there has been a breach of natural justice, or fraud or corruption on the part of the arbitral tribunal.
- The meaning of the term public policy is clarified in Australia in s. 8(7A) *International Arbitration Act* 1974 (**IAA)** which provides two circumstances where an award will be in conflict with the public policy of Australia:

> *To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy 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 in connection with the making of the award.*

See also: s. 37(2) Arbitration Act 2005 (Malaysia); s. 24 *International Arbitration Act* 1994 (Singapore); s. 103(3) *Arbitration Act* 1996 (UK); ss. 81(2)(b)(ii), 86(2)(b), 89(3)(b), 95(3)(b), 98D(3)(b) Arbitration Ordinance (HK) *cf*. *Arbitration Act* (No. 11 of 1995) (Sri Lanka); *Arbitration Law* 1999, Indonesia (and many other national Acts where no definition)

The "contrary to public policy" ground

- The "*contrary to public policy*" ground is derived from the NYC, Art V(2)(b) and has international basis. In France ICA awards could only be rejected on the grounds *ordre public* if there was shown to be a contravention of *international public policy*
- It is generally accepted that an award should only be set aside on this ground if it is contrary to “truly transnational” public policy.
- International public policy is confined to violation of really fundamental conceptions of legal order in the country concerned; or norms that embody and reflect fundamental notions of morality and justice. The concept is described by Bokhary PJ and Sir Anthony Mason NPJ in *Hebei Import & Export* (see below).

TCL v Castel – Australian position

- The law in relation to setting aside or non-enforcement of arbitral awards, focussing on the public policy ground and for breach of natural justice, was recently clarified in Australia in:

- *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361;311 ALR 387; [2014] FCAFC 83.

- **Background facts**: Castel was an Australian electrical goods distribution company. TCL was a Chinese manufacturer of air conditioning units which had granted Castel exclusive right to sell TCL air conditioners in Australia. Castel claimed that TCL had breached their agreement by, inter alia, manufacturing and supplying air conditioners to other Australian distributors which were not branded “TCL”, to be sold in competition to those distributed by Castel.

TCL v Castel Electronics – Australian position

- The dispute between the parties was referred to arbitration in Melbourne pursuant to an arbitration clause in the distribution agreement referring disputes to arbitration in Australia.
- Following the hearing, the arbitral tribunal made an award in favour of Castel requiring TCL to pay it $2,874,870, and subsequently a costs award of $732,500. TCL failed to pay the awards (referred to hereafter as “the award”).
- Castel then made application to enforce the award which TCL opposed on the basis that:
- - the application was defective and the Court had no jurisdiction to enforce the award;
- - if there was jurisdiction, the award should be set aside or not enforced as being contrary to public policy because of a breach of the rules of natural justice in the arbitral hearing.

TCL v Castel Electronics – Australian position

- At first instance the Federal Court in dealing with the issue whether the court had jurisdiction to enforce the award, concluded that it did: *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209; 287 ALR 297; [2012] FCA 21.
- TCL then applied to the High Court to prohibit the Federal Court from hearing the matter on the grounds of lack of jurisdiction and constitutional invalidity of the conferral of jurisdiction on the Court under Art 35 of the Model Law.
- The High Court resoundingly dismissed the application in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533; 295 ALR 596; [2013] HCA 5.

TCL v Castel Electronics – Australian position

- Subsequently the Federal Court made orders enforcing the award and dismissing TCL's application to set it aside in the face of lengthy complaints by TCL about the arbitral tribunal's findings of fact [2012] FCA 1214. TCL again appealed.
- The Full Federal Court dismissed the appeal, illuminating the power to set aside, or not to enforce, an award as contrary to the *public policy* of Australia, and specifically for breach of natural justice under Arts 34 and 36 of the Model Law: (2014) 232 FCR 361;311 ALR 387; [2014] FCAFC 83.
- The Court held that an award made in ICA will not be set aside, or denied recognition, or enforcement, by reference to the principles of natural justice or procedural fairness, unless there exists *real unfairness* or *real practical injustice* in the conduct of the arbitration, or making of the award. This should be able to be demonstrated without a detailed re-examination of the facts.

