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

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"The yin & the yang are opposite forces. Yet, they exist together in the harmony of a perfect orb."[1]

"Yinyang (i)s a process of harmonization ensuring a constant, dynamic balance of all things"[2].

Introduction

International commercial arbitration (**ICA**) is a consensual and non-curial or "alternative" dispute resolution process for the determination of transnational commercial disputes[3]. In recent decades it has proven spectacularly successful on a global level and is recognised as the preferred method for resolving such disputes.[4] Its success has been enabled by the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (**New York Convention**)[5], and facilitated in recent years by the *UNCITRAL Model Law on International Commercial Arbitration* 1985 (as amended 2006)(**Model Law**)[6]. The proliferation of ICA has led to the development of an "internationally recognised harmonised procedural jurisprudence", which combines the best practices of both the civil and common law

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[1] R. A. WISE, Wise Quotes of Wisdom

[2] The Internet Encyclopedia of Philosophy (IEP) (ISSN 2161-0002) at http://www.iep.utm.edu/yinyang/

[3]Reference has been made to: *The International Arbitration Act 1974: A Commentary*, 2nd Ed; M. Holmes, and C. Brown, Lexis Nexis, 2015; and generally, *Redfern and Hunter on International Arbitration, Student Edition*, by Redfern, Hunter, Blackaby and Partasides, 5th Ed., Oxford Uni. Press, 2009; *International Arbitration: A Handbook*, by Phillip Capper, 3rd Ed., LLP, 2004; *Australian Commercial Arbitration*, Hockley, Croft, Hickie & Ho, Lexis Nexis, 2015.

[4] *TCL Air Conditioner (Zhongshan) Co Ltd v. The Judges of the Federal Court of Australia and Anor* (2013) 251 CLR 533; (2013) 295 ALR 596; (2013) 87 ALJR 410; [2013] HCA 5 at [10]("TCL case"); The Hon. P. A. Keane, Justice of the High Court, (2013) 79 *Arbitration* 195-207; 2013 International Arbitration Survey, PWC and Queen Mary, University of London, School of International Arbitration. Available at: **www.arbitrationonline.org/docs/pwc-international-arbitration-study2013.pdf** and past years' surveys

[5] See http://www.newyorkconvention.org/

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

systems, taking into account diffuse cultural and legal backgrounds and philosophies. The new jurisprudence is establishing an accepted procedure for dispute resolution which benefits international arbitration, as well as modern jurisprudence generally.[7]

To be effective ICA requires the support of domestic courts applying domestic laws (*lex arbitri*) which give effect to the NYC (and if applicable a Model Law *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

In order to function and be effective, the consensual process must be supported by national, or domestic, laws which are given effect to by domestic courts. The most important of these are:

- the law applicable to, or 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 supervisory role of national courts supporting it;
- the *lex causa* - the law governing the substantive contract;
- the national laws which legislate for the enforcement mechanisms of the New York Convention (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 and any ethical codes of conduct.[8]

New York Convention (NYC) and the Model Law - NYC

The NYC is the single most important factor explaining the success of ICA. With 154 countries so far having acceded to it, it is the most successful instrument in international trade law[9].

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[7] Rt Hon. Sir Michael Kerr, *Concord and Conflict in International Arbitration,* (1997) 13 *Arbitration International* 122 at 125-6.

[8] Capper at p. 11ff. Five systems of law may apply to international commercial arbitration: Redfern & Hunter, at p. 165, cited in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666; [2013] WASCA 66 [36]

[9] ICCA's Guide to the Interpretation of the New York Convention, Foreword by P Sanders available at http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf

The NYC is primarily concerned with two matters:

- the recognition of, and giving effect to, arbitration agreements; and
- the recognition, and enforcement, of international (non-domestic) arbitral awards.

It achieves the *first* by requiring a court of a contracting state to refer a dispute which has come before it, and which falls within the scope of an arbitration agreement, to arbitration; and the *second* by 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.[10]

Interpretation of the NYC

It is noted that the NYC as an international treaty is interpreted in accordance with the rules of interpretation of international law, which are codified in Articles 31 and 32 of the *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). Art 31(2) defines "context" for the purpose of the interpretation of a treaty[11]. Recourse may be had to supplementary means of interpretation where the interpretation according to 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[12].

Model Law

[10] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York on 10 June 1958 known as the *New York Convention;* Redfern & Hunter at p. 72; the 148 countries which have acceded to the NYC are the vast majority of countries in the world. On 16 April 2013 Myanmar also acceded to the NYC: **www.newyorkconvention.org/new-york-convention-countries/contracting-states;** Articles II and IV NYC

[11] Art 31(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (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. (3) There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.

[12] Cf the approach in Indonesia as stipulated by the Indonesian Civil Code Arts 1342-1351, and civil law countries: A Brief on Arbitration in Indonesia, M Husseyn Umar, PT Fikahati Aneska, 2015, p. 52ff

The next most influential international legal instrument in the present context is the Model Law[13]. It was formulated in recognition that it would be in the interests of ICA to have uniform standards of arbitral procedure and that the development of a model law on the subject was the best way to achieve this[14]. 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' include many countries in Asia[15], and 72 countries and 102 jurisdictions globally[16]. Australia's *lex arbitri* is the *International Arbitration Act* 1974 (Cth.)("**IAA**") which gives the Model Law force of law in Australia (s. 16). 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 process

The foundation of the arbitral process is *contract* - the agreement by which the parties refer their disputes to arbitration. Indeed, 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 so requires it). Its terms will bind the parties, as well as the arbitrator appointed pursuant to it.[17] Unless settled by agreement, the arbitral process will culminate in an award capable of enforcement with curial assistance from national courts.

Separability of "arbitration agreement"

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 and on this basis survives termination of the contract. As a result:

- the arbitral tribunal has jurisdiction to rule on its own jurisdiction even if the underlying contract has been terminated or set aside;[18] and

[13] The 1985 Model Law was revised in 2006, available at www.uncitral.org

[14] Ibid, Dean Lewis at pp. 23-24

[15] Australia; Sri Lanka; Bangladesh; Brunei; Cambodia, China (Hong Kong and Macau); India; Japan; Malaysia; Myanmar; New Zealand; Philippines; Republic of Korea; Singapore; and Thailand

[16] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

[17] *Rizhao Steel Holding Group Co Ltd* (2012) 43 WAR 91; (2012) 287 ALR 315; 262 FLR 1; [2012] WASCA 50 at [165]–[166]

[18] Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd (2012) 287 ALR 315; 262 FLR 1; [2012] WASCA 50; at [165]–[166]

- the invalidity of the substantive contract will not necessarily mean that the arbitration clause is invalid.[19]

The separability principle is reflected in Art 10(f) and (h) of the Indonesian Arbitration Law[20].

The arbitral award

The making of a binding and enforceable award by the arbitral tribunal is the object and purpose – indeed, the culmination – of the arbitration process. The particular *lex arbitri* engaged will set requirements which an award must contain but the precise requirements for an award will principally be determined by the arbitration agreement (incorporating any arbitration rules) as modified by the *lex arbitri.*[21] 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.

Enforcement of awards

Under both the NYC and the Model Law a simple procedure is provided for the enforcement of international arbitral awards. Under Art. IV(1) NYC "to obtain the recognition and enforcement .. the party applying for recognition and enforcement shall, at the time of the application, supply: (a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement referred to in article II (that is the arbitration agreement or clause) or a duly certified copy thereof". The procedure under the Model Law is even simpler: "the party relying on an award or applying for its enforcement shall supply the original award or a copy thereof" (Art 35(2)) (but not the arbitration agreement). In like terms, in Australia under s. 9 IAA (1), "(i)n any proceedings in which a person seeks the enforcement of a foreign award .. he or she shall produce to the court: (a) the duly authenticated original award or a duly certified copy; and (b) the original

[19] Comandate Marine Corp v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45; 238 ALR 457; [2006] FCAFC 192; at [219]
[20] Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolutions - A Brief on Arbitration in Indonesia, M Husseyn Umar, PT Fikahati Aneska, 2015, p. 6
[21] Redfern & Hunter at para 9.114; ibid, Capper at p. 117ff

arbitration agreement under which the award purports to have been made or a duly certified copy". An expedited process for enforcement of awards is also provided for under the Indonesian Arbitration Law. An international arbitration award may enforced by application to the Central Jakarta District Court (or Supreme Court if the government of Indonesia is a party) producing the material required for a Model Law enforcement application, as well as statement from the diplomatic representative of the Republic of Indonesia in the country where the International Arbitration Award was rendered, stating that the claimant's country is bound to the Republic of Indonesia by bilateral or multilateral treaty on the recognition and execution of International Arbitration Awards (Arts 65-67).

Grounds upon which an award is liable to be set aside, or refused recognition or enforcement

The grounds upon which a court may interfere with, or review, an arbitral award in ICA, are generally strictly and expressly limited. In ICA there should be no appeal on the basis of the merits of an arbitral award[22] or for an error of law or fact. This is the case in Indonesia where it is emphasised that "The District Court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement" (Art 3(1) and see Art 11 of the Indonesian Arbitration Law)[23]. There is no appeal or *cassation* to the Supreme Court, against a decision of the Chairman of the Central Jakarta District Court contemplated in Article 66, item (d), recognise and enforce the award, but a cassation to the Supreme Court is allowed from a decision refusing to do so[24].

Under the NYC and the Model Law, only if the arbitral process is subject to some serious procedural irregularity (and in a limited range of other circumstances) is the award liable to be set aside, or refused recognition or enforcement. A mere error of law or fact will not suffice[25]. The grounds for challenging awards under the NYC (as reflected in the Model

[22] *AKN v ALC* [2015] SGCA 18 , [37] (Menon CJ), Singapore Court of Appeal

[23] Harmonizing Arbitration Laws in The Asia Pacific Region, by Frans H. Winarta, INDONESIA ARBITRATION - Vol. 7 No. 1 March 2015 : 1-8 at p. 4

[24] Art 68

[25] *PT Central Investindo v Franciscus Wongso* [2014] SGHC 190 at [101] cited in

Law) are concerned with the structural integrity of the arbitration proceedings[26], and equate with errors which go to jurisdiction.

In Model Law countries[27], the circumstances by which an award may be set aside are limited to those set out in Art 34, and those on the basis of which it may be refused enforcement or recognition are contained in Art 36. The circumstances under Arts 34 and 36 are with one exception identical. They draw their inspiration from Articles V(1)(a)-(e) and V(2)(a) and (b) of the NYC[28]. 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*[29]. 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 on the grounds that: (a) letters or documents submitted in the hearings which are admitted to be forged or are declared to be forgeries after the award has been rendered; (b) documents are found after the award has been rendered which are decisive in nature and were deliberately concealed by the opposing party; or (c) an award is made based on fraud committed by one of the parties to the dispute[30].

The NYC/Model Law grounds are well known.

Under the Model Law an arbitral award **may only** be set aside or refused recognition or enforcement, if the party making the application establishes that:

- *a party to the arbitration agreement .. was under some incapacity*[31]*, or the agreement was not valid under applicable law*[32]: **Art V(1)(a) NYC; Arts 34(2)(a)(i); 36(1)(a)(i) of the Model Law**;

[26] *Kanoria v Guinness* [2006] EWCA Civ 222, [30] cited by the Hong Kong Court of Appeal in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* 2012] 4 HKLRD 1 at 7[7] per Tang V-P (with whom Kwan and Fok JJA agreed) cited in *Cameron Australasia Pty Ltd v Aed Oil Ltd (subject to deed of company arrangement)* [2015] VSC 163 at [20] (Croft J)

[27] **W**hich includes many Asian countries such as Australia (International Arbitration Act 1974); Sri Lanka (Arbitration Act No. 11 of 1995); Bangladesh; Brunei; Cambodia, China (Hong Kong and Macau); India; Japan; Malaysia; Myanmar; New Zealand; Philippines; Republic of Korea; Singapore; Thailand, see: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

[28] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; (2013) 295 ALR 596; [2013] HCA 5 at [53]-[54]. The *International Arbitration Act* 1974 (Cth) (IAA) gives the force of law in Australia to the Model Law: s. 16 IAA

[29] A Brief on Arbitration in Indonesia, M Husseyn Umar, PT Fikahati Aneska, 2015, p. 82

[30] Art 70 of the New Arbitration Law

[31] Incapacity to enter a contract under ordinary principles of contract law: *Australian Commercial Arbitration*, ibid, n. 1 at p. 184

[32] By reason of the principle of separability the circumstances vitiating the arbitration agreement much relate directly to that and not to the underlying substantive contract: *Australian Commercial Arbitration*, ibid, n. 1 at p. 184

- *the party making the application (or against whom the award is invoked) was not given proper notice of the arbitral proceeding*[33]*, or was otherwise unable to present his case*[34]: **Art V(1)(b) NYC; Arts 34(2)(a)(ii) and 36(1)(a)(ii)**[35];
- *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*[36]: **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)**;
- *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)**.

A court may also set aside, or refuse recognition or enforcement of, an award if it finds that:

(a) the subject-matter of the dispute is not capable of settlement by arbitration under the law of that State[37]; or

(b) the award is in conflict with the public policy of that State.

Article 34(2)(b)(i),(ii); Art 36(1)(b) of the Model Law; Article V(2)(a) and (b) NYC[38]**.**

While an application to set aside an award under Art 34 must be made within three months of the award being made (or received) and to a Court in the State where the award was made, there is no time limit specified in Art 36[39] and an application for enforcement under the NYC may be made in any State which is a signatory. The primary supervisory function is with the court of the seat, as distinct from the enforcement court but the enforcement court will not necessarily defer to the court of supervisory jurisdiction[40].

