Judicial Approaches to Enforcing Foreign Arbitral Awards in Australia and Singapore

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It has been stated that 'no field of legal scholarship or practice operates in the world of private international law as continuously and pervasively as does international arbitration'.[1] Repeat surveys have illustrated that arbitration continues to grow globally as the preferred method of cross-border commercial dispute resolution. The Asia Pacific region has not been immune to this momentum of growth.[2]

Australia and Singapore, as leading economies in the Asia Pacific region, are two jurisdictions with a strong pro-arbitration culture.[3] Intending to be a valuable point of reference for practitioners and students of this subset of private international law, this paper investigates the legal obligations of Australia and Singapore to enforce foreign arbitral awards in their jurisdictions. In providing its review, the paper discusses a number of relatively recent and key judgments from both jurisdictions to illustrate the reasoning of courts in these jurisdictions, on the question of enforcement and recognition of awards. To this end, an analysis of the Australian and Singaporean approaches to the enforcement of foreign arbitral awards is provided, with a discussion of the judicial reasoning of some key cases where courts have exercised their jurisdiction on the question of recognition and enforcement of awards.

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[1] George A Berman, *International Arbitration and Private International Law* (Brill Nijhoff, 2017).

[2] Queen Mary University of London School of International Arbitration, *2018 International Arbitration Survey: The Evolution of International Arbitration* (Survey, 2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report> ('*2018 Queen Mary Survey*').

[3] Colin Ong, 'Regional Overview and Recent Developments: Asia Pacific: International Arbitration 2019', *iclg.com* (Web Page, 22 August 2019) <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/6-regional-overview-and-recent-developments-asia-pacific>.

I INTRODUCTION

Arbitration has evolved to become a preferred method for the resolution of disputes of an international or cross-jurisdictional nature.[4] As a method of dispute resolution, historically, arbitration has been used in both commercial and non-commercial contexts. Well known arbitrations in a commercial context include *Saudi Arabia v Arab American Oil Company*.[5] Notable arbitrations in a non-commercial context include the *Sudan v The Sudan People's Liberation Movement* involving the Abyei Boundaries.[6] The above-mentioned arbitrations demonstrate utilisation of arbitration by nation states, commercial enterprises, and even armed groups, indicating the flexibility of arbitration to accommodate a diverse range of disputes and parties.

Concomitant with arbitration becoming a preferred method of dispute resolution, an international legal framework has developed to accommodate and support its practice.[7] While arbitration, at its crux, is a voluntary method of dispute resolution, it has nonetheless developed features which compel parties to comply with certain obligations, such as the parties' obligation to comply with the orders made under a valid award.[8] The recognition and enforcement of the arbitral award, however, falls within the purview of the national courts. Enforceability of awards is perceived as international arbitration's most valuable feature according to the last two Queen Mary Surveys conducted in 2015 and 2018.[9] Enforcement of an award

[4] See *2018 Queen Mary Survey* 2018 (n 2).

[5] George Sayen, 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia' (2014) 24(4) *University of Pennsylvania Journal on International Economic Law* 905, 909.

[6] Lori F Damrosch and Sean D Murphy, *International Law: Cases and Materials* (West Academic Publishing, 2014) 544.

[7] See, eg, *International Arbitration Act 1974* (Cth) s 8(1) ('*IAA*').

[8] See, eg, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) art III ('*New York Convention*').

[9] See Queen Mary University of London School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (Survey, 2015) <http://www.arbitration.qmul.ac.uk/research/2015/index.html>. See also *2018 Queen Mary Survey* (n 2).

is usually sought by parties, where there is a need to seize assets of the award debtor in that jurisdiction.[10]

This paper will focus on two jurisdictions: Australia and Singapore. In its discourse, it will discuss the landscape of contemporary international arbitration as applicable to these jurisdictions and how this gives rise to enforcement obligations. As an analytical exercise, an investigation of the obligation of both jurisdictions to enforce foreign awards, drawing on cases, will be undertaken to form comparisons in the judicial reasoning between the two.

The discussion to follow will illustrate that the legislatures and judiciaries of both Australia and Singapore are strongly in support of international commercial arbitration as a method of dispute resolution, and therefore actively support the recognition and enforcement of international awards. The international arbitration legislation of both jurisdictions share strong similarities and no substantive differences. The commitment of both jurisdictions to enforcement is manifested by being signatories to major conventions such as the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of 1958 (‘*New York Convention’)* and the International Court for the Settlement of Investment Disputes (‘*ICSID*’).[11] Further, both jurisdictions have generally subsumed the *Model Law* into their national laws on arbitration. The paper will also assess the degree of convergence and divergence between the jurisdictions, with respect to grounds for recognition, enforcement and refusal of awards.

The reader will observe the cases which follow generally illustrate that Australia and Singapore are both pro-enforcement jurisdictions and their courts will require the strictest proof, consistent with the law, to refuse to recognise an award or refuse to enforce an award. This

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[10] Jack M Graves and Joseph F Morrissey, *International Sales Law: Problems, Cases and Commentary* (Kluwer Law International, 2008) 459–84.

[11] *New York Convention* (n 8); The International Court for the Settlement of Investment Disputes created by the *Convention on the Settlement of Investment Disputes between States and Nationals of other States,* opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (‘*ICSID*’).

applies as much to foreign arbitral awards where applications are made to enforce them under the *New York Convention,*[12] as to arbitration awards made in-jurisdiction, whether international or domestic.

II CONTEMPORARY LANDSCAPE OF INTERNATIONAL COMMERCIAL ARBITRATION IN AUSTRALIA AND SINGAPORE

Certain conventions and treaties have become synonymous with international commercial arbitration. These include the *New York Convention*,[13] the *ICSID*[14] and the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration* of 1985 ('*Model Law*').[15] Australia and Singapore are signatories to the *New York Convention* and the *Model Law*, supported by their contemporary national arbitration laws.[16] Both jurisdictions are financial and commercial centres in the Asia Pacific region. It is trite to state that national courts play a significant role in the recognition and enforcement of awards. Therefore, the degree to which an enforcement court will provide support for arbitral awards can be critical for the parties. There may, however, be variation in the judicial approach of each jurisdiction, which can have major consequences for the parties. Although there are a number of other factors for a seat being preferred, such as general reputation and recognition of the seat, a court which upholds the *New York*

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[12] *New York Convention* (n 8).

[13] Ibid.

[14] *ICSID* (n 11).

[15] *UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (21 June 1985) annex I, as amended by UN GAOR, 61st sess, Supp No 17, UN Doc A/61/17 (7 July 2006) annex I ('*Model Law'*).

[16] See 'Contracting States', *New York Arbitration Convention* (Web Page) <http://www.newyorkconvention.org/countries>. See also 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>; *IAA* (n 7); *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) ('*SAA*').

Convention and the *Model Law* is likely to be preferred by the parties.[17]

A The *New York Convention 1958*

The *New York Convention* has been described as 'one of the most successful conventions'[18] with the central purpose of allowing for the enforcement of 'arbitration agreements and arbitral awards, without prejudice to the rights and protection the State has already afforded to the parties under its laws'.[19] The magnitude of the Convention lies in the fact that it 'established for the first time a comprehensive international legal framework for international arbitration agreements, arbitral proceedings and arbitral awards'.[20] There is a requirement of reciprocity in the *New York Convention*, by virtue of 'awards rendered in a signatory country in question, are guaranteed to be enforceable abroad in all other States, which are parties to the Convention'.[21]

Article III states:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of

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17 See Ozlem Susler, 'Jurisdiction of Arbitration Tribunals: A Comparative Study' (Doctor of Juridical Science Thesis, La Trobe University, 2012) 37 <http://hdl.handle.net/1959.9/497091>. See also *2018 Queen Mary Survey* (n 2).

18 Teresa Cheng, 'Celebrating the Fiftieth Anniversary of the New York Convention' in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International, 2009) 679.

19 See ibid.

20 Gary B Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) 19.

21 Gerold Herrmann, 'The 1958 New York Convention: Its Objectives and Its Future' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International, 1999) 18.

> arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.[22]

The above clause ensures equal treatment of foreign awards and prevents unnecessary burdens being placed on parties who seek to have their award recognised and enforced in another signatory state.

Therefore, as signatories to the *New York Convention*, Australia and Singapore are generally obliged to enforce foreign arbitral awards. At this stage, it should also be noted that the Convention stipulates limited instances where a court of a signatory country may refuse enforcement of an award. These grounds are set out in art V and include: a party to the arbitration suffering incapacity, invalidity of the arbitral agreement, a party to the arbitration being subject to procedural unfairness, the award being beyond its scope, the subject matter of the arbitration not being capable of being arbitrated and enforcement of an award being contrary to the public policy of that country.[23] The cases reviewed in this paper present a variety of these grounds.

B *UNCITRAL Model Law 1985*

The *Model Law*[24] has been described as 'the single most important statutory instrument in the field of international commercial arbitration'.[25] It provides a complete guide for the ideal arbitral process, from inception to completion. The *UNCITRAL Arbitration Rules*[26] supplement the *Model Law*. The Rules provide further detailed provisions with respect to procedural issues, such as selecting the seat of arbitration and appointing the arbitral panel. The changes introduced by the *Model Law* and subsequently implemented by nation

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22 *New York Convention* (n 8) art III.
23 Ibid art V.
24 *Model Law* (n 15).
25 Born (n 20) 23.
26 *UNCITRAL Arbitration Rules*, GA RES 68/109, UN Doc A/68/462 (16 December 2013).

states have been described as a 'major success'.[27] The success of the *Model Law* is further reflected in the fact that 'it has been adopted in a substantial (and growing) number of jurisdictions and serves as a model for legislation in many others'.[28]

It has been opined that the central purpose of the *Model Law* is the pursuit of 'the harmonisation of law through the provision of an internationally agreed legal framework, for the conduct of international commercial arbitration with an emphasis on party autonomy and restriction of interference by the courts, of the place of arbitration'.[29] It is noteworthy that the *Model Law* seeks compliance from parties to an arbitration with respect to some fundamental procedural requirements. These requirements include the obligation that parties are treated equally as per the *Model Law*'s art 18 and the requirement, under art 24, that parties provide to each other all relevant information, with respect to the arbitration, that they have provided to the arbitral tribunal.

III GROUNDS FOR CHALLENGING ARBITRATION AWARDS

Most international and national laws have time limits on bringing challenges before national courts.[30] Alternatively, during the enforcement stage, the losing party may challenge the award on jurisdictional grounds before a national court. In such circumstances,

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27 Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 63.

28 Born (n 20) 23.

29 Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Lawbook Co, 2011) 14.

30 See art 21(3) of the *UNCITRAL Arbitration Rules* (n 26) which provides that a challenge to the jurisdiction of the arbitral tribunal must be raised not later than in the statement of defence or, in relation to a counter-claim, in the reply to the counter-claim. The *Arbitration Act 1996* (UK) s 31(1) stipulates that any challenge to the jurisdiction of the arbitral tribunal must occur no later than the time the relevant party takes the first step in proceedings to contest the merits of any matter regarding the challenge.

typically the losing party may seek to have the award set aside. Table 1 provides an overview of the ways in which arbitration awards may be challenged and the key arguments associated with each ground. There are four bases upon which it may be possible for a national court to set aside an arbitration award:

- jurisdictional grounds
- procedural grounds
- substantive grounds
- arbitrability. [31]

Table 1: *Challenges to Arbitration Awards*

Grounds	Key Arguments
Jurisdictional grounds	absence of a valid and binding arbitration agreement award deals with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration
Procedural grounds	deficiencies in the way in which the arbitral tribunal was appointed lack of due process the procedure adopted in the arbitration is not in accordance with the agreement of the parties
Substantive grounds	enforcement of award is contrary to public policy (e.g. competition law) enforcement of award would lead to a mistake of law or a mistake of fact (in limited jurisdictions)
Arbitrability	the subject matter of the dispute is not capable of settlement by arbitration

Source: Nigel Blackaby et al, *Redfern and Hunter on International Commercial Arbitration* (Oxford University Press, 5th ed, 2009) 594.

[31] Nigel Blackaby et al, *Redfern and Hunter on International Commercial Arbitration* (Oxford University Press, 5th ed, 2009) 594 (‘*Redfern and Hunter 5th ed’*). The term ‘arbitrability’ refers to whether a dispute is capable of resolution by an arbitral tribunal.

IV LEGISLATIVE FRAMEWORK FOR INTERNATIONAL ARBITRATION: AUSTRALIA AND SINGAPORE

A *Australia*

Australia has been described as having 'a strong arbitration culture, both domestically and internationally'.[32] This strong culture is coupled with a 'momentum in encouraging international parties to choose Australian seats for international commercial arbitration'.[33] Judicial decisions in Australia overwhelmingly illustrate that its national courts are avowedly pro-international commercial arbitration. Australian judges are said to 'remain resolutely opposed to public policy challenges to awards which, in reality, attempt to re-agitate factual issues'.[34] It has also been claimed that Australian judges have developed a 'sophisticated body of case law to guide practitioners and there is widespread acceptance that international jurisprudence is influential in developing Australian arbitration law'.[35]

There are two international instruments which underpin international arbitration in Australia: the *New York Convention* and the *Model Law,* both of which share substantial similarities. In the Australian context, international arbitration is governed by the *International Arbitration Act 1974* ('*IAA'*)[36] which was enacted to fulfil Australia's legal obligations pursuant to the *New York Convention*.[37] Section 19 of the *IAA* provides an additional provision to the *New York Convention,* by stipulating that an award is in breach

[32] Rana and Sanson (n 29) 15.
[33] Doug Jones, *Commercial Arbitration in Australia* (Lawbook Co, 2011) 1.
[34] Albert Monichino and Alex Fawke, 'International Arbitration in Australia: 2013/2014 in Review' (2014) 25(4) *Australasian Dispute Resolution Journal* 187, 187.
[35] Ibid 203.
[36] *IAA* (n 7).
[37] Jack W Nelson, 'International Commercial Arbitration in Asia: Hong Kong, Australia and India Compared' (2014) 10(2) *Asian International Arbitration Journal* 105, 110.

of public policy if there has been fraud or corruption involved, or the rules of natural justice have been violated in rendering the award.[38] The *Model Law* is also incorporated into the *IAA* by s 16, thus aligning the Australian arbitral regime with two of the most important international frameworks for the regulation of arbitration.[39] Simultaneously, there are a number of state-based laws in operation, which are also premised on the *Model Law*. Some of the state-based regimes in Australia include the Commercial Arbitration Acts of New South Wales (2010) and Victoria (2011).[40]

Further, the *International Arbitration Amendment Act 2010* (Cth) introduced some significant amendments to the *IAA* to ensure contemporary arbitration practices are reflected.[41] Although major amendments to arbitration occurred in 2010, the most recent amendments to the *IAA* took place in 2018.[42] The enforcement and setting aside of awards is found under ss 7 and 8 of the *IAA*, which is examined in this paper.

B *Singapore*

Singapore has emerged as a destination at the forefront of international commercial arbitration, being described as a 'champion of international commercial arbitration representing a parallel method of dispute resolution'.[43] The commitment Singapore has displayed with respect to arbitration as an alternative method of dispute resolution has

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[38] *IAA* (n 7) s 19.
[39] Ibid s 16.
[40] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic).
[41] Richard Garnett and Luke Nottage, 'The 2010 Amendments to the International Arbitration Act: New Dawn for Australia' (2011) 7(1) *Asian International Arbitration Journal* 29, 30.
[42] In 2010, the *Model Commercial Arbitration Bill* ('*MCAB*') based on the *Model Law* (n 15) as uniform national arbitration, replaced the state Commercial Arbitration Acts in Australia. The most recent amendments to the *IAA* (n 7) received royal assent on 25 October 2018 and commenced on 26 October 2018.
[43] Nicholas Poon, 'Choice of Law for Enforcement of Arbitral Awards: A Return to the Lex Loci Arbitri?' (2012) 24(1) *Singapore Academy of Law Journal* 113, 142.

earned it ‘a favourable reputation in the international world of commerce as an attractive venue for international arbitration’.[44] Singapore has been described as a ‘world centre’ for international arbitration.[45] Similar to Australia, arbitration in Singapore is a dual-track regime as the legislature has enacted statutes regulating both domestic and international arbitration. Domestic arbitration is governed by the *Arbitration Act* (‘*AAS*’) and international arbitration is governed by the *International Arbitration Act* (‘*SAA*’).[46] Also similar to Australia, the *Model Law* and the *New York Convention* are subsumed in the aforementioned Act.[47] Akin to s 19 of the *IAA,*[48] the *SAA* extends the parties’ recourse against the award to encompass public policy breaches which include fraud, corruption or a breach of natural justice resulting in the rights of the parties being prejudiced.[49] It is contended that s 24 was enacted to reinforce art 18 of the *Model Law,* which stipulates that parties be treated equitably.[50] Further, in support of arbitrations, s 12A of the *SAA* authorises courts, in limited circumstances, to make interim orders such as injunctions or a securing of the amounts in dispute. In accordance with section 12A(6), such orders can only be made when an arbitral tribunal has no power to act effectively.[51]

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[44] Jonathon Choo, ‘The Rise and Rise of Singapore: Singapore as a Preferred Venue for International Arbitration’, *Singapore International Arbitration Blog* (Blog Post, 15 June 2015) <http://singaporeinternationalarbitration.com/2015/06/15/the-rise-and-rise-of-singapore-singapore-as-a-preferred-venue-for-international-arbitration/>.

[45] Jane Croft, ‘Singapore is Becoming a World Leader in Arbitration’, *Financial Times* (online, 3 June 2016) <https://www.ft.com/content/704c5458-e79a-11e5-a09b-1f8b0d268c39>.

[46] *SAA* (n 16); *Arbitration Act* (Singapore, cap 10, 2002 rev ed) *(‘AAS’)*.

[47] The *Model Law* (n 15) is annexed as sch 1 of the *SAA* (n 16) and the *New York Convention* is annexed as sch 2 of the *SAA*. However, ch VIII of the *Model Law*, which addresses recognition and enforcement of awards, is excluded from the *SAA*.

[48] *IAA* (n 7).

[49] *SAA* (n 16) s 24.

[50] Matthew Secomb, ‘Shades of Delocalisation: Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore’ (2000) 17(5) *Journal of International Arbitration* 123, 146–7.

[51] *SAA* (n 16) s 12A(6).

In addition to pro-enforcement laws, the Singaporean government has provided strong support for international commercial arbitration, assisting to establish the Singapore International Commercial Court.[52] Singapore remains amongst the top five seats for arbitration in the world and the Singapore International Arbitration Court (SIAC) ranks amongst the most preferred five institutions worldwide.[53]

V ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN AUSTRALIA

The procedure for enforcing foreign awards under the *IAA* is considerably similar to the enforcement procedure pursuant to the *Model Law*, which is subsumed in the *IAA*.[54] The *IAA* also gives effect to Australia's obligations under the *New York Convention*[55] setting out the procedure for recognition and enforcement of foreign awards.[56] It provides that 'a foreign award may be enforced in a court of a State or Territory as if the award were a judgment of that court'.[57] The most recent amendments to the *IAA* include an amendment to s 8(1) to clarify that a foreign award is binding between the 'parties to the award'.[58] This proposed amendment aims to bring Australian law into closer alignment with the *New York Convention*, which renders an award binding between the 'parties to the award'.[59]

[52] 'Establishment of the SICC', *Singapore International Commercial Court* (Web Page, 2 May 2019) <https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc>.
[53] *2018 Queen Mary Survey* (n 2).
[54] *IAA* (n 7) s 16.
[55] The *New York Convention* (n 8) is given force of law under the *IAA* (n 7) sch 1.
[56] *IAA* (n 7) pt II.
[57] Ibid s 8(2).
[58] Ibid s 8(1).
[59] Adam Firth et al, 'Staying on the "Cutting Edge"- Proposed Amendments to the International Arbitration Act 1974 (Cth)', *Ashurst* (Web Page, 24 September 2018) <https://www.ashurst.com/en/news-and-insights/legal-updates/international-arbitration-update-staying-on-the-cutting-edge-180924/>. See also *New York Convention* (n 8) art III.

Prior to the amendment in 2018, s 8(1) stipulated that 'a foreign award is binding by virtue of the *IAA* for all purposes on the parties to the arbitration agreement, in pursuance of which it was made'. This language had led to uncertainty in relation to the enforcement of an award against non-parties to an arbitration agreement in Australia.[60] The amendment to s 8(1) attempted to elucidate that a successful party to an arbitration will only be required to show the award and the arbitration agreement to enforce a foreign award. This amendment effectively aligns with legislation in prominent arbitration centres such as Singapore.[61]

VI REFUSING ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN AUSTRALIA

A significant feature of the *IAA* with respect to foreign awards is that Australian courts cannot review the award itself — they only have discretion to refuse to enforce the award if any of the grounds provided in ss 8(5) or (7) are applicable.[62] Courts of the United States and England have indicated that the *New York Convention* prevents a court from reviewing a foreign award, irrespective of whether it includes any legal errors.[63] This 'hands-off' approach also appears to be adopted by Australian courts. Judgments of Australian courts have signalled consideration for the aims of the *IAA*, primarily that: arbitration ought to be maintained as an effective and efficient method of dispute resolution and that awards are promoted as enforceable decisions.[64]

60 See, eg, *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1.
61 Firth et al (n 59).
62 *IAA* (n 7) ss 8(5), (7).
63 Jesse Kennedy, 'Arbitrate This! Enforcing Arbitral Awards and Chapter III of the Constitution' (2010) 34(2) *Melbourne University Law Review* 558, 563.
64 See, eg, Ella Wisniewski, 'Enforcing Arbitral Awards in Australia', *Wagner Arbitration* (Web Page, 27 June 2017) <https://wagner-arbitration.com/en/journal/enforcing-arbitral-awards-in-australia/>.

Grounds for refusal of foreign awards are outlined under s 8 of the *IAA*.[65] Section 8(5) outlines a number of procedural grounds which mirror the grounds for refusal under the *New York Convention*.[66] These briefly relate to a party being under an incapacity,[67] the arbitration agreement not being valid under the applicable law,[68] a party not being given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or being unable to present their case in the arbitral proceedings,[69] the award addressing an issue beyond the terms or scope of the submission to arbitration,[70] the constitution of the tribunal or the arbitral procedure not being in accordance with the parties' agreement, or with the laws where the arbitration occurred,[71] or the award has not yet become binding on the parties to the award, or has been set aside or suspended by a competent authority of the country in which, or pursuant to the law of which, the award was made.[72] The *Model Law*[73] mirrors the grounds for refusal of awards found under art V of the *New York Convention* — effectively creating a single standard of judicial review. A crucial characteristic of this standard is the inability of parties to review the merits of a dispute at the time of enforcement.[74] Concomitantly, s 8(7) stipulates additional grounds where an award may be refused to be enforced:

(a) where the subject matter of the dispute is not capable of settlement by arbitration under the applicable law;[75]

(b) where the award is found to be in breach of public policy.[76]

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65 *IAA* (n 7).
66 *New York Convention* (n 8).
67 *IAA* (n 7) s 8(5)(a).
68 Ibid s 8(5)(b).
69 Ibid s 8(5)(c).
70 Ibid s 8(5)(d).
71 Ibid s 8(5)(e).
72 Ibid s 8(5)(f).
73 *Model Law* (n 15) art 35.
74 Alex Baykitch, 'Arbitration in Australia: An Arbitrator's Right to Be Wrong', *King & Wood Mallesons* (Web Page, 12 March 2013) <https://www.kwm.com/en/au/knowledge/insights/arbitration-in-australia-an-arbitrators-right-to-be-wrong-20130312#>.
75 *IAA* (n 7) s 8(7)(a).
76 Ibid s 8(7)(b).

Section 8(7)(a) refers to 'arbitrability' — a stand-alone ground for challenging an award, whereas s 8(7)(b) is a substantive ground according to Table 1 above.[77] Derogation from a compulsory legislative provision, such as public policy, would most probably result in a court review of the award for a set aside application.[78] The drafters of the *New York Convention* presumed the public policy exception to enforcement was a crucial safety valve that would prevent imposition on state sovereignty, if a foreign award was irreconcilable with the enforcing country's legal regime.[79] It should be noted that there may be differences with enforcement arising from the scope and wording of 'public policy', as well as distinctions on the substance of public policy among states.[80]

The term 'public policy' may be defined as fundamental values, deemed so crucial to society that they cannot be ousted by private agreement.[81] Notwithstanding some judgments where foreign arbitral awards are not enforced owing to national regulations, there is a growing international convergence of understanding with respect to the proper application of public policy exceptions. Two key reasons explain why courts seldom refuse enforcement of a foreign arbitral award. Firstly, national public policy has customarily been interpreted strictly. Further, numerous countries have both a national public policy and an international public policy — in such cases, the tendency is to

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77 Nigel Blackaby, *Redfern and Hunter 5th ed* (n 31) 594.

78 Jean François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd ed, 2007) 114.

79 Margaret Moses, 'Public Policy: National, International and Transnational', *Kluwer Arbitration Blog* (Blog Post, 12 November 2018) <http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/>.

80 Julie Soars, 'The Role of Courts in International Arbitration: Setting Aside Awards' (Speech, Federal Court of Australia, 22 March 2016) <https://www.ciarb.net.au/resources/international-arbitration/setting-aside-awards/>.

81 Jan Paulsson, 'Do Allegations of Public Policy Condemn International Arbitration to Being Unpredictable?' (Seoul Arbitration Lecture, Bae Kim & Lee, 21 June 2012) <https://lbrcdn.net/cdn/files/gar/articles/SEOUL_Paulsson_ponders_public_policy_News_Arbitration_News_Features_and_Rev.pdf>.

apply their own states' international public policy in relation to foreign awards.[82]

Concomitantly, cases from Australian courts demonstrate that the judicial perspective with respect to refusing enforcement of an award is narrow and a high bar has been set by the courts for successfully objecting to enforcement. For instance, Australian courts are unlikely to refuse enforcement on grounds of breaches of natural justice, unless a party demonstrates that there was 'real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness.'[83] Courts also expect parties who allege breaches of natural justice to readily establish this on the facts, without the need for extensive re-examination.[84] An example of this approach may be observed in the decision made in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* ('*TCL*'),[85] which was reaffirmed in *Colin Joss Pty Ltd v Cube Furniture Pty Ltd [No 1]*, where the court opined that 'awards should not be scrutinised with an over-critical or pedantic eye and should be viewed with common sense and without undue legality'.[86] These decisions highlight the uniform approach adopted, with respect to the application of public policy in international and national arbitral awards in Australia.[87]

VII AUSTRALIAN CASE LAW – SELECT ENFORCEMENT CASES

There are a number of recent cases which reinforce the contemporary Australian pro-enforcement judicial outlook, with respect to

[82] Moses (n 79).
[83] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, [55] ('*TCL*').
[84] Ibid [53]–[54].
[85] *TCL* (n 83).
[86] *Colin Joss Pty Ltd v Cube Furniture Pty Ltd [No 1]* [2015] NSWSC 735, [47].
[87] Moses (n 79).

international commercial arbitral awards. A study of these cases follows.

A An Expeditious Judgment for Enforcement of an Arbitral Award: Giedo van der Garde BV v Sauber Motorsport AG[88]

This case was connected to the Formula One Grand Prix event in Melbourne during 2015. The dispute involved a Formula One driver, Giedo van der Garde, who sought to be reinstated as a driver for the Sauber F1 Team. The applicant, van der Garde, applied for enforcement of a Swiss arbitral award before the Victorian Supreme Court.[89] The award included a determinative order that required the respondent, Sauber, to refrain from taking any adverse action against the applicant which would affect his participation in the 2015 Formula One season as one of the respondent's nominated drivers. Unless one of the few grounds for refusal to enforce an award apply,[90] under s 8(2) of the *IAA,* Australian courts are expected to recognise and enforce a foreign award as though it were the judgment of that Australian court.[91] The respondent pleaded against the award on several grounds.

The first ground was that the arbitral award, under s 8(5)(d) of the *IAA*, dealt with matters beyond the remit of the arbitration agreement. The respondent argued that the determinative order was too nebulous to amount to an order which could be judicially supported.[92] Further, the respondent also claimed that, in accordance with s 8(7)(b) of the *IAA*, enforcement of the award will be contrary to public policy interests.[93] It was argued that an enforcement of the award would place lives in danger, procedural fairness was not afforded to the respondent and that enforcement should be refused pursuant to s 8(7)(a) of the

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88 [2015] VSC 80 ('*Giedo van der Garde'*); *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786 ('*Sauber Appeal*').
89 *IAA* (n 7) s 8(2).
90 The grounds for refusal can be found under *IAA* (n 7) ss 8(5), (7).
91 Ibid s 8(2).
92 *IAA* (n 7); *Giedo van der Garde* (n 88) [7].
93 *Giedo van der Garde* (n 88) [8].

IAA, as the dispute between the parties could not be settled by the laws of the State of Victoria.[94]

Croft J found the determinative order to be sufficiently clear.[95] The subject matter was within the contemplation of the parties and was capable of being determined by way of arbitration.[96] His Honour also found that enforcement of the award would not be contrary to public policy and there had been no breaches of natural justice or procedural fairness.[97] The respondent sought a stay of the enforcement order, contesting that the matter was not capable of being arbitrated and breaches of natural justice had occurred in making the award.[98] The Victorian Supreme Court of Appeal dismissed the appeal.[99] The Court cited *TCL*[100] by stating: '[i]nsofar as reliance is placed upon ss 8(7)(b) and 8(7A)(b), we adopt the analysis of the Full Federal Court in *TCL*'[101]

The Court further stated:

> Courts should not entertain a disguised attack on the factual findings or legal conclusions of an arbitrator 'dressed up as a complaint about natural justice'. Errors of fact or law are not legitimate bases for curial intervention. Unfairness in any particular case will depend upon context, and all the circumstances of that case.[102]

The authors are of the view that the Court's decision emphasises the generally supportive attitude adopted by the Australian courts with respect to enforcement of arbitral awards, whether they are made in Australia or abroad. It also underscores that courts will not be drawn

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94 *IAA* (n 7) s 8(7)(a).
95 *Giedo van der Garde* (n 88) [10].
96 Ibid [11], [19].
97 Ibid [20].
98 These two grounds for seeking a stay of the order were made pursuant to *IAA* (n 7) ss 8(7)(b) and 8(7A)(b) respectively.
99 *Sauber Appeal* (n 88).
100 *TCL* (n 83).
101 *Sauber Appeal* (n 88) 789.
102 Ibid 789.

into parties' subterfuge arguments, which lack clear grounds for intervention. The decision also provides comfort in that Australian courts exercise a degree of caution when challenges to the legal merits of arbitral awards are 'dressed up' as natural justice or process related challenges.

B *William Hare UAE LLC v Aircraft Support Industries ('William Hare')*[103]

The *William Hare* case was dealt with at three levels. Initially, at the New South Wales Supreme Court,[104] then at second instance, on appeal to the New South Wales Supreme Court of Appeal,[105] and subsequently on an application for special leave to the High Court.[106] In summary, William Hare, the applicant, entered into an agreement with the respondent, Aircraft Support Industries, to perform construction works at Abu Dhabi airport. A dispute emerged between the parties and the applicant commenced arbitration proceedings relating to what final payment was due to it and the release of the second portion of retention monies held by the respondent. The final arbitration award ordered the respondent to make two payments, one of USD797,500 regarding retention monies and a second payment of USD50,000 regarding a discount offered by the applicant. The applicant was awarded a total of approximately USD1.5 million. The award was not complied with by the respondent, therefore the applicant sought enforcement of the award in the New South Wales Supreme Court under s 8(2) of the *IAA*.[107]

The respondent resisted enforcement of the award and contended that the enforcement of the award would be contrary to public policy

[103] [2014] NSWSC 1403 ('*William Hare*').
[104] Ibid.
[105] *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCA 229 ('*Aircraft Support Industries*').
[106] *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2016] HCASL 59 ('*ASI HC Appeal*').
[107] *William Hare* (n 103). *IAA* (n 7) s 8(2) states that a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.

interests, on the grounds that the arbitral award breached rules of natural justice enlivened by s 8(7)(b) of the *IAA*.[108] The concern before the Supreme Court was with respect to the $50,000 in favour of the applicant. In the applicant's originating procedure for arbitration in October 2012, the applicant sought payment of the amount.[109] By May 2013, when the parties agreed to an arbitration terms of reference, the applicant's claim for USD50,000 was still in existence.[110] The applicant's statement of claim following the agreed terms of reference omitted the claim for USD50,000, and the sum was not addressed by the disputants in the submissions.[111] It should, however, be noted that the applicant's statement of claim had a catch-all claim, to the effect that 'such other relief as the Tribunal deems appropriate'.[112] It was the respondent's position that if the arbitral Tribunal was making an order for the payment of the sum, then principles of natural justice warranted the respondent having an opportunity to address the sum.

Before the Supreme Court, the respondent relied on six grounds to support their argument for breach of natural justice, namely:

- the Tribunal found that the applicant was entitled to payment of a particular unclaimed sum; and reasons were not provided by the Tribunal as to why the applicant was entitled to that sum;

- the respondent's contention that an alleged agreement captured in a letter dated 10 May 2011 had to be a permitted variation in order to be enforceable was not considered by the Tribunal, and reasons were not provided by the Tribunal as to why the alleged agreement was a variation;

- the respondent was not permitted to rely upon supplementary grounds of defence and proceeded provisionally, prior to its determination of whether the supplementary defences could be relied upon;

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108 *IAA* (n 7) s 8(7)(b).
109 *William Hare* (n 103) [15].
110 Ibid [18].
111 Ibid [23]–[29].
112 Ibid [24].

- reasons were not provided by the Tribunal as to why each of the defences relied upon by the respondent was rejected;

- reasons were not provided by the Tribunal as to why the sums claimed by the applicant were due under the agreement; and

- reasons were not given as to why the sums due under the agreement were otherwise than as pleaded by the respondent.[113]

In addition to arguing contravention of public policy interests, it was also submitted that the whole award must be struck out, as it was not open to the Supreme Court under s 8 of the *IAA* to uphold the award in part and to sever its remaining portion.[114] In their determination of the issue of public policy, and in limiting its scope, the Court adopted the approach in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics,* quoting the Full Federal Court in *TCL*:

> that the phrase was understood to be limited to the fundamental principles of justice and morality conformable with, and suited to operation within, the international nature of subject matter - international commercial arbitration, a context very different from the review of public power in administrative law. This approach to confining the scope of public policy has widespread international judicial support.[115]

It was accepted by the Supreme Court that one breach of natural justice had occurred with respect to the first ground the respondent relied on and not the other five grounds, namely, that the Tribunal should have afforded the disputants an opportunity to make submissions on the point. Drake J upheld the respondent's position and stated that

> in the absence of any explicit statement by the [applicant] that the claim for US $50,000 was still maintained despite its absence from the Statement of Claim, the claim ought reasonably have been treated by all concerned as no longer pressed. If, as appears to be the case, the tribunal took a different view and considered that it remained open to it to deal with that claim and possibly make an order against the [respondent] for payment of US $50,000, I think that fairness required the tribunal to give

113 Ibid [11].
114 *IAA* (n 7) s 8.
115 *TCL* (n 83) [74]–[75].

> notice of its view to the parties (especially to the [respondent]) and invite them to address the claim, including by the making of submissions.[116]

The Supreme Court held 'by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered by the Respondent to that extent'.[117] The Court was of the view that the partial enforcement of the award would be just and it severed the portion of the award which had not complied with principles of natural justice. The decision of the Supreme Court seemed to contradict previous decisions, which found that setting aside an award on grounds of public policy should be interpreted narrowly.[118] If previous Australian decisions were strictly followed, especially in light of the Applicant's catch-all claim, then the respondent's claim would not be sufficient to satisfy the high bar of a natural justice breach occurring.

The respondent appealed, contending that an award resultant from breaches of natural justice could not be partially enforced. The Court of Appeal disagreed with this argument, stating that with respect to an award, 'the bad portion is clearly separate and divisible' and that 'the residue can be enforced'.[119] The Court also stated that the primary judge's decision was 'correct' and the initial arbitrators' award 'dealt with the oral evidence, giving reasons … and how subsequent conduct supported that conclusion'.[120] It was also stated that the reasons provided by the arbitrators 'having regard to the issues ultimately raised by the submissions, met the standard' of natural justice.[121]

The respondent sought special leave to appeal the decision of the Court of Appeal, however, the High Court refused to grant leave.[122] It

[116] *William Hare* (n 103) [62].
[117] Ibid [63].
[118] See generally *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] 277 ALR 415 ('*Uganda Telecom*'). See also *TCL* (n 83).
[119] *Aircraft Support Industries* (n 105) [57].
[120] Ibid [50]-[51].
[121] Ibid.
[122] *ASI HC Appeal* (n 106).

is the view of the authors that this decision correctly illustrates that while Australian courts are strongly pro-arbitration and that courts will enforce or partially enforce a foreign arbitral award, Australian courts have shown their readiness to depart from such judicial norms in circumstances involving legitimate and valid breaches of public policy and natural justice principles. The decision also highlights that for a court to do so, the party seeking such an order will need to satisfy a relatively high bar, namely that there was an acute unfairness and injustice. Commenters have observed that 'this narrow exception to the discretion of Australian courts to recognise and enforce foreign arbitral awards, is consistent with the decisions of courts of other Asia-Pacific jurisdictions around the world' and that 'Australian courts can and will enforce a foreign arbitral award in part'.[123]

The fact that the Court permitted partial enforcement of an award illustrates the extent Australian courts will go to for the purposes of properly enforcing awards, even when a portion of the award sought may be void.

C *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*[124]

This dispute stems from a distribution agreement which subsequently became an exclusive one between two commercial entities — Castel, an Australian electrical products distribution company, and TCL, a Chinese air conditioner manufacturing company. Castel secured the exclusive entitlement to sell TCL air conditioners in Australia under their agreement, however Castel alleged that TCL breached its agreement by selling unbranded air conditioners to other competitor distributors and sold faulty conditioners to Castel. In accordance with their distribution agreement, Castel commenced arbitral proceedings against TCL. The Tribunal issued an award against TCL, ordering it pay approximately $2.8 million to Castel and a costs award of about

[123] James Argent, 'Aircraft Support Industries Pty Ltd v William Hare UAE LLC (2015) 298 FLR 183; [2015] NSWCA 229: The Enforceability of Foreign Arbitral Awards in Australia' (2016) 5(2) *Journal of Civil Litigation and Practice* 148, 153.

[124] (2013) 251 CLR 533 ('*TCL Air*').

$700,000. TCL failed to pay the required monies, resulting in Castel issuing proceedings in the Australian Federal Court pursuant to the *IAA*.[125]

TCL argued that the application was deficient and the Court lacked jurisdiction to enforce the award. In the alternative, TCL argued that even if the Federal Court was held to have jurisdiction, the award was against public policy and in breach of natural justice.[126] Murphy J held in favour of Castel in his judgment, finding the Court had jurisdiction to hear the matter.[127] His Honour permitted the enforcement of the award, holding that the award was not against public policy, nor a breach of natural justice, thereby rejecting the remaining arguments propounded by TCL.[128] Murphy J, in the Federal Court judgment of first instance, interpreted a breach of public policy as an explicit violation of the fundamental notions of fairness and justice and did not find such a breach applicable to the matter before him.[129] In doing so, he gave effect to the *IAA*, the *Model Law* and the *New York Convention*.[130] His Honour also reinforced the approach adopted by Australian courts in recognising and enforcing arbitral awards in Australia. The appeal by TCL was subsequently dismissed by the Full Court of the Federal Court.[131]

TCL appealed the decision to the High Court of Australia. The first main challenge was on the grounds that the jurisdiction conferred on the Federal Court, in an application for enforcement of an award (brought under art 35 of the *Model Law*), is inherently inconsistent with ch III of the *Australian Constitution* — which vests judicial power in Federal Courts.[132] Secondly, that the *IAA* unlawfully vests judicial

[125] Ibid 563; *IAA* (n 7).
[126] *TCL Air* (n 124) 563.
[127] Ibid.
[128] Ibid.
[129] *Castel Electronics Pty Ltd v TCL Air Conditioners (Zhongshan) Co Ltd* (2012) 287 ALR 297, 307.
[130] *IAA* (n 7). The *Model Law* (n 15) and the *New York Convention* (n 8) are included in schs 1 and 2 of the *IAA*.
[131] *TCL* (n 83).
[132] *TCL Air* (n 124) 534.

power in arbitral tribunals. French CJ, Hayne, Crennan, Kiefel and Gageler JJ unanimously dismissed the appeal.[133] Notably, the Court held that 'Article 35 of the *Model Law* neither undermines the institutional integrity of the Federal Court, nor confers judicial power on an arbitral tribunal. Neither Article 28 of the *Model Law* nor an implied term of an arbitration agreement requires an arbitral award to be correct in law.'[134] This holding reinforces the approach adopted by Australian courts — where, in light of the *New York Convention*, courts are prevented from reviewing an award for legal correctness.[135]

Commenters have observed that 'mere errors of fact or law, without more, are not grounds for court intervention. Additionally, attacks by parties on findings of fact disguised as a breach of natural justice will not be entertained.'[136] The strict application of the rules of natural justice has the added advantage of protecting against the 'comfort of domesticity' when hearing such matters.[137] Further, the judgment of *TCL* confirmed that the notion of public policy in Australia encompasses both substantive law and procedural justice.[138]

The approach of the Court confirming the above policy is discernible from its judgment, where it states:

> Enforcement of an arbitral award is enforcement of the binding result of the agreement of the parties to submit their dispute to arbitration, not enforcement of any disputed right submitted to arbitration. The making of an appropriate order for enforcement of an arbitral award, does not signify the Federal Court's endorsement of the legal content of the award, any more than it signifies its endorsement of the factual content of the award.[139]

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[133] Ibid.
[134] Ibid 544.
[135] See, eg, Kennedy (n 63) 563.
[136] Craig Edwards, 'Australia and Singapore – Differences in Applications to Set Aside an Arbitral Award?' (2019) 29(4) *Australian Dispute Resolution Journal* 234, 238.
[137] Clyde Croft, 'The "Temptation of Domesticity" and the Role of Courts in Australia's Arbitral Regime' (2015) 89(10) *Australian Law Journal* 684, 684.
[138] See *TCL* (n 83) [13].
[139] *TCL Air* (n 124) 555–6.

In relation to TCL's allegation that judicial power had been unlawfully conferred on the arbitral Tribunal, the High Court held that

> the conclusion that an arbitrator is the final judge of questions of law arising in the arbitration, does not demonstrate that there has been some delegation of judicial power to arbitrators. The determination of a dispute by an arbitrator does not involve the exercise of the sovereign power of the State to determine or decide controversies.[140]

The Court thereby refuted all of the arguments raised by the appellant, TCL, reinforcing the pro-arbitration approach adopted by the courts in Australia. The authors are of the view that this decision was critical, as it was issued by the High Court and consolidates the Australian courts' stance as a pro-arbitration jurisdiction. The significance of this judgment is also reflected in the fact that the majority of Attorney-Generals represented the states of Australia and the national professional arbitration bodies participated as amicus curiae.[141] If the High Court had decided differently on this case, the authors are of the view that it would likely have proven damaging to Australia's reputation as a pro-enforcement jurisdiction. *TCL* also indicates that it is crucial to create or preserve international harmony to a reasonable extent and thus create convergence in the approach to international commercial arbitration. At the least, where the *Model Law* and *New York Convention* are concerned, public policy is restricted to the essential grounds of justice and morality that is appropriate in the international sense.[142]

Other authors have observed that the decision 'highlights the freedom of parties to an international arbitration agreement, to choose the applicable law governing their agreement and any dispute within its ambit.' The decision also 'highlights the finality of an arbitral award made pursuant to an authority, conferred by the parties to an

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140 Ibid 575.
141 Ibid 576.
142 David Ryan and Khanaga Dharmananda, 'Summary Disposal in Arbitration: Still Fair or Agreed to Be Fair' (2018) 35(1) *Journal of International Arbitration* 31, 38.

arbitration agreement' and that '[e]nforcement does not however require that the award ... be free from any error of law'.[143]

D *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* ('*Uganda Telecom*')[144]

This judgment relates to an application to the Australian Federal Court by Uganda Telecom Limited ('UTL') for the recognition and enforcement of a foreign award issued in Uganda against Hi-Tech Telecom Pty Ltd ('Hi-Tech'). The contract in dispute between the parties required UTL to provide switching services and facilities to Hi-Tech.[145] When a number of invoices were not paid by Hi-Tech, UTL issued a demand for payment and subsequently initiated arbitral proceedings.[146] The arbitrator ruled in favour of UTL, ordering damages and interest to be paid by Hi-Tech.[147] The Ugandan High Court registered the award and issued a decree for its execution.[148]

The main grounds on which Hi-Tech challenged the validity of the award were:

(a) that the underlying contract between the parties was void for uncertainty;

(b) the composition and/or procedure of the arbitration was purported to be in breach of the agreement between the parties;

(c) the arbitration addressed matters which were beyond the scope or terms of the arbitration clause;

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[143] Susan Douglas, 'TCL Airconditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia [2013] HCA 5: A Case Note' (2013) 11(1) *Journal of New Business Ideas & Trends* 42, 45.
[144] *Uganda Telecom* (n 118).
[145] Ibid 415.
[146] Ibid.
[147] Ibid.
[148] Ibid.

(d) the award does not fall within the meaning of 'foreign award' or 'arbitral award' pursuant to s 3(1) of the *IAA*, therefore is not binding according to s 8;[149]

(e) Hi-Tech was not provided proper notice of the arbitration, therefore the award is unenforceable;

(f) the sole director of Hi-Tech was unable to travel to Uganda to attend the arbitral proceedings out of fear for his safety. Hi-Tech allege that they did not have the chance to present their case to the arbitrator, thus the award should not be enforced under s 8(5)(c) of the *IAA*;[150]

(g) the award included an error of law in that the amount calculated for general damages was excessive;

(h) due to the above grounds put forward, enforcement of the award would result in a breach of public policy.[151]

In relation to the public policy argument, Foster J referred to the *IAA*,[152] stating that the amendments which took effect in 2010 ensured that no such discretion remained.[153] His Honour then proceeded with the following passage, which sums up the approach of Australian courts as to whether a broad discretion exists for rejection of enforcement of an award, on a public policy basis:

> Section 8(7)(b) preserves the public policy ground. However, it would be curious if that exception were the source of some general discretion to refuse to enforce a foreign award. Whilst the exception in s 8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases. The principles articulated in those cases sit more comfortably with the purposes of the Convention and the objects of the Act.[154]

[149] *IAA* (n 7) ss 3(1), 8.
[150] Ibid s 8(5)(c).
[151] *Uganda Telecom* (n 118) 421–2.
[152] *IAA* (n 7).
[153] *Uganda Telecom* (n 118) 439.
[154] Ibid. The term 'Convention' refers to the *New York Convention* (n 8) and the term 'Act' is in reference to the *IAA* (n 7).

Further, the Federal Court could not find any reason to refuse recognition or enforcement of the award by reference to various legal instruments, including, but not limited to, the *IAA*.[155] His Honour found that any omissions in the arbitration agreement were addressed by the *Uganda Arbitration and Conciliation Act* ('*UACA*').[156] Further, in the absence of a seat being specified by the parties, the arbitrator has the power to nominate a seat pursuant to the *UACA*, which is what occurred in this particular case.[157] Accordingly, the Federal Court held that the underlying agreement between the parties was sufficiently certain and valid. Similarly, the arbitral procedure and arbitral authority were found to be valid and were governed by the *UACA*, which included mechanisms to address the purported deficiencies raised by Hi-Tech.[158] All the remaining grounds upon which Hi-Tech sought to rely on were rejected.[159] The authors are of the view that the decision of the Federal Court in this case fortifies Australia's position as generally one of pro-arbitration and pro-enforcement, creating greater convergence between the approach adopted by the courts of Australia and Singapore.

The judgment of Foster J evinces a narrow approach to resist enforcement on the grounds of public policy, where he states that it is not against public policy for a foreign award to be enforced by an Australian court without examining the merits or the result reflected in the award.[160] The decision elucidates that the rationale of the *IAA*[161] and the public policy of Australia is to enforce such awards where possible.[162] The court opined, and the authors agree, that the grounds of public policy do not confer any general discretion on the court to

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[155] *IAA* (n 7).
[156] *Uganda Telecom* (n 118) 430–2; *Arbitration and Conciliation Act* (Uganda) cap 4, Laws of Uganda, 2000, Revised Edition ('*UACA*').
[157] *Uganda Telecom* (n 118) 430. Pursuant to *UACA* (n 156) ss 10-15, 20(2).
[158] *Uganda Telecom* (n 118) 431.
[159] Ibid 439-40.
[160] Ibid 436–7. See *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535, 557 [96].
[161] *IAA* (n 7).
[162] *Uganda Telecom* (n 118) 436–7.

refuse enforcement of a foreign award.[163] Although *Uganda Telecom* did not directly concern the courts' right to review a tribunal's findings of *fact*, its strict application of s 8(7)(b) of the *IAA,* combined with its 'pro-enforcement bias' of the *New York Convention*, and its rejection of arguments of law which were not raised before the Tribunal, highlight an approach of minimal judicial review.[164]

Others have also observed that the decision

> is one of many Australian decisions that confirm the limitations on the appeal and review of arbitral awards. These include no general discretion to refuse enforcement in Australia, and that the public policy ground for refusing enforcement … is to be interpreted narrowly without residual discretion.[165]

VIII Enforcement of Foreign Arbitral Awards in Singapore

The *2018 Queen Mary Survey* indicates that Singapore is once again one of the world's five most attractive seats for international commercial arbitrations.[166] The default position of the *SAA* with respect to enforcing arbitral awards is that the awards can be enforced as they have, according to s 19, the same status as a judgment. However, leave to enforce is required by the High Court of Singapore.[167]

The *SAA* states that '[a]n award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same

[163] Ibid 439.

[164] Michael Hwang and Kevin Lim, 'Corruption in Arbitration – Law and Reality' (2012) 8(1) *Asian International Arbitration Journal* 1, 93.

[165] Doug Jones, 'Australia as a Global Hub' (Speech, LCIA Sydney Symposium, 8 October 2017) <http://dougjones.info/content/uploads/2017/07/LCIA-Keynote-Address-Doug-Jones.docx>.

[166] *2018 Queen Mary Survey* (n 2).

[167] *SAA* (n 16) s 19.

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'.[168] With respect to the specific enforcement of foreign awards, the Act provides: 'a foreign award may be enforced in a court either by action or in the same manner as an award of an arbitrator made in Singapore is enforceable under s 19'.[169] Further, the *SAA* deems a foreign award as 'binding for all purposes upon the persons between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore'.[170]

A *Refusing Enforcement of Foreign Arbitral Awards in Singapore*

Singaporean courts can abstain from enforcing an award if it is contrary to Singaporean public policy.[171] As of March 2015, one author held the view that '[t]here has, to date, been no instance where the Singapore courts have refused to enforce an arbitral award on the grounds of public policy'.[172] An example where an award was set aside for grounds other than public policy can be found in *CRW Joint Venture v PT Perusahaan Gas Negara* ('*CRW*'), where the Singapore Court of Appeal set aside the final award on the grounds of excess of jurisdiction by the arbitral Tribunal and breach of the rules of natural justice.[173] Decisions such as *CRW* do not alter the overarching supportive approach which Singapore courts adopt towards recognition and enforcement of arbitral awards — rather, it signals that where serious defects exist with respect to the arbitral procedure and award, courts are ready to intervene and exercise their discretion.[174]

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168 Ibid.

169 Ibid s 29(1).

170 Ibid s 19(B).

171 *AJU v AJT* [2011] 4 SLR 739, 758 ('*AJU*').

172 Nish Shetty, *Public Policy and Singapore Law of International Arbitration* (Memorandum, 25 March 2015) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=B179BAF0-63E1-46C5-B1D3-3834DEF95AE2>.

173 *CRW Joint Operation v PT Perusahaan (Persero) TBK* [2011] SGCA 33.

174 Dinesh Dhillon, 'Singapore Court of Appeal Sets Aside Final Arbitral Award on the Grounds of Excess of Jurisdiction and Breach of Natural Justice Rules' (2011) 23(8) *Allen & Gledhill Legal Bulletin* 8 <https://s3.amazonaws.com/documents.lexology.com/56b60cdd-07ea-4554-bf50-ebc7cdd9abeb.pdf>.

An award may also be set aside if 'the making of the award was induced, or affected by fraud or corruption'.[175] Singapore's Court of Appeal has clarified that an award tainted by fraud is an award that is contrary to Singapore's public policy interest.[176] An arbitral tribunal may also set aside an award if the rules of natural justice were breached or the rights of a party prejudiced.[177] To succeed on an allegation that rules of natural justice were breached, a court must be satisfied of the rule which was breached, the manner in which it was breached, the connections of the breach to the award and the prejudice caused by the breach.[178] Regarding the issue of prejudice, the Court of Appeal has clarified that a party would be prejudiced where materials of weighty relevance, not made available to an arbitrator, could have made a difference to the arbitrator.[179]

IX SINGAPOREAN CASE LAW – SELECT ENFORCEMENT CASES

A *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*[180] – award set aside

Although this case was a national award between two Singaporean parties, it is indicative of the degree of caution exercised by Singaporean courts on the question of setting aside an award. Concomitantly, it provides assurance to foreign parties that only in cases where a party has sustained sufficient prejudice will the court apply any recourse available under the governing laws. What amounts to 'sufficient prejudice' is a discretionary measure. Further, in the judgment delivered by the Court of Appeal of the High Court of

[175] *SAA* (n 16) s 24(a).
[176] [2006] SGCA 41 ('*PT Asuransi*').
[177] *SAA* (n 16) s 24(b).
[178] *Soh Ben Tee & Co Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.
[179] *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125, 142 ('*LW Infrastructure*').
[180] *LW Infrastructure* (n 179).

Singapore, there are numerous analogies drawn between the *Model Law* and the *AAS* highlighting that the *AAS* is closely aligned with the *Model Law*. The decision emphasises that the court will only permit setting aside an award if the circumstances of the case satisfy the grounds provided in the *AAS*.[181]

This was an appeal case which was dismissed by the Singapore Court of Appeal. In fact, there were two appeals to the Court of Appeal — one by each party to this proceeding. The contract between the parties was for a building project, where Lim Chin was the sub-contractor for LW, and did not meet the timelines for completion of the work. Under the subcontract, LW terminated Lim Chin for breach. The dispute was heard by an arbitrator, where the respondent in this proceeding, Lim Chin, was the claimant in the arbitration. The arbitrator awarded a sum to the claimant, with interest applicable from the date of the award. Both parties made an appeal, on the grounds of questions of law flowing from the award.[182] Prakash J of the High Court of Singapore largely allowed the appeal by LW and remitted the final award to the arbitrator for reconsideration.[183]

Subsequently, the arbitrator issued his supplementary award number two, whereupon the respondent was awarded a sum as liquidated damages. The arbitrator awarded interest from the date of the second award, as he had done so with the first award. About one month following the rendering of the second supplementary award, the solicitors for LW requested pre-award interest from the arbitrator, relying on s 43(4) of the *AAS*.[184] Three days after receiving the request, the arbitrator issued an additional award providing the respondent with a pre-award interest amount, notwithstanding that he had not received any communication or submissions from the applicant, Lim Chin, on the matter.[185] The applicant challenged the additional award in the High Court of Singapore, seeking to have it nullified on the grounds

[181] Ibid 133.
[182] Ibid 125.
[183] Ibid 129.
[184] Ibid 130; *AAS* (n 46) s 43(4).
[185] *LW Infrastructure* (n 179) 130.

that it was not made under s 43(4) of the *AAS*.[186] In the alternative, the applicant sought to have the additional award set aside on the basis that it was a breach of natural justice pursuant to s 48(1)(a)(vii) of the *AAS*.[187] When the matter was before the High Court, Chiu J discussed the significance of minimal curial intervention in arbitral awards. In particular, the following quote sums up the approach adopted by Singaporean courts on enforcement of awards: 'It is incontrovertible that international practice has now radically shifted in favour of respecting and preserving the autonomy of the arbitral process in contrast to the earlier practice of enthusiastic curial intervention.'[188]

His Honour set aside the additional award entirely on the grounds of s 48(1)(a)(vii) of the *AAS,* however refused to declare the award a nullity.[189] On appeal, the Court of Appeal had a number of questions it needed to address, the most relevant to this paper being the degree to which the court retains any supervisory authority over arbitration, beyond the express provisions in the applicable statute.[190] The Court of Appeal affirmed Chiu J's decision and refused to declare the award a nullity. It held that the applicant was denied the opportunity to respond to the request for pre-award interest, which warranted sufficient grounds to set aside the additional award.[191] The authors are of the view that this decision rightly, and in the spirit of arbitration, confirms that Singaporean courts are not hesitant to set aside an award where the rights of a party have been breached, although the general practice continues to be limited judicial intervention with arbitral awards.[192] This decision, therefore, represents a minority of cases where an award was set aside.

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[186] *AAS* (n 46) s 43(4).
[187] Ibid s 48(1)(a)(vii); *LW Infrastructure* (n 179) 132.
[188] *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2012] 2 SLR 1040, 1052.
[189] Ibid 1042.
[190] *LW Infrastructure* (n 179) 128.
[191] Ibid 147.
[192] Clyde Croft, 'Judicial Intervention in the Asia Pacific Region' (Conference Paper, UNCITRAL-MOJ-KCAB Joint Conference: Arbitration Reform in the Asia Pacific Region: Opportunities and Challenges, 11–12 November 2013) 33 <https://www.supremecourt.vic.gov.au/about-the-court/speeches/judicial-intervention-in-the-asia-pacific-region>.

B *The Active/Passive Remedies Dichotomy: PT First Media v Astro Nusantara*

The significance of the *PT First Media TBK v Astro Nusantara International BV*[193] decision lies in the Singapore Court of Appeal's broad construction of international arbitration instruments such as the *Model Law*[194] and its underpinning philosophy as it applies to the *SAA*.[195] It also raises other questions, such as where an extension of time is sought, to challenge enforcement of an award pursuant to the *New York Convention*, is the fact that the award has not been set aside by the courts of the seat of arbitration a relevant factor?[196] This case arose out of a joint venture ('JV') dispute between entities belonging to an Indonesian conglomerate referred to as the 'Lippo' group and entities under the 'Astro' group being a Malaysian media organisation.[197] The purpose of the JV was to supply satellite television services in Indonesia.[198]

The vehicle for the JV was named PT Direct Vision ('DV'). Lippo's share in the JV was to be held by PT Ayunda Prima Vitra ('Ayunda'). In turn, Ayunda's duties were guaranteed by PT First Media TBK ('FM').[199] The terms of the joint venture were subsumed in the subscription and shareholders agreement ('SSA').[200] The additional Astro parties were not a party to the SSA.[201] The Singapore International Arbitration Centre SIAC ('SIAC') was to govern any arbitrations, according to the parties' SSA. A dispute arose relating to the funding of the JV, upon which Ayunda, being one of the entities under Lippo, instigated curial proceedings against some of the additional Astro parties.[202]

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193 [2014] 1 SLR 372 ('*PT*').
194 *Model Law* (n 15) art 7(2).
195 *SAA* (n 16). See, eg, *PT* (n 193) [50]–[53].
196 *PT* (n 193) [62]-[64], [75]-[76].
197 Ibid [3].
198 For the sake of simplicity, the parties will be referred to hereinafter as 'Astro' and 'Lippo'.
199 *PT* (n 193) [4].
200 Ibid [5].
201 6th to 8th respondents in the Astro group ('additional Astro parties').
202 *PT* (n 193) [6]-[8].

Astro claimed that Lippo had acted in breach of the SSA by initiating court action in Indonesia. In response, Astro initiated arbitral proceedings against Lippo in Singapore and applied for a joinder of additional Astro parties who were not included in the SSA, but had contributed substantial funds to the JV.[203] A preliminary hearing was conducted to rule on the question of joinder and jurisdiction.[204] The Tribunal ruled that the additional parties were to be joined to the proceedings under r 24(b) of the *SIAC Rules* — primarily, on the grounds of close linkage between the various claims, defences and counterclaims.[205] By doing so, the Tribunal confirmed it had jurisdiction to address the claims. Lippo did not appeal to the Singapore Court to challenge the preliminary ruling on jurisdiction, as stipulated in art 16 of the *Model Law*.[206] In total, the Tribunal issued five arbitral awards, ordering Lippo to pay the majority of the monies to the additional Astro parties, and less than $1 million to the Astro parties that were actually parties to the SSA. Astro successfully sought leave from the Singapore High Court to enforce the awards.[207] Lippo had not applied to have the awards set aside in Singapore within the requisite time frame.[208]

Following the issuance of the awards, Astro and the additional Astro parties also sought enforcement of the awards in other jurisdictions, including Hong Kong and Indonesia. Lippo had not contested enforcement of the awards in Hong Kong, as it did not have any assets in that jurisdiction. The time limitation to challenge enforcement in Hong Kong expired and judgment was entered on the

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203 Ibid [9]-[10].

204 Under the rules that applied at that time to SIAC, r 24b conferred a wide power on the Tribunal to allow other parties to be joined in the arbitration with their express consent.

205 *SIAC Rules 2007* (Singapore) r 24(b).

206 *Model Law* (n 15) art 16, which is applicable under the *SAA* (n 16).

207 *PT* (n 193) [11]–[12]. The High Court judgment initiated by Astro can be found under *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2012] SGHC 212 (‘*Astro*’).

208 Pursuant to the *Model Law* (n 15) art 34 applicable under the *SAA* (n 16). The time allowed under art 34 is 90 days.

awards against Lippo.[209] Around mid-2011, one of the Lippo parties loaned funds to its parent company listed in Hong Kong. Upon learning this, Astro applied for and successfully obtained a garnishee order in Hong Kong, that the parent company pay the funds to Astro. In early 2012, Lippo issued a summons to set aside the Hong Kong judgment. Those proceedings were stayed pending resolution of the Singapore enforcement proceedings.[210] Astro applied to the Singapore High Court which entered judgments on the awards against Lippo.[211] Subsequently, Lippo applied to set aside the judgments on the basis that there were legislative grounds for Lippo to invoke lack of jurisdiction as a premise to resist or refuse enforcement of the awards. This was the threshold question before the Court.[212] The Court refused to set aside the awards made against Indonesia's Lippo group in favour of Astro.[213]

Her Honour Ean J held that there were no grounds to refuse recognition and enforcement of the awards issued by SIAC.[214] The Court described art 16(3) as having an 'exclusionary effect' — Lippo had not applied for a review within the prescribed time limit.[215] Once, however, the time for making an application passes, such ruling becomes final, therefore precluding a party from contesting an award on a question of jurisdiction at the enforcement phase.[216] Lippo's failure to take steps earlier under s 19B of the *SAA,* read in conjunction with art 34 of the *Model Law*, effectively barred it from raising the

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209 *Astro Nusantara International BV v PT First Media TBK* [2015] HCCT 45/2010 [5] ('*Astro v PT First Media*').

210 'Astro v Lippo: First Media's Hong Kong Appeal Dismissed', *Arbitration Notes* (Web Page, 8 December 2016) <https://hsfnotes.com/arbitration/2016/12/08/astro-v-lippo-first-medias-hong-kong-appeal-dismissed/>.

211 *Astro* (n 207). See also Dylan McKimmie and Merial Steadman, 'Parties Choose Your Remedies: The Singapore Court of Appeal Has Spoken', *mondaq* (Web Page, 11 December 2013) <http://www.mondaq.com/australia/x/280428/International+Courts+Tribunals/Parties+choose+your+remedies+the+Singapore+Court+of+Appeal+has+spoken >.

212 *Astro* (n 207)[9].

213 Ibid [65].

214 Ibid [73].

215 *Model Law* (n 15) art 16(3) provides that the party must, within 30 days after receiving the ruling on jurisdiction, apply to the relevant court for a review.

216 *Astro* (n 207) [151].

question of jurisdiction at the enforcement stage of the awards.[217] Her Honour emphasised the significance of fairness, justifying minimal court intervention and opined that the courts are not a stage where dissatisfied parties can have a second bite of the cherry.[218] This statement highlights the court's attitude towards parties attempting to circumvent the law, by having a second chance for review, which may be perceived as opportunistic at best.

1 *The Appeal to the Singapore Court of Appeal*

On appeal by Astro, the Court set aside the judgment by Ean J and granted Lippo leave to apply to set aside the enforcement orders.[219] The Singapore Court of Appeal highlighted the choice of active and passive remedies open to an award debtor — it reviewed the relevant provisions of the *Model Law*, the *New York Convention* and the *SAA* to elucidate the underpinning rationale of these, as they applied to the case.[220]

The SGCA had two questions to address:

(a) Whether the courts possess the power to refuse enforcement of an award pursuant to s 19 of the *SAA*, and if so, what the scope or content of that power is;[221]

(b) Whether art 16(3) of the *Model Law* is a 'one-shot remedy', with the result that Lippo's failure to challenge the preliminary ruling

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[217] Ibid [88].
[218] Ibid [123].
[219] *PT* (n 193) [13]–[15].
[220] See ibid [1].
[221] *PT* (n 193) [32]. *SAA* (n 16) s 19 provides that '[a]n award or 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' (emphasis added). Further, s 19B(4) states that '[t]his section shall not affect the right of a person to challenge the award by any available arbitral process of appeal or in accordance with the provisions of this Act and the Model Law'.

in the award on preliminary issues precludes it from raising the joinder objection.[222]

The Court of Appeal held for Lippo on both questions. On the first question, the Court analysed the history of s 19 of the *SAA* and various cases, before concluding that this provision preserves the power of the courts to refuse enforcement. The enforcement of awards was held to be governed by s 19 and its interpretation must be aligned with the rationale underpinning the *Model Law*.[223] On the second question, the Court found that the *Model Law* advocates a 'choice of remedies' with active remedies co-existing alongside passive ones — the active remedies of having the ruling on jurisdiction reviewed, or applying to have it set aside — alternatively the passive remedy of resisting enforcement of the award.[224] Although the Court acknowledged the significance of ensuring certainty and efficiency in awards, it was not of the view that these factors prevailed over the active and passive remedies open to the award debtor.[225] Among some of the points made in its summary, the Court included the following:

1) Article 16(3) of the *Model Law* was not intended to be a 'one-shot' remedy, nor affect the existence of defences at the recognition and enforcement phase;[226]

2) The overriding objective of the *Model Law* was to de-emphasise the seat of arbitration and promote the consistent treatment of international arbitration awards;

3) The 'choice of remedies', under which passive remedies will still be available to the award debtor who failed to use their active remedies, is essential to the design of the *Model Law*;

4) The ideal way to implement the rationale of the *Model Law* would be to recognise that the same basis for resisting

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[222] *PT* (n 193) [32].
[223] Ibid [143].
[224] Ibid [84], [87].
[225] Ibid [116].
[226] Ibid [132].

enforcement pursuant to art 36(1) of the *Model Law* will be equally available under s 19 of the *SAA;*[227]

5) Under s 19, Lippo has the right to make an application for setting aside as reflected in art 36(1) of the *Model Law*.[228]

The Court opined that the 'choice of remedies' is not merely an element of the *Model Law's* enforcement framework, it is the crux of the entire design.[229] A party which did not exercise an active remedy to challenge the preliminary award under art 16(3) of the *Model Law*, or the passive remedy of setting aside proceedings pursuant to art 36 of the *Model Law*, could use s 19 of the *SAA* to defend enforcement proceedings, as long as it had not waived its entitlement to do so.[230] The Court's decision to permit challenges to arbitral jurisdiction at a later stage has been criticised for being contrary to the underlying policy of efficiency and certainty in arbitral proceedings, thus undermining art 16(3) of the *Model Law*.[231]

As to the final question before the Court of Appeal, it had to rule on whether the joinder of additional parties fell under the ambit of the *Model Law*.[232] The Court reviewed the arbitral Tribunal's decision de novo[233] and held in favour of Lippo on the joