GAR Global Arbitration Review

The Asia-Pacific Arbitration Review

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Enforcement of Arbitral Awards in the Asia-Pacific

Andre Yeap SC and **Kelvin Poon**
Rajah & Tann Asia

Summary

Arbitration in Asia continues to be on the rise. In 2017, the Singapore International Arbitration Centre (SIAC) received a record-breaking 452 new cases from parties across 58 jurisdictions, which marked a 32 per cent increase from 2016.[1] In Hong Kong, a total of 460 new cases were filed at the Hong Kong International Arbitration Centre (HKIAC).[2] This continued rise may be explained by a number of factors including growth in the region, the relatively low costs of conducting an arbitration in the Asia-Pacific (as opposed to, for instance, in America or Europe),[3] and the proliferation (and continued development and advancement) of arbitral institutions in Asia.[4]

One further factor – which perhaps explains the popularity of arbitration (as compared to litigation) in general – is the relative ease with which arbitral awards (as compared to court judgments) may be enforced worldwide.[5] But is this really the case? Have countries in Asia generally tended toward being arbitration-friendly or arbitration-averse? We consider recent developments in a few jurisdictions – Singapore, India and Australia – to examine if convergence toward or divergence from a uniformed approach in the enforcement of international arbitral awards has been the order of the day.

THE MODEL LAW

The Model Law was designed to 'assist states in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration'[6] in a bid to achieve uniformity of the law of arbitral procedures across jurisdictions.[7] Of particular importance for the purposes of this article, the Model Law provides states with guidelines on the enforcement of arbitral awards. This is found in articles 35 and 36 of the Model Law, which provide:

> Chapter VIII. Recognition and Enforcement of Awards
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> Article 35. Recognition and enforcement
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> 1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
> 2. The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.
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> Article 36. Grounds for refusing recognition or enforcement
>
> 1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
>   1. at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
>
>   1.

a party to the arbitration agreement referred to in article 7 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 thereon, under the law of the country where the award was made; or

2. the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
3. the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
4. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
5. the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

2.if the court finds that:

1. the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
2. the recognition or enforcement of the award would be contrary to the public policy of this State.

2. If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Legislation based on the Model Law has been adopted in 74 states, with two Asian states – Korea and Myanmar[8] – coming on board as recently as 2016. Even though there remain

countries in the region – such as Indonesia – that have yet to adopt the Model Law, even these countries typically nevertheless enact domestic legislation that broadly tracks the Model Law provisions in relation to enforcement.9

SINGAPORE

Singapore is a Model Law country that has enacted local legislation (the International Arbitration Act (IAA) and the Arbitration Act) that gives effect to the Model Law (with seeming exceptions that are discussed below). Two developments in the field of enforcement bear mention.

The first is the decision by the Court of Appeal of PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal [2014] 1 SLR 372. Although this decision was made some years ago (on 31 October 2013), its significance cannot be overstated. In short, the Court of Appeal upheld the notion of 'choice of remedies' – which means broadly that a party would not be precluded from resisting enforcement of an arbitral award (in Singapore) by dint of its having failed to apply to set aside the award at its seat. Although this seems a rather trite proposition in Singapore now, it was not at the time, not least given the legislative framework in the country (in particular, the IAA).

A party seeking to resist enforcement of a foreign award in 2013 would have been confronted principally with two provisions of the IAA.

- First, section 19 of the IAA, which provides: 'An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award'.
- Second, section 3(1) of the IAA, which provides: 'Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore'. Chapter VIII houses articles 35 and 36, which are cited above, and effectively provides for the mechanism to resist enforcement.

In this light, and at the risk of oversimplifying, it was perhaps understandable that the High Court came to the conclusion that '[r]efusal of recognition and enforcement cannot be divorced from setting aside – a domestic international award is either recognised and not set aside, or it is not recognised and is set aside' (Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others [2013] 1 SLR 636 at [82]).

The Court of Appeal disagreed. After engaging in a thorough analysis not just of the history of section 19 of the IAA but also the Model Law, it came to the conclusion that a 'choice of remedies' was 'not just a facet of the Model Law enforcement regime; it [was] the heart of its entire design' (at [65]); and the choice of remedies notion was indeed incorporated in section 19 of the IAA, purposively interpreted (at [99]).