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[33] A failure to give proper notice to a party against whom a claim is made is a clear breach of procedural fairness. The arbitration agreement, and/or incorporated arbitration rules will set notice requirements which must be met.

[34] Related to the requirement under s. 18

[35] See also Art 18 Model Law and may be constituted by a refusal to hold a hearing; allowing new claims to be introduced at a late stage in the proceeding without affording the other side a proper opportunity of responding; failing to allow a party to present argument: *Australian Commercial Arbitration*, ibid, n. 1 at p. 184ff

[36] The award deals with matters beyond arbitral tribunal's jurisdiction as derived from the arbitration agreement: *Australian Commercial Arbitration*, ibid, n. 1 at p. 187 -8

[37] Art 34(2)(b)(i) raises the issue of arbitrability, in other words what types of disputes can be resolved by arbitration

[38] 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)

[39] Of course local limitations of actions statutes may be applicable, for example, s. 7 Limitation Act 1980 (UK); Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd [1985] 1 W.L.R. 762; [1985] 2 All E.R. 436; s. 5(1)(c) Limitation of Actions Act 1958 (Vic).

[40] Hebei Import and Export Corp v Polytek Engineering Co Ltd [1999] 2 HKC 205 at [83] – [86]

The public policy ground

One of the grounds upon which a court may set aside or refuse recognition or enforcement of an arbitral award (and in Indonesia the only ground) is if it finds that the award is in conflict with the **public policy** of that State[41].

An important feature of public policy in Model Law countries is procedural fairness which Art 18 and Arts 34(2)(a)(ii) and 36(1)(a)(ii) of the Model Law - the fundamental procedural fairness/"unable to present its case" ground - are concerned. The two grounds may be very similar in a given case as they essentially relate to natural justice and procedural fairness but they are conceptually different:

(a) the "public policy" ground being concerned with contraventions of "fundamental principles of justice and morality"; and

(b) the "unable to present its case" ground with whether the party seeking to set aside the award has been accorded procedural fairness[42].

It has been suggested that the public policy exception is superfluous given the "unable to present its case" ground[43].

The concept of *public policy*

International public policy is said to be confined to violation of fundamental conceptions of legal order in the country concerned; or norms that embody and reflect fundamental notions of morality and justice.[44] It is suggested that an award should only be set aside on the public policy ground if it is contrary to "truly transnational" public policy[45]. The ground was defined by Sir Anthony Mason NPJ in *Hebei Import & Export*[46] as meaning "contrary to the fundamental conceptions of morality and justice of the forum".

[41] Article V(2)(a) and (b) NYC; Article 34(2)(b)(ii), Art 36(1)(b) Model Law; s. 8(7) International Arbitration Act 1974 (Cth.); see also s. 37(1)(b)(ii) of the Malaysian Arbitration Act 2005; Art 66 of the Arbitration Law 1999 (Indonesia)
[42] Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd [2016] VSC 326
[43] Bermann, p. 70
[44] Bermann, p. 71; and see *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387; [2014] FCAFC 83 at [76]
[45] In France traditionally ICA awards could only be rejected on the grounds of public policy or *ordre public* if there was shown to be a contravention of international public policy: NCCP Article 15002 *Societe Impex v Societe PAZ*, Judgment of May 18, 1971, Cour de Cassation, [1972] DS Jur 37
[46] (1999) 2 HKCFAR 111, (at p 130F); [1999] 1 HKLRD 665

It is suggested that the prevailing view is that public policy considerations "should be approached with extreme caution"[47]. It has been said by an English judge that "(i)t is never argued at all but when other points fail". The same case described public policy considerations as "a very unruly horse and when once you get astride it, you never know where it will carry you"[48].

It is suggested that "most national courts have adopted the narrower standard of international public policy, applying substantive norms from international sources"[49]. While a harmonious approach to the grounds for judicial review of arbitral awards is desirable, according to various commentators, "given differences in legal traditions, there can be no reasonable expectation of identity of result, even where there are no relevant statutory differences"[50]. However in order to achieve a harmonious approach to the public policy ground as well as the other NYC grounds for setting aside or refusing enforcement and recognition of awards, according to one commentator, "it is necessary to align national interests with the standard application of public policy in the global community"[51].

While public policy will necessarily differ from forum to forum[52] and the Model Law like the NYC does not prescribe a universal standard of public policy, a ***breach of natural justice***[53] has been internationally accepted as a violation of generic "procedural public policy"[54].

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[47] Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co [1987] 2 All ER 769 at 779 (Donaldson MR, with Woolf and Russell LJJ agreeing)

[48] Richardson v Mellish (1824) 2 Bing 229, 252; 130 ER 294, 303.

[49] ICCA Guide to the NYC, Pieter Sanders (Gen. Ed.) at p. 107

[50] James Spigelman QC's paper, *Issues in Contractual Interpretation: A Comparative Perspective* , p. 15 available at: http://neil-kaplan.com/#kaplan-lecture

[51] 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), 148-161 at p 154

[52] Natural Justice Fallibility in Singapore Arbitration Proceedings (2014) 26 SAcLJ by K.H. Shahdadpuri at pp 576-7, [40], [42]

[53] The concept of natural justice is defined by the Lexis Nexis AU Encyclopaedic Dictionary as "The right to be the subject of decision-making which follows a fair procedure. The obligations of natural justice are usually divided into two rules: the 'hearing rule' and the 'rule against bias'. Where the 'hearing rule' applies, it requires that a person be given an opportunity to present their case with knowledge of any prejudicial material that might be taken into account by the decision-maker: Kioa v West (1985) 159 CLR 550 ; 62 ALR 321 ; Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88 ; 222 ALR 411 ; [2005] HCA 72 . The 'rule against bias' protects the right to have a decision made by a decision-maker who is neither biased nor might reasonably be apprehended to be so: Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337 ; 176 ALR 644 ; [2000] HCA 63 . Natural justice is now more often referred to as procedural fairness, although under either label the concern of the law in this area is to avoid practical injustice: Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 214 CLR 1 ; 195 ALR 502 ; [2003] HCA 6 (Gleeson CJ)

[54] Ibid, Shahdadpuri at n. 9

Australian position

Section 8(7A) *International Arbitration Act* 1974 (Cth.) 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.

This non-exclusive definition is virtually identical or similar to provisions in other countries in the region[55] and provides courts in applying the concept of public policy.

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd ("TCL case")[56]

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 the TCL case.

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.

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: (a)the application was defective and the Court had no jurisdiction to enforce the award; (b) if there was jurisdiction, the award should be

[55] 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)

[56] (2014) 232 FCR 361;311 ALR 387; [2014] FCAFC 83

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.

At first instance the Federal Court in dealing with the issue whether the court had jurisdiction to enforce the award, concluded that it did[57].

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[58].

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[59]. TCL again appealed. The Full Federal Court, in the case referred to above, 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.

It was held that the scope of "public policy" should be confined and a narrow meaning adopted. In Australia an ICA award will not be set aside, or denied recognition, or enforcement, as contrary to public policy (by reason of a breach of natural justice or otherwise)[60] unless there exists *real unfairness* or *real practical injustice* in the conduct of the arbitration, or making of the award[61]. This should be able to be demonstrated without a detailed re-examination of the facts. 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. The Court's approach in considering the rules of natural justice and the no-evidence rule was to examine: (a) the relevant provisions of the

[57] Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (2012) 201 FCR 209; 287 ALR 297; [2012] FCA 21

[58] 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

[59] [2012] FCA 1214

[60] Or on the other grounds in Arts 34 and 36 Model Law: see TCL case in n. 14 at [111]

[61] TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361 (2014) 311 ALR 387; [2014] FCAFC 83 ("TCL case"). For a more detailed case note of the TCL case, see: Australian Alternative Dispute Resolution Bulletin, December 2014, Lexis Nexis at pp 134-5

IAA (Australia's *lex arbitri*); (b) the concept of "public policy" and the relevant principles of natural justice: (i) in the context of the history and interpretation of the critical international instruments both internationally and in Australia; and (ii) in light of international and regional case law[62].

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

There are significant parallels between the Australian approach and that adopted in many other countries in Asia.

Indonesia

The first State which will be examined is the Republic of Indonesia. Indonesia, while not a Model Law country, acceded to the NYC on 7 October, 1981 (with the reciprocity and the commercial reservations). Despite the enactment of the Indonesian Arbitration Law in 1999, which it is suggested was primarily adopted from the NYC[63], it was founded on the Indonesian Code of Civil Procedure and the rules developed in the pre-existing practices of arbitration in Indonesia and did not constitute a national legislative implementation of the NYC[64]. Nevertheless some of the provisions of the Model Law are reflected in the Arbitration Law[65]. In this way "Indonesia has legally endorsed the pro-enforcement policy that is embodied in the Convention[66]". However "in practice, 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" – again public policy being the only ground upon which courts will interfere in the enforcement process. 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

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[62] TCL case at [75]-[76]; International Relief and Development Inc v Ladu [2014] FCA 887; BC201407777 at [169] (Kenny J)

[63] 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), 148-161 at p 152

[64] 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 at p. 241. The only regulation in Indonesia that implements the New York Convention is the Supreme Court Regulation No.1 of 1990 concerning the Procedure for the Execution of Foreign Arbitral Awards, ibid.