TCL v Castel Electronics – Australian position

- The Court held that the scope of "public policy" should be confined and a narrow meaning adopted.
- The court emphasised that in interpreting the IAA (Australia's *lex arbitri*) it was important to establish and maintain, in so far as its language permits, a degree of harmony and concordance of approach to ICA, by reference to the jurisprudence of common law countries in the region which is part of the growing harmonized law of international commerce.
- After examining these sources the court concluded that the meaning of "public policy" in Art V of the NYC and Arts 34 and 36 of the Model Law and in turn ss. 8(7A) and 19 IAA was limited to:
- ***the fundamental principles of justice and morality of the State acknowledging the international context.***

TCL v Castel Electronics – Conclusion

- The Court's approach in considering the rules of natural justice and the no-evidence rule was to examine:
- the relevant provisions of the IAA (Australia's *lex arbitri*);
- the concept of "public policy";
- the relevant principles of natural justice –
- in the context of the history and interpretation of the critical international instruments both internationally and in Australia and
- in light of international and regional case law.

- This approach emphasises the international nature of ICA, as well as the development of an "internationally recognised harmonised procedural jurisprudence".

- There are significant parallels to the approach taken in Australia to that adopted in other countries in Asia.

Contrary to public policy ground – Indonesia

- While Indonesia is not a Model Law country, it acceded to the NYC on 7 October, 1981 (with the reciprocity and the commercial reservations).
- Arguably the public policy ground has more relevance in Indonesia as it is the sole ground for refusing recognition and enforcement of an award.
- Indonesian Arbitration Law enacted in 1999 seemingly to adopt the NYC was founded on the Indonesian Code of Civil Procedure and the pre-existing rules and practices of arbitration and was not a national legislative implementation of the NYC.
- Nevertheless some of the provisions of the Model Law are reflected in the Arbitration Law.

Contrary to public policy ground – Indonesia

- In practice, it is suggested there has been a substantial intervention of municipal courts and the application of domestic approach to public policy exception, which consequently inhibit the pro-arbitration policy.
- Art 66(c) of the *Arbitration Law* provides:

  > "the International Arbitration Awards contemplated in item (a), which may only be enforced in Indonesia, are limited to those which do not conflict with public order"

- The meaning of this article is obscure.

Contrary to public policy ground - Indonesia

- It is stated that the public policy ground has been interpreted in Indonesia in light of Art.4(2) Indonesian *Supreme Court Regulation No.1 of 1990* which states that "the exequatur will not be granted if the award violates the fundamental basis of the entire Indonesian legal system and society".
- Accordingly any international award that is in conflict with the mandatory provisions of any of Indonesian law may be refused to be enforced.
- Indonesia's pluralistic legal culture creates uncertainty about the public policy ground's application.

Contrary to public policy ground - Indonesia

- It is suggested that the public policy exception has been applied in a "highly territorial" and "rule-oriented" manner leading to Indonesian courts construing the exception expansively.
- According to commentators, there is an urgent need for Indonesia to:
- (a) shift from the territoriality doctrine to the concept of *internationalism* and to a narrowing of the public policy ground;
- (b) adjust the Indonesian Arbitration Law to bring it in line with the provisions of the Model Law.

Contrary to public policy ground – Malaysia

Malaysia

- The Malaysian *Arbitration Act* 2005 is based on the Model Law. The threshold required before a Court will exercise its discretion to set aside an arbitral award for being in conflict with public policy is a high one. Likewise the definition of public policy is restrictive: *Tanjung Langsat*
- If the arbitral award is sought to be shown to be in conflict with public policy for an alleged breach of natural justice, such breach must: have caused actual prejudice to the aggrieved party, or 'shock the conscience' or offend 'fundamental principles of justice and morality: (ibid) (See *MTM Millenium*, *PT Asuransi*)

Contrary to public policy ground – Malaysia

- In order to set aside an award it needs to be established that there was a “conflict with the public policy of Malaysia in the narrow sense of something offending basic notions of morality and justice or something clearly injurious to the public good in Malaysia”: *Majlis Amanah Rakyat*
- The High Court favoured an approach for Malaysian Courts based on “comparative jurisprudence in the interests of maintaining comity of nations and a uniform approach to the model law, so far as that is possible, to the concept of “public policy” in relation to foreign awards”

Contrary to public policy ground – Singapore

- **Singapore**
- The Model Law is given force of law in Singapore. In Singapore courts the exception will be construed narrowly: *AJU v AJT*
- An award will only be refused enforcement if it would 'shock the conscience' or 'violate the forums most basic notions of morality: *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*
- When faced with such an objection the court must assess the real nature of the complaint: *AKN v ALC*
- The preconditions to a successful application to set aside an arbitral award for breach of natural justice may be stated.