Since the decision in Astro, and from this we glean the second broad development, Singapore courts have faced a number of arbitration-related applications (typically setting aside or resisting enforcement).10 The general approach has been one of deference (in line with the Model Law), and attempting to give effect as far as possible to the parties' agreement to arbitrate.11

One example of this is the High Court decision of JVL Agro Industries Ltd v Agritrade International Pte Ltd [2016] 4 SLR 768. There, the High Court was faced with an application to set aside an arbitral award on the basis of, among other things, the tribunal having arrived at the award in breach of natural justice. Having 'found there to be substance in [the applicant's] submissions', the High Court asked counsel for the respondent if 'he wished to invite [the court] to exercise [its] power under Art 34(4) of the UNCITRAL Model Law . . . to suspend [the] setting aside proceedings for a period of time in order to give the tribunal an opportunity to resume the arbitral proceedings and take action to eliminate the grounds advanced by [the applicant]'.12 Counsel for the respondent did indeed extend such an invitation to the court. The High Court then suspended the setting-aside proceedings for six months and remitted the award to the tribunal for it to 'consider whether it was necessary or desirable, and if so to what extent, to receive further evidence or submissions on three specific issues'.13 The foregoing is an example of the High Court trying to give effect to the parties' agreement to arbitrate as far as possible because instead of proceeding directly to address the setting-aside application, it instead alerted parties to the option of remission (and thereafter indeed remitted the matter, which could conceivably have resulted in the award having been 'corrected'). As it transpired, the remission was found to have been in vain as, among other things, the tribunal effectively considered it was neither necessary nor desirable for it to receive further evidence or submissions on the issues identified by the court.14 The High Court went on to consider the application on the merits and found in favour of the applicant, setting aside the award.15

More recently, the High Court granted a permanent injunction restraining a party from re-litigating, in a foreign court, matters which have been fully resolved in a final award issued pursuant to an arbitration seated in Singapore. In granting the injunction, the High Court in Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd [2018] SGHC 56 carefully considered whether such an injunction was governed by the Model Law because 'if a matter is governed by the Model Law, the court's intervention is restricted to the extent provided for in the Model Law and nothing else'. In the event, the High Court concluded that article 5 of the Model Law did not prevent the court from issuing a permanent anti-suit injunction as the grant of a permanent injunction or other remedy is not a matter governed by the Model Law.16 In arriving at its decision, the High Court expressly upheld the finality and sanctity of an arbitral award. It considered that where proceedings are commenced in relation to claims already fully resolved by arbitration, such proceedings are in substance an attack on the award and would be a breach of the party's obligation not to set aside or otherwise attack any issued award other than though the mechanisms provided for in the seat of arbitration, which could justify the grant of a permanent anti-suit injunction.17

In short, the Singapore courts have steered a course in line with the Model Law18 – upholding the principle of double control yet intervening in a principled manner (again in line with the Model Law regime) in exercising their supervisory jurisdiction.

AUSTRALIA

In a recent decision by the Supreme Court of Victoria, Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd [2017] VSC 97, the court provided guidance on what was a final award, and whether an arbitrator was functus officio. Although the court's determination was in relation to the Commercial Arbitration Act 2011 (CAA) (ie, a 'domestic statute in the State of Victoria'),19 the Supreme Court itself noted that 'it should be interpreted in conformity with international norms with respect to the Model Law, "so far as practicable"' (at [10]). In this

regard, the Supreme Court's analysis would be relevant to the other states in Australia and other Model Law jurisdictions in general.[20]

The parties in this case were embroiled in two sets of proceedings, as outlined below.

In the first set of proceedings, Blanalko alleged Lysaght breached a design and construction contract. This led to court proceedings beginning in 2012, which culminated in a settlement deed. Through the settlement, part of the dispute was resolved and the remaining part was directed to arbitration. In the arbitration, the arbitrator delivered an interim award on 15 June 2016, which resolved most of the dispute, and invited parties to make submissions on, among other things, costs. A further award, which was named a 'final award', was delivered on 9 August 2016. In this, the arbitrator found that he had the jurisdiction to consider the matter of costs of the court proceedings but did not go on to decide the issue because he did not have the requisite information. Neither party thereafter requested an additional award under section 33(5) of the CAA, which is substantially similar to article 33(3) of the Model Law: 'Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award'. Blanalko thereafter applied to court for an order that Lysaght pay its costs of the court proceedings that commenced in 2012. Lysaght applied to stay Blanalko's application on the basis it should be arbitrated (ie, pursuant to section 8 of the CAA, which is substantially similar to article 8 of the Model Law).

In the second set of proceedings, Blanalko filed an application to set aside the arbitral award on the basis that the arbitrator had no power to determine the question of costs the way that he did (which was, in Blanalko's submission, tantamount to 'permitting the parties to make application to the Supreme Court for it to determine the question').[21] This was brought pursuant to section 34(2)(a)(iii) of the CAA, in other words, that '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'.

