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## HOW TO PROMOTE A UNIFORM INTERPRETATION OF PUBLIC POLICY?

by Cecil Abraham

### Introduction

1. There has been an increase in the number of jurisdictions around the world that have ratified the Model Law and replaced older legislation on arbitration. New challenges have since emerged notably with regards to the way in which the courts recognise and enforce awards rendered in both, domestic and international arbitrations under the new emerging arbitration framework.
2. The emerging jurisdictions which have adopted the Model Law appear to have developed the law on 'public policy' in ways that, perhaps, have not been anticipated. The concept of public policy has been playing an increasingly important (and unexpected) role under the new arbitration framework in these jurisdictions, particularly with respect to setting aside applications.
3. This is the topic of my presentation. I shall specifically be speaking on how the courts of developing countries such as India, the Philippines and Malaysia have dealt with (or will be expected to deal with) this subject. In so far as India is concerned, new arbitration legislation was introduced in 1996<sup>1</sup> incorporating the Model Law. In a new Act in 2005, Malaysia has also accepted the Model Law framework. Whilst there are no decisions of note in Malaysia as the Act of 2005 is relatively new, there have been a number of decisions which I shall deal with. I shall also touch on various on decisions of the United Kingdom, New Zealand, Canada, and Singapore on the treatment of public policy.

### What does the Model Law mean by the use of the words 'Public Policy'?

4. The Model Law refers to 'public policy' in 2 places.
5. Article 34 (which deals with applications to set aside an award) in sub-article (2)(b)(ii) provides that an award may be set aside only if '*the court finds that the award is in conflict with the public policy of this State*'.
6. Later, in Article 36 (1)(b)(ii) (which deals with the grounds for refusing recognition or enforcement of an award) the Model Law provides:

*'Recognition or enforcement of an arbitration award, irrespective of the country in which it was made, may be refused only if the court finds that the recognition or enforcement of the award would be contrary to the public policy of this State.'*

7. The Model Law does not define what it means by 'public policy'. I would, however, like to point out that the United Nations publication of the Model Law in 1994 provides an Explanatory Note<sup>2</sup> which provides some guidance.

8. Paragraph 42 of the Explanatory Note (on grounds for setting aside an award) provides that the Model Law allows for an award to be set aside for '*...violation of public policy, which would include serious departures from fundamental notions of procedural justice.*'

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<sup>1</sup> The Arbitration and Conciliation Act of 1996 (India).

<sup>2</sup> Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration.

9. Paragraph 44 of the Explanatory Note goes a little further. It states:

*“Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy... may be different in substance, depending on the State in question (i.e. State of setting aside or State of enforcement)”*

10. It would therefore appear that the Model Law envisages differing public policy standards that would apply from State to State and that this may not be restricted to ‘*serious departures from fundamental notions of procedural justice*’ which, arguably, would be consistent between most, if not all, States.

11. I need to reproduce a provision of the New Zealand Arbitration Act of 1996 (on which the Malaysian Act of 2005 is modelled) because of certain additions it has included over and above the Model Law. The Act of New Zealand provides an example of what may constitute ‘*fundamental notions of procedural justice* (as used in the Explanatory Notes to the Model Law)’.

12. Section 34(2)(b)(ii) of the New Zealand Arbitration Act is in the following terms: “*An arbitral award may be set aside by the High Court only if the High Court finds that the award is in conflict with the public policy of New Zealand.*”

13. Section 34(6) of the New Zealand Arbitration Act (which has no equivalent in the Model Law) goes on to provide:-

*“For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if –*

*(a) the making of the award was induced or affected by fraud or corruption; or*

*(b) a breach of the rules of natural justice occurred –*

*(i) during the arbitral proceedings; or*

*(ii) in connection with the making of the award.*

14. What is therefore clear is that where fraud or corruption induced or affected the award, or where the award was reached in a breach of the rules of natural justice and procedural fairness, the registration, recognition or enforcement of that award would be against the public policy of New Zealand (and Malaysia).