Contrary to public policy ground – Singapore

- To successfully set aside an arbitral award for breach of natural justice, it must be established:
- (a) which rule of natural justice was breached;
- (b) how it was breached;
- (c) in what way the breach was connected to the making of the award; and
- (d) how the breach prejudiced its right.

- John Holland P/L v Tokyo Engineering Corp (Japan);Soh Beng Tee

- The breach must have necessarily made a difference to the outcome: LW Infrastructure Pte and culminated in actual prejudice to a party (Soh Beng Tee at [98]).

Contrary to public policy ground – Hong Kong

- **Hong Kong**:
- The Model Law have the force of law in Hong Kong. The "public policy" ground is narrowly construed and means "contrary to the fundamental conceptions of morality and justice of the forum" . (T)he award must be .. fundamentally (and obviously) offensive to that jurisdiction's notions of justice". "(T)here must be … a substantial injustice arising out of an award which is so shocking to the court's conscience as to render enforcement repugnant". The conduct complained of "must be serious, even egregious" , and only a sufficiently serious error which has undermined due process will suffice: *Hebei Import.* Another application of this ground in Hong Kong is the well known case of *Gao Haiyan v Keeneye Holdings*

Contrary to public policy ground – Japan

Japan:

- The Japanese *Arbitration Law* is based on the 1985 Model Law with a few limited variations.
- The Law provides that an arbitral award may be set aside or refused recognition or enforcement if:
- the content of the arbitral award is in conflict with:
- the public policy; or
- good morals of –

  Japan: Art 45(2)
- Japanese courts have narrowly interpreted ‘public policy’ in light of the purposes of the Arbitration Law.
- The public policy exception has rarely been successful in Japan.

Contrary to public policy ground – China

China

- While the PRC is not a “Model Law country” (with the exception of Hong Kong and Macau) there is an increasing reluctance on the part of the Chinese courts to invoke “public policy” type grounds.
- The “public policy” exception is not expressly included as one of the grounds in Art 260 of the *Civil Procedure Law of the PRC.* However if the people’s court determines that an award’s enforcement goes against the social and public interest of the country it will not be allowed. It appears this will require proof of an affront to the higher "social public interest" of China as a whole, whether it relates to the moral order of the country or the sovereignty of the Chinese courts.
- This difficult level of proof may explain why the SPC has apparently vacated only one foreign arbitral award on public policy grounds since (at least) 2000.

Republic of Korea

Korea:

- South Korea is a Model Law country. The Korean Supreme Court has adopted a narrow interpretation of “public policy”.
- The Supreme Court has stated that the public policy exception was intended to protect only the most fundamental moral beliefs and social order in the enforcing country.
- In applying NYC Art V(2)(b), the Supreme Court has ruled that “recognition or enforcement may be refused on public policy grounds only if the consequences would be against the good moral and social order of the country.”
- The existence of fraud in the arbitration would be valid grounds to refuse enforcement under Article V(2)(b): Korean Supreme Court, 2006Da20290, Decided on 2009. 5. 28.

Contrary to public policy ground – India

- **India:**
- *Arbitration and Conciliation Act* 1996 is based on the Model Law. The Indian Supreme Court has notably held that:
- the broad interpretation of "public policy" used for setting aside a domestic arbitration award will not be applied to enforcement of an ICA award in India: *Renusagar Power Co.; Shri Lal Mahal Ltd. -v- Progeto Grano Spa*
- The enforcement of an ICA award can only be opposed on grounds of "public policy" when the award is contrary to: the fundamental policy of Indian law; the interests of India; or justice and morality. Reinforced by recent amendments to the *Arbitration and Conciliation Act* 1996 which define "public policy".

Contrary to public policy ground – India

- *Arbitration and Conciliation Act* 1996 - Explanations 1. and 2. to s. 34 provides as follows:
  - Explanation 1. For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.
  - Explanation 2. For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Contrary to public policy ground – Sri Lanka

- In Sri Lanka courts will exercise extreme caution in applying the concept of public policy: *Kiran Atapattu v Janashakthi General Insurance Co. Ltd*: SC Appeal 30-31/2005 decided on 22.2.2013.
- Courts exercising jurisdiction under the s 32 of the *Arbitration Act* (No. 11 of 1995) (the equivalent of Art 34 Model Law) will not sit in appeal over the conclusions of the arbitral tribunal.
- An arbitration award will not be lightly set aside and that a court will only look into the matter, in the context of violation of public policy, if there is some illegality or immorality that is more than a mere misstatement of the law.