The court dismissed the setting aside application[22] and found that the 'final award', despite its label, was not in fact a final award.[23] This was because it 'did not decide all issues put to the arbitrator within the arbitrator's mandate and did not involve an order or direction that might be characterised as an invalid delegation of power to a third party'.[24]

The court also gleaned from the UNCITRAL Secretarial Notes that a party is not constrained by the 30-day time limit in section 33(5) of the CAA (and in general article 33 of the Model Law) to seek a further award where, as was the case in this instance, the arbitrator made 'a conscious decision not to deal with an issue'.[25] Necessarily, the court found that the arbitrator's mandate in respect of costs of the court proceedings commenced in 2012 remained.[26]

What is noteworthy about the judgment for the purposes of this article is twofold. First, the court emphasised from the outset the need to interpret the CAA in line with the Model Law (at [10]). Second, the court thereafter conducted a rigorous analysis relying not only on local authorities but court decisions from neighbouring Model Law jurisdictions (including New

Zealand[27] and Singapore)[28] as well as the UNCITRAL Analytical Commentary[29] and the Model Law drafting history.[30] Both signal steps toward convergence.

More directly, on the topic of enforcement, the Victorian Court of Appeal in Gutnick and another v Indian Farmers Fertiliser Cooperative Ltd and another [2016] VSCA 5 upheld an arbitration award,[31] dismissing an application to resist enforcement on the basis of public policy.

There, the arbitral award declared certain agreements involving the sale of shares to be rescinded, and ordered the return of the purchase price with interest and costs.[32] By then, the shares had already been transferred pursuant to the agreements but no provision was made in the award for the return of the shares. The applicants argued the award should not be enforced in Australia because enforcement would be contrary to public policy. This was based on section 8(7)(b) of the International Arbitration Act 1974 (Cth),33 which is materially similar to article 36(1)(b)(ii) of the Model Law.[34]

The crux of the applicants' 'public policy' argument was as follows:

- the award permits 'double recovery' as the award allows the respondents to have their money back and keep the shares (which had already been transferred pursuant to the agreements); and
- double recovery was contrary to public policy (and that therefore enforcement of the award should not be allowed).[35]

The court ruled that there was no risk of double recovery in that case, thereby dismissing the appeal. The pertinent portions of the judgment are as follows:

> 29. It needs to be recalled that the applicants are contending that the award should not be enforced because it would fundamentally offend principles of justice and morality. We accept the contention of the respondents that the effect [the orders in the award], was that both [agreements] were set aside ab initio and that the parties were restored to the positions that they were in before the agreements were entered into. As the applicants themselves conceded, the effect of the order that the agreements 'are rescinded' was to revest equitable title in the shares in the applicants. We also accept the contention of the respondents that for the applicants to have made good the proposition that enforcement of the award would be contrary to public policy, they would have had to have established that the primary declaration of rescission would or should not have been made under the domestic law of Australia or England without express consequential orders providing for the revesting of the shares.
>
> 30. When the tribunal made its award declaring that the agreements had been rescinded, it did not declare that the respondents were entitled to retain ownership of the shares; nor did it say anything that implied such an entitlement. It is plain from the award that the respondents' case was a conventional claim for rescission involving the return of what was purchased with a refund of the purchase price. The arbitral tribunal accepted those claims and made an award and order accordingly. As the judge put it, 'the declaration of rescission in the award necessarily entails the avoidance of the transactions from the beginning and the restoration of the parties to their

> previous positions'. With respect, we agree. Far from being contrary to public policy, we consider that the award conforms with the public policy of Australia.

In short, the court's approach was consistent with the notion of minimal curial intervention[36] (particularly in the arena of resisting enforcement on the basis of public policy) – marked clearly in the portion quoted above (Gutnick at [29]) by the court's acknowledgement of the high threshold the applicants needed to meet. Incidentally, this strict approach to considering 'public policy' based applications to resist enforcement – or to set aside – has been adhered to by the Singapore courts as well.[37]

In line with this approach of being a pro-arbitration jurisdiction, 2017 also saw the Federal Court of Australia in Lahoud v Democratic Republic of Congo [2017] FCA 982 enforcing two investment arbitration awards for the first time.

INDIA

In the previous edition of the Asia-Pacific Arbitration Review,[38] we referred to India's amendment, in December 2015, to its domestic arbitration legislation (the Arbitration and Conciliation Act 1996) as manifesting India's ambition to be a pro-arbitration jurisdiction.