15. The question that arises is what has been the judicial experience on ‘public policy’ and enforcement of awards.

### **Malaysia**

16. The Act of 2005 has not been the subject of any judicial decisions in so far as what would constitute a breach of the nation’s ‘public policy’. We can however look at the decisions on the New York Convention Act, and to a limited extent, to decisions on the reciprocal enforcement of judgments on how the courts have dealt with public policy.

17. In 1991<sup>3</sup>, our High Court registered a United Kingdom judgment on a gaming debt under the reciprocal enforcement of judgments statute. It was argued that Malaysian public policy militates against enforcing foreign judgments on gaming debts. The High Court held that since the gaming took place in England, and it was not unlawful under English law, the enforcement of that judgment could not be against Malaysian public policy.

18. In 1994<sup>4</sup>, our High Court was asked to enforcement an international award. The respondent had not appeared in the arbitration despite being given notice. At the enforcement proceedings, the respondent

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<sup>3</sup> The Aspinall Curzon Ltd v Khoo Teng Hock [1991] 2 MLJ 484, HC.

<sup>4</sup> Harris Adacom Corporation v Perkom Sdn Bhd [1994] 3 MLJ 504, HC.

argued that it was contrary to Malaysian public policy to enforce the award since the applicant was an Israeli company. In 1994, Israel was one of 3 countries with which Malaysia had no diplomatic relations. The applicant, in fact, was an American company which held a 68% stake in an Israeli company. The Malaysian court enforced the Award. It would however appear from the reasons given by the court that if the respondent was able to show that the applicant was an 'Israeli based company', the award would not have been enforced for being against Malaysian public policy as trade with Israel was prohibited.

19. In 1999<sup>5</sup>, in another High Court decision involving the registration of a judgment, this time from Singapore, the High Court refused registration. The High Court held that since a Malaysian plaintiff had to comply with the laws of service of a foreign country in which a foreign defendant is situated, similarly, Malaysian public policy would dictate that a Singapore writ had to be served in compliance with Malaysian law. The High Court held that both Malaysian and Singaporean law on service was not complied with, and as such, the Singaporean judgment would not be registered in Malaysia for being against Malaysian public policy.

20. A year later in 2000<sup>6</sup>, the High Court allowed the registration of a Singapore judgment in Malaysia. The High Court held that, on the facts, there was no breach of the Banking and Financial Institution Act 1989, in that the applicant was not conducting banking business in Malaysia by offering the respondent a banking facility. The High Court opined: "*When a Malaysian court is considering the issue of public policy in Malaysia, it should look at Malaysian law, Malaysian government policy, Malaysian moral values and all other relevant factors then prevailing in Malaysia.*"

21. In summary therefore, of the 4 decisions discussed, 3 decisions advocate a reference to Malaysian statutory law in deciding whether an award or a foreign judgment is consistent with Malaysian public policy. Where there is a breach of a Malaysian statutory provision, it would appear that the Malaysian court will hold there to be a breach of Malaysian public policy.

22. In the one exception (the decision in 1994), there was no breach of a statute. The High Court however noted, by the way, that since the government of Malaysia did not have diplomatic relations with Israel, an award obtained by an Israeli company would not be enforced in Malaysia as being against Malaysian public policy.

### Philippines

23. The Court of Appeal of the Republic of Philippines in a decision dated 29.11.2006 in *Luzon Hydro Corporation v Hon. Rommel O. Baybay* dealt with an application to set aside a foreign arbitral award on the basis that the award was null and void having been rendered contrary to the public policy of the Philippines.

24. This is an important decision as the Court of Appeal (unlike its counterpart in Malaysia) noted the obligations attendant to signing and ratifying the New York Convention (at page 36 of the judgment):-  
"*This Court recognizes that the Philippines is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As a general rule, the courts are aware of the encouragement given to the parties to resort to arbitration as a mode of dispute resolution. As such, foreign arbitral awards issued in accordance with the rules of the UN convention are entitled to great respect and recognition by the international community. However, this court recognizes that there are exceptions to this rule. Compelling reasons exist to justify the action to be taken by this Court in regard to the validity of the arbitral award...*"

25. The Court of Appeal referred to the public policy of the country and held that the award could not be given effect to because if it were, it would result in the '...supplanting of our own laws and public policies.' It appears from the judgment that the substantive law of the Philippines applied to the dispute. The arbitrator however appeared to have not appreciated that law in coming up with the Award.