Contrary to public policy ground – Sri Lanka

- Sri Lankan courts have no jurisdiction to re-examine the evidence before the arbitral tribunal or to correct errors of law in an award (even patent and glaring ones), *unless* the error can be established to be a jurisdictional error or can be shown to be of such a nature as to render the award contrary to public policy: *Light Weight Body Armour Ltd. v. Sri Lanka Army* [2007] BALR 10

- In Sri Lanka the concept of 'public policy' encompasses "fundamental principles of law and justice in substantive as well as procedural aspects":

Conclusion

- Limited curial interference and steadfast curial support - the yin and yang of ICA is its fundamental organising principle – its *sine qua non*.
- International trade demands uniformity of laws/harmonisation so that there is greater predictability, and certainty in commercial relationships.
- An approach when seeking to construe the concept of "public policy" of examining: the relevant provisions of the '*lex arbitri*'; the concept of "public policy" in the context of the history and interpretation of the critical international instruments - both internationally and locally, and in light of domestic, international and especially regional case law is in accord with international, and in particular, the practice in much of Asia.

Conclusion (cont'd)

- It is suggested that such an internationalist approach can be adopted in relation to the interpretation of the NYC and Model Law generally.
- The approach of courts in the region which emphasises *comparative jurisprudence* will assist in maintaining a uniform approach to the interpretation of the NYC and Model Law, which will assist to maintain the *yin and yang* of ICA (limited curial interference and steadfast curial support) thereby facilitating international trade and the comity of nations.

  - Participants are referred to my identically titled paper for a more detailed examination of this subject.

Bibliography

- *Redfern & Hunter on International Arbitration,* Blackaby et al; 5th Ed, Oxford, 2009
- *The International Arbitration Act 1974: A Commentary*, M Holmes, and C Brown, 2nd Edition, Lexis Nexis, 2015
- *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, Hon. Gen. Ed. P Sanders, 2011.Available at: http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf
- Recognition and Enforcement of Foreign Arbitral Awards: The Application of the New York Convention by National Courts, [July 2, 2014 draft] by Prof. George A. Bermann, available at: http://www.iacl2014congress.com/fileadmin/user_upload/k_iacl2014congress/General_reports/Bermann__General_Report_Recognition__Enforcement_of_Foreign_Awards_July_2_2014__2_.pdf
- The Interpretation and Uniformity of the Uncitral Model Law on International Commercial Arbitration focussing on Australia, Hong Kong and Singapore, Dean Lewis, 2016
- Australian Commercial Arbitration, Hockley, Croft, Ho and Hickie, Lexis Nexis, 2014
- Commercial Arbitration in Australia, Doug Jones, 2nd Ed., Lawbook Co., 2013
- Recognition & Enforcement of Arbitral Awards by Hon. Justice Saleem Marsoof, PC, The Bar Association Law Journal, 2013 Vol. XX, pp 1 - 10
- Setting Aside of Awards: Public Policy & Rules of Natural Justice, Ir. Lai Sze Ching, MIArb Newsletter, No 2, 2014, pp 12 – 17

Bibliography

- The concept of public policy exception to the enforcement of foreign arbitral awards: the Indonesian perspective, by Fifi Junita, Int. A.L.R. 2013, 16(5)
- Arbitration in Indonesia Law No. 30 of 1999 Arbitration and Alternative Dispute Resolutions Hadiputranto, Hadinoto & Partners 2007; available at: http://www.hhp.co.id/files/Uploads/Documents/Type%202/HHP/br_hhp_arbitrationindonesia.pdf
- The meaning of international award under Indonesian arbitration law, by Huala Adolf; Int. A.L.R. 2010, 13(6), 241-246, International Arbitration Law Review, 2010
- Harmonizing Arbitration Laws in The Asia Pacific Region by Frans H. Winarta, INDONESIA ARBITRATION - Vol. 7 No. 1 March 2015 : 1-8
- Arbitration And Maritime Issues In Indonesia by M. Husseyn Umar, INDONESIA ARBITRATION - Vol. 7 No. 3 September 2015 : 01-06
- Enforcement of Arbitral Awards by W Suwito, INDONESIA ARBITRATION - Vol. 7 No. 4 December 2015 : 29-41
- A Brief on Arbitration in Indonesia, M Husseyn Umar, PT Fikahati Aneska, 2015
- Arbitrating in "developing" arbitral jurisdictions: a discussion of common themes and challenges based on experiences in India and Indonesia, by Nicholas Peacock; International Arbitration Law Review 2010; Int. A.L.R. 2010, 13(6), 221-233
- Indonesia: the new Arbitration Law of 1999: Indonesia's first comprehensive arbitration law by Karen Mills; International Arbitration Law Review 2000; Int. A.L.R. 2000, 3(3), N39-41

Bibliography

- *Recognition & Enforcement of Arbitral Awards* by Hon. Justice Saleem Marsoof, PC, The Bar Association Law Journal, 2013 Vol. XX, pp 1 - 10
- *Setting Aside of Awards: Public Policy & Rules of Natural Justice,* Ir. Lai Sze Ching, MIArb Newsletter, No 2, 2014, pp 12 – 17
- *The Enforcement of International Arbitration Awards and Public Policy, An AMTAC and Holding Redlich Seminar,* 10 November 2014; G Farnsworth, M Holmes QC, Allsop CJ
- *The Concept of Public Policy in Setting aside of Arbitral Awards - a comparative study of the approach of Courts in Sri Lanka and India,* by Chandaka Jayasundere LLM Attorney at Law: http://www.lawasia.asn.au/1308_1030_1230_ADR_JAYASUNDERE_Chandaka_WP.pdf
- When can arbitral awards be set aside based on excess of jurisdiction and public policy? K Shanti Mogan; 19 May 2016; http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Malaysia/Shearn-Delamore-Co/When-can-arbitral-awards-be-set-aside-based-on-excess-of-jurisdiction-and-public-policy#1
- Arbitration Guide, IBA Arbitration Committee, Malaysia, April 2012, Sunil Abraham, Zul Rafique & Partners
- Why Arbitrate in Malaysia and the Liberalisation of the Malaysia Legal Profession, by Lim Chee Wee, available at:http://klrca.org/wp-content/uploads/2013/03/Why-Arbitrate-in-Malaysia-and-the-Liberalisation-of-the-Malaysian-Legal-Profession-by-Lim-Chee-Wee.pdf

Bibliography

- *The New Malaysian Arbitration Regime 2005,* WSW Davidson & Datuk S. Rajoo, [2005] Malaysian Law Journal
- *The Natural Justice Fallibility in Singapore Arbitration Proceedings,* by KH Shahdadpuri (2014) SAcLJ 562
- Singapore Court's approach to Model Law principles, Regional Arbitral Institutes Forum ("RAIF") Conference 2015, Singapore Update, Chan Leng Sun, SC
- Challenging Arbitration Awards for breach of the Rules of Natural Justice, Justice Judith Prakash, speech delivered on 24.08.13 at CIArb International Arbitration Conference, Penang, Malaysia
- South Korea: receptive to foreign arbitration awards? Beomsu Kim and Benjamin Hughes of Shin & Kim, available at file:///C:/Users/user/Downloads/D--web-Homepage-upload_files-data-SouthKoreaAsiaCounsel-January2010(4).pdf
- International arbitration in Korea – award enforcement by Lance B Lee available at : file:///C:/Users/user/Downloads/v11i1_JURIS_SK.pdf
- Critical Appraisal of 'Patent illegality' as a ground for setting aside an arbitral award in India, Garima Budhiraja Arya, and Tania Sebastian, Arbitration (2012) 24.2 Bond Law Review
- Indonesia: The risks of enforcing foreign awards, by A.Y. Kadir, Global Arbitration News; http://globalarbitrationnews.com/indonesia-the-risks-of-enforcing-foreign-awards-20150129/

- **John K. Arthur**
- LLB., BA., DipICArb, FCIArb
- Barrister and Member of the Victorian Bar
- c/- List S, Owen Dixon Chambers, 205 William Street, Melbourne VIC., 3000, AUSTRALIA.
- T: +61 3 9225 8291
- Mob: + 61 412 892 199
- E: jkarthur@vicbar.com.au
- W: http://www.gordonandjackson.com.au/
- Linked in: https://au.linkedin.com/pub/john-arthur/56/661/512\
- Full profile: http://www.vicbar.com.au/Profile?2419