Despite the coming into force of the Arbitration & Conciliation Amendment Act 2015 (the Amendment Act), there has been some confusion in relation to whether its provisions would apply to arbitration proceedings commenced before the Amendment Act came into force. Specifically, issues have arisen as to whether the Amendment Act governs applications relating to arbitration proceedings that were commenced before the Amendment Act came into force for:

- interim measures to support such arbitrations that were seated outside of India; and
- petitions filed under section 34 of the 1996 Act to set aside awards emanating from arbitration proceedings, and whether a stay on enforcement would be granted automatically once such a petition is filed.

These issues have arisen largely because of the way section 26 of the Amendment Act is framed. It states:

> Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

While the Bombay High Court had ruled that the Amendment Act would apply to proceedings in court filed after the Amendment Act came into force,[39] there were decisions in other high courts of India going in the opposite direction,[40] which added to the confusion.

A recent judgment of the Indian Supreme Court in Board of Control for Cricket in India v Kochi Cricket Pvt Ltd (Appeal (Civil), 2879-2880 of 2018) issued on 15 March 2018 (the BCCI case) may have finally put these issues to rest even though it remains to be seen whether this decision will be uniformly applied across the Indian Courts. Eschewing a literal interpretation that would do violence to what the Supreme Court recognised to be the legislature's

intention behind the passing of the Amendment Act (ie, to make India an arbitration-friendly jurisdiction), the Supreme Court held that arbitration-related applications filed in court after the coming into force of the Amendment Act will be governed by its provisions even if the underlying arbitration proceedings were commenced before the Amendment Act came into force. The Supreme Court arrived at such a conclusion by reading the last phrase in section 26 ('this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act') to mean that the Amendment Act shall apply to any court proceedings 'in relation to arbitral proceedings' commenced on or after the commencement of the act. Thus, even if the underlying arbitration proceedings had commenced prior to the Arbitration Act, the act will apply so long as the application to the Indian court was made after the Amendment Act came into force.41

In light of the BCCI case, it would appear that the Indian Courts will have power to entertain applications for interim measures in support of foreign arbitral proceedings commenced prior to the coming into force of the Amendment Act if the court proceeding were filed post the Amendment Act coming into force. While a proviso to section 2 of the Amendment Act states that applications for interim measures will apply even where the arbitration was seated outside India, the confusion surrounding the proper interpretation of section 26 of the Amendment Act had meant that some applications for interim measures in aid of foreign arbitrations commenced before the Amendment Act came into force were refused on the basis that the Amendment Act did not govern such applications.

The second main amendment to the Arbitration and Conciliation Act 1996, perhaps more directly relevant to the theme of this chapter, was the provision relating to enforcement of awards. The key amendment in the Amendment Act was the addition of a provision, section 36(2) and 36(3) which stipulates that an application to set aside an award would not automatically stay any application to enforce the same. This was a departure from the original act which provided for such stays being automatically granted upon a petition to set aside the award being filed. Rather, under the Amendment Act, whether a stay would be granted would be a matter for the court's discretion, and may be subject to 'conditions as it may deem fit'. This, it has been noted, could curb or control the undue delays faced by successful parties attempting to enforce their awards.

For the reasons given earlier, there has been some uncertainty as to whether these new provisions would apply to awards issued in respect of arbitral proceedings commenced before the Amendment Act came into force. The BCCI case seems to have clarified that these new provisions would apply even to awards issued pursuant to arbitral proceedings commenced before the Amendment Act came into force. In arriving to its decision, the Supreme Court expressed concern that it would be inherently unfair for enforcement proceedings to be stayed automatically simply on the basis that an application had been made under section 34 to set aside an award.42

With the BCCI case, it would appear that the Indian courts have taken a further step in bringing its court procedures in line with the legislative's objective of making arbitration an efficient and predictable method of dispute resolution in India.43

CONCLUSION

From the foregoing, the trend in Asia toward convergence based on the countries surveyed continues unabated. That said, parties (and parties' counsel) may still face practical challenges in enforcement, whether as a function of needing to familiarise themselves with

the nuances (convergence not being complete) of a foreign jurisdiction (where enforcement is being considered) or being dissuaded as a matter of perception.4444 It is apparent (or perhaps it has always been) that the endgame of arbitration is recourse to the courts whether through applications for setting aside or resisting enforcement. And although courts can go far in ensuring these processes are not abused (as the courts above have), as the continuing saga of Yukos epitomises,45 efforts at convergence will often be challenged by divergent interests.

Endnotes

Andre Yeap SC andre.yeap@rajahtann.com
Kelvin Poon kelvin.poon@rajahtann.com

Rajah & Tann LLP 9 Battery Road #25-01, Straits Trading Building Singapore, 049910, Republic of Singapore

Tel: +65 6535 3600 / +65 9690 2253

https://www.rajahtann.com/