26. The Court of Appeal held that the petitioner's failure to recover liquidated damages for delay and it being compelled to grant an extension of time to the respondent was wrongly refused as a matter of law.

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<sup>5</sup> United Overseas Bank Ltd v Wong Hai Hong [1999] 1 MLJ 474, HC.

<sup>6</sup> Banque Nasionale De Paris v Wuan Swee May & Anor [2000] 3 MLJ 587, HC.

Further, the award of substantial costs to the respondent was a further error. Philippine law and public policy did not allow for the award of costs except where proceedings were initiated with bad faith, and there was no finding of bad faith here.

27. A read of the judgment demonstrates the serious extent to which the Court of Appeal disagreed with the various conclusions of Philippine law reached by the arbitrator. The Court of Appeal concluded:-

*“It must be stressed in no uncertain terms that parties who enter into an arbitration agreement are bound by the provisions contained therein. In effect, the parties repose their trust and confidence in the arbitration tribunal, as they would in a court, to fairly and faithfully enforce their contractual stipulations as the law between such parties. However, when an arbitral tribunal, grossly fails in its task to resolve disputes between parties in accordance with their agreements consistent with Philippine law and public policy, as the arbitral tribunal has glaringly done in this case and as apparent on the face of its Final Award and its other awards, the Court cannot abdicate on its supreme responsibility to serve the ends of justice. More so in this instant case when the lower court called upon to enforce the Final Award acts with obvious bias and manifest partiality, this court is constrained to step in to prevent a miscarriage of justice and to avoid multiplicity of suits or circuitous appeals.”*

### **India**

28. There are 2 decisions of note in India. Both are Supreme Court decisions. Each, however, was delivered under different statutes.

29. The first decision is that of *Renusagar Power Co Ltd v General Electric Co.*<sup>7</sup> This was a decision delivered before India adopted the Model Law. The Supreme Court in *Renusagar* held that a foreign award may not be enforced (under the old Act) if the award was contrary to the public policy of India. The Supreme Court held that the use of the words ‘public policy’ was in its narrow sense. The Supreme Court held that in order to attract a bar on the ground of being against Indian public policy, there must be something more than just a violation of the law of India. The Supreme Court went on to hold that public policy should be defined in the sense in which it is applied in the arena of private international law. The Supreme Court in *Renusagar* held that a foreign award would not be enforced (under the *Foreign Awards (Recognition and Enforcement) Act of 1961* by reason of breach of public policy if it was contrary to:-

- (i) the fundamental policy of Indian law; or
- (ii) the interests of India; or
- (iii) justice or morality.

30. India adopted the Model Law in 1996 with the passage of the *Arbitration and Conciliation Act of 1996*. The Supreme Court in 2003 was called upon to decide the ambit of the court’s jurisdiction where an award is challenged in a decision called *Oil and Natural Gas Corporation Ltd v SAW Pipes Ltd.*<sup>8</sup> The Supreme Court framed the issue like this: whether the court has jurisdiction to set aside an award which is patently illegal or in contravention of the provisions of the Arbitration and Conciliation Act of 1996 or any other substantive law governing the parties or is against the terms of the contract.

31. The Supreme Court in *Oil and Natural Gas* first considered whether the award was against the public policy of India. It referred to earlier decisions of the Indian Supreme Court where it was held that public policy was not the policy of the government and that it connotes ‘...some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time.’

32. The Supreme Court in *Oil and Natural Gas* then noted the traditional or narrow view that the courts will not invent new heads of public policy. The court referred to the traditional decisions on public policy<sup>9</sup> that it was ‘an unruly horse’ and contrasted this with the approach of Lord Denning in 1971 who said that ‘With a good man in the saddle, the unruly horse can be kept in control.’<sup>10</sup>

<sup>7</sup> 1994 Supp (1) SCC 644.

<sup>8</sup> 2003 AIR Supreme Court 2629.

<sup>9</sup> For instance, Lord Davey in *Janson v Driefontein Consolidated Gold Mines* [1902] AC 484 @ 500; *Richardson v Mellish* (1824) 2 Bing. 229 @ 252.

<sup>10</sup> *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591 @ 606.

33. The Supreme Court opined that it preferred modern approach: That the principles that govern public policy can, on the proper occasion, be expanded and modified in keeping with the public good. The Supreme Court then dealt with its earlier decision in *Renusagar* and decided not to follow it in light of the different legislative framework that that decision was decided under.

34. The Supreme Court then referred to *section 68 of the English Arbitration Act 1996* and noted how that Act allowed awards to be challenged on the grounds of serious irregularities. The Supreme Court then held that a wider meaning needed to be given to the term 'public policy of India' within the meaning of the Arbitration and Conciliation Act 1996.

35. My reading of the *Oil and Natural Gas* decision therefore is that the Supreme Court was moved by the fact that under the previous statutory framework (and even in England), an award could be challenged on more grounds than under the Model Law statutory framework. The Supreme Court therefore found it necessary to adopt a wider definition of the term 'public policy of India' and included in this definition an award which on its face 'patently violates a statutory provisions cannot be in the public interest. The Supreme Court held that in addition to what was laid down in *Renusagar* as being against the public policy of India, an award would be against the public policy if it was contrary to:-

- (i) the fundamental policy of Indian law; or
- (ii) the interests of India; or
- (iii) justice or morality; or
- (iv) in addition, if it is patently illegal (in that it goes to the root of the matter. The illegality cannot be trivial.)

36. The Supreme Court in *Oil and Natural Gas* further held that an award could be set aside if it was so unfair and unreasonable that it shocks the conscience of the court.

37. The decision of *Oil and Natural Gas* therefore, clearly, takes the matter a step further than the courts of the Philippines and Malaysia. It sets a precedent, which, thus far, has not been followed in Malaysia, Singapore and in New Zealand<sup>11</sup>.

### **Other decisions**

38. In *Amaltal Corporation v Maruha*<sup>12</sup>, the New Zealand Court of Appeal opined that public policy '*concerned fundamental principles of law where enforcement would violate basic notions of morality or justice or be clearly injurious to the public good*' citing the United Nations Commission on International Trade Law Report of 21 August 1985 at p 297: "*the Commission's understanding that the term 'public policy as used in the New York Convention and many other treaties covered 'fundamental principles of law and justice in substantive as well as procedural respects.'*" The Court of Appeal held that even if the arbitrator had misappreciated the law on penalties, that did not render the award as being against the public policy of New Zealand.

39. The United States in the Court of Appeals from the Second Circuit in *Parsons & Whittemore Overseas Co Inc v Societe Generale De L'Industrie Du Papier (RAKTA)*<sup>13</sup> held that the enforcement of a foreign award might be denied on the basis that its enforcement '*would violate the forum state's most basic notions of morality and justice.*'

40. The Court of Appeal of Ontario said in *Boardwalk Regency Corp v Maalouf*<sup>14</sup> that it was common ground that the reason for imposing public policy was 'essential morality' and that it was "*more than the morality of some persons and it must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.*"

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<sup>11</sup> In the decision of *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554, HC.

<sup>12</sup> [2004] 2 NZLR 614, CA.

<sup>13</sup> 508 F 2d 969 (1974) at 974.

<sup>14</sup> (1999) 6 OR (3d) 737 @ 743.

### Conclusion

41. The above decisions show a marked distinction in the treatment of awards and the definition of public policy between the developed and developing jurisdictions.

42. The adoption of a broad interpretation of 'public policy' will increase instances where courts interfere and set aside awards rendered in arbitrations under the Model Law framework. The need for the education of judges and counsel alike on instances where awards can be challenged under the Model Law framework therefore adopts an added dimension of importance.

43. The Explanatory Notes to the Model Law appears to indicate that the concept of public policy should vary from State to State. This would, if given a broad interpretation, go against the international arbitration community's desire for there to be an international public policy<sup>15</sup>, shared by all States (which would only include the narrow, basic fundamental safeguards that every arbitration proceeding should observe).

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<sup>15</sup> The Swiss Federal Court has in *Beverly Overseas* (2001) defined 'international public policy' as follows:  
"International public policy consists of fundamental and generally recognised principles. Their non-application would be contrary to the basic values common to all civilized nations."