[65] Ibid, Huala Adolf at p. 241: • the scope of the application of the arbitration (art.1 ML similar to art.2 of the Law); the definition of arbitration (art.2 ML and art.1 of the Law); the extent of court intervention art.5 ML and art.3 of the Law); the definition and form of arbitration agreement (art.7 ML and art.7 of the Law); the appointment of arbitrator(s) (art.11 ML and art.14 of the Law).

[66] 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), 148-161 at p 152

public order". It is suggested that the basic meaning of this Indonesian concept of public policy is unclear[67]. It has been interpreted by Indonesian courts in light of art.4(2) of the 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"[68]. On this view any international award that is in conflict with the mandatory provisions of any of the Indonesian law may be refused to be enforced[69].

While as a civil law country, the primary source of public policy is Indonesian statute law,[70] Indonesia's pluralistic legal culture creates uncertainty about the application of the public policy ground[71]. It has been suggested that the application of the public policy exception in a "highly territorial" and "rule-oriented" manner has led Indonesian courts to construe the exception expansively[72]. The explanations why Indonesian courts apply a domestic Indonesian concept of public policy instead of the international concept of public policy it is suggested are three-fold: "theories of territorial sovereignty, interest analysis and distributive justice"[73]. "Nationalists or traditionalists are reluctant to enforce foreign awards since it can be considered an infringement of the state's sovereignty[74]". The primary legal basis of the enforcement of foreign arbitral awards is local or national laws and there is no reason why the concept of public policy should not also be determined by those laws[75]. According to one commentator "the relativity feature of public policy and strong dichotomy of public and private international law have led Indonesia to determine its own public policy based on its own objectives and interests"[76]. Further, "the concept of the integralistic state has been influential in the conception of public policy in Indonesia"[77].

According to one commentator with the implementation of the Indonesian Arbitration Law, there has not been "a fading of the parochial approach to the public policy exception."[78] The same commentator has commented that "Indonesia has to shift from the territoriality

[67] Ibid Fifi Junita at p. 153
[68] Ibid Fifi Junita at p. 159
[69] Ibid Fifi Junita at p. 160
[70] Ibid
[71] ibid
[72] Ibid Fifi Junita at p. 155
[73] Ibid Fifi Junita at p. 152
[74] Ibid Fifi Junita at p. 152
[75] Ibid Fifi Junita at p. 152
[76] Ibid Fifi Junita at p. 153
[77] Ibid Fifi Junita at p. 158
[78] Ibid Fifi Junita at p. 159

doctrine to the concept of internationalism[79]" and to a narrowing of the public policy ground[80]. Another eminent Indonesian commentator and arbitrator has stated that there is "an urgent need now in Indonesia to adjust the Indonesian Arbitration Law in line with the provisions of the UNCITRAL Model Law."[81]

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[82].

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: (a) have caused actual prejudice to the aggrieved party; (b) 'shock the conscience'; or (c) offend 'fundamental principles of justice and morality[83].

In order to set aside an award on the public policy ground it needs to be established that there is 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."[84] It has been held that Malaysian Courts should follow an approach 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."[85]

Singapore

The Model Law is given force of law in Singapore[86]. A court may refuse enforcement of a foreign award in Singapore if it finds that "enforcement of the award would be contrary to

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[79] Defined as "the principle of community interests or action between different nations" which suggests "harmony attained by mutual recognition as opposed to diversity and isolationalism founded on parochial attitudes": ibid, Fifi Junita at p. 160 citing Michael Pryles, "Internationalism in Australian Private International Law" (1989) 12 Sydney Law Review 96, 107

[80] Ibid Fifi Junita at p. 160

[81] Arbitration And Maritime Issues In Indonesia by M. Husseyn Umar, INDONESIA ARBITRATION - Vol. 7 No. 3 September 2015 : 01-06 at 6

[82] Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd [2016] AMEJ 0770

[83] ibid; see MTM Millenium, PT Asuransi

[84] Majlis Amanah Rakyat v Kausar Corporation Sdn Bhd [2009] 1 LNS 1766

[85] Ibid. This approach is along the same lines as the Australian approach seen in the TCL case

[86] by its International Arbitration Act, s. 3

the public policy of Singapore"[87]. The exception is construed narrowly[88]. An award will only be refused enforcement if it would 'shock the conscience' or 'violate the forum's most basic notions of morality[89]. There must be exceptional circumstances which violate the most basic notions of morality and justice, or are injurious to the public good[90]. Singapore courts will readily pay heed to international jurisprudence on the Model Law in describing the ambit of the ground[91].

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; (d) how the breach prejudiced the rights of the party concerned;[92] and (e) that the breach necessarily made a difference to the outcome[93], culminating in actual prejudice to a party[94].

Hong Kong

The provisions of the Model Law have the force of law in Hong Kong subject to the *Arbitration Ordinance Cap 609*. The "contrary to public policy" ground which is narrowly construed[95] means "contrary to the fundamental conceptions of morality and justice of the forum"[96]. "(T)he award must be .. fundamentally (and obviously) offensive to that jurisdiction's notions of justice".[97] "(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"[98].The conduct complained of "must be serious, even egregious"[99], and only a sufficiently serious error which has undermined due process will suffice.[100] Another

[87] S. 31(4)(b) IAA (Singapore)
[88] AJU v AJT [2011] SGCA 41 and according to one commentator there has been no instance where the Singapore courts have refused to enforce an arbitral award on the grounds of public policy: *Public Policy and Singapore Law of International Arbitration,* by Nish Shetty, Clifford Chance; 25 March 2015; Memorandum TO Members of the IBA Recognition and Enforcement of Awards Subcommittee
[89] PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR (R) 597. See also, AJU v AJT [2011] SGCA 41; AQU v AQV [2015] SGHC 26; AKN v ALC [2015] SGCA 18; Coal & Oil Co LLC v GHCL Ltd [2015] SGHC 65
[90] PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597
[91] Ibid PT Asuransi case at [59]
[92] John Holland P/L v Tokyo Engineering Corp (Japan) [2001] 1 SLR (R) 443 at [18] affd in Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR (R) 86 at [29]
[93] LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd [2013] 1 SLR 125
[94] Soh Beng Tee at [98]
[95] Shanghai Fusheng Soya-Food Co Ltd & Anor v Pulmuone Holdings Co Ltd [2014] HKCFI 894 per Hon Mimmie Chan
[96] See n. 15 above
[97] Bokhary PJ in *Hebei Import & Export,* see n. 15 explained (at p 123H-I)
[98] A v R (Arbitration: Enforcement) [2009] 3 HKLRD 389, per Reyes J
[99] Grand Pacific Holdings Ltd v Pacific China Holdings Limited (in liq) (No 1) [2012] 4 HKLRD 1 at [94] (Tang VP)
[100] Ibid, Grand Pacific Holdings Ltd at [105]

application of this ground in Hong Kong is the well known case of *Gao Haiyan and anor v Keeneye Holdings Ltd and anor*.

China

While the "public policy" exception is not expressly included as one of the grounds in Art 260 of the *Civil Procedure Law of the PRC*, if the People's Court determines that the enforcement of the award goes against the social and public interest of the country it will not allow enforcement. According to commentators "a violation of public policy seems to 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 (Case Study 3). 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[101]. There is evidently an increasing reluctance on the part of the courts in the PRC to invoke "public policy" type grounds[102].

Japan

The Japanese *Arbitration Law*[103] is based on the 1985 Model Law with a few limited variations[104]. The *Arbitration 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."[105] Japanese courts have narrowly interpreted 'public policy' in light of the purposes of the Arbitration Law. While there are no published Supreme Court cases defining the term "public policy",[106] the lower courts have concluded that if arbitral proceedings violated the public policy of Japan, this would mean that "the content of the

[101] The Enforcement of Foreign Arbitration Awards in China, by Henry (Litong) Chen, MWE China Law Offices and B. Ted Howes, McDermott, Will & Emery, see: http://www.mwe.com/info/pubs/BLR_1109.pdf
[102] Ibid, The Enforcement of Foreign Arbitration Awards in China, see *Conclusion*
[103] Law No. 138 of 2003 which came into force on 1 March 2004
[104] see IBA Sub-Committee on Recognition and Enforcement of Awards Country Report - Japan June 30, 2015 Country Reporters: Hiroyuki Tezuka (h_tezuka@jurists.co.jp) Yutaro Kawabata (y_kawabata@jurists.co.jp)
[105] Articles 44(1)(viii), 45(2)(ix), and 46(8) of the Law; see n. 34
[106] under Articles 44, 45, and 46 of the Law, see n. 34

arbitral award is in conflict with the public policy or good morals of Japan."[107] The public policy exception has rarely been successful in Japan.[108]

South Korea

South Korea is a Model Law country which interprets the public policy ground restrictively and narrowly in light of the need for certainty and stability in international commercial transactions[109]. 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[110]. 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)[111].

India

The Indian *Arbitration and Conciliation Act* 1996 is based on the Model Law and the public policy exception is framed in Model Law terms. The Indian Supreme Court has notably held that: (a) 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 and courts are slower to invoke public policy in cases involving a foreign element than when purely municipal legal issues are involved [112]; (b) the enforcement of an ICA award can only be opposed on grounds of "public policy" when the award is contrary to the fundamental

[107] See n. 34; and see, K.K. Kouno v. Y Inc., LEX/DB No. 25473502, (Tokyo Dist. Ct. 13 June 2011), upheld in Y Inc. v. K.K. Kouno, LLI/DB No. L06720791, (Tokyo High Ct. 13 March 2012) upheld the Tokyo District Court's judgment; in that case the court set aside an arbitral award on the basis that it offended Japanese procedural public policy in that the arbitrator had taken a central fact as being undisputed although it was in fact disputed between the parties.

[108] Baker and Mackenzie: 2011; Dispute Resolution Around the World – Japan; Enforcement of arbitration awards, p.17 available at: http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Dispute%20Resolution/Dispute%20Resolution%20Around%20the%20World/dratw_japan_2011.pdf

[109] South Korea: receptive to foreign arbitration awards? Beomsu Kim and Benjamin Hughes of Shin & Kim, see: http://www.shinkim.com/upload_files/data/SouthKoreaAsiaCounsel-January2010(5).pdf referring to Korean Supreme Court Dec. No. 89Daka20252, 10 April 1990.

[110] Korean Supreme Court Dec. No. 89Daka20252, 10 April 1990 and Korean Supreme Court Dec. No. 93Da53504, 14 February 1995 cited in Beomsu Kim and Benjamin Hughes at n. 44

[111] Korean Supreme Court, 2006Da20290, Decided on 2009. 5. 28

[112] Shri Lal Mahal Ltd. -v- Progeto Grano Spa Civil Appeal (2014) 2 SCC 433, [22], [25] (SC)

policy of Indian law; the interests of India; or justice and morality[113], or in addition, if it is patently illegal[114].

This is now reinforced and clarified by recent amendments[115] to the *Arbitration and Conciliation Act* 1996 by the introduction of *Explanations* to ss. 34(2)(b), 48(2)(b) which define "public policy". 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.

Sri Lanka

In Sri Lanka courts will exercise extreme caution in applying the concept of public policy[116]. 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. 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[117].

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.

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

[113] Renusagar Power Co. Ltd.v. General Electric Co., 1994 Supp (1) SCC 644; Shri Lal Mahal Ltd. -v- Progeto Grano Spa Civil Appeal (2014) 2 SCC 433, [48] (SC).
[114] ONGC v. Saw Pipes, 2003 (5) SCC 705; Associate Builders v Delhi Development Authority 2014 (4) ARBLR 307.
[115]
[116] Kiran Atapattu v Janashakthi General Insurance Co. Ltd: SC Appeal 30-31/2005 decided on 22.2.2013
[117] Light Weight Body Armour Ltd. v. Sri Lanka Army [2007] BALR 10

Conclusion

Limited curial interference and steadfast curial support - the yin and yang of international arbitration is its fundamental organising principle – its *sine qua non*.

International trade demands uniformity of laws or at least harmonisation so that those involved will have the benefit of greater predictability, and certainty in their commercial relationships[118].

It is submitted that an approach by national courts of construing the "public policy" ground by examining the relevant '*lex arbitri*' in light of domestic, international and regional case law and materials, having regard to the need to promote uniformity in its application, is in accord with international, and in particular, the practice adopted in much of Asia. It is suggested that such an internationalist approach can be adopted in relation to the interpretation of the NYC and Model Law generally.

An emphasis on comparative jurisprudence will encourage a uniform approach to the interpretation of the NYC and the Model Law, as well as the development of an "internationally recognised harmonised procedural jurisprudence"[119] which will assist to maintain the yin and yang of ICA, and thereby facilitate international trade, as well as the comity of nations.

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[118] *The Interpretation and Uniformity of the Uncitral Model Law on International Commercial Arbitration focussing on Australia, Hong Kong and Singapore*, Dean Lewis, Wolters Kluwer, 2016, pp4, 12, 21ff. The rule of law is essential to the operation of a market economy. It is critical for its proper functioning for those who sell goods and services to know that they will be paid for them. An essential part of the rule of law is freedom from arbitrary power and equality before the law.

[119] Rt Hon. Sir Michael Kerr, *Concord and Conflict in International Arbitration,* (1997) 13 *Arbitration International* 122 at 125-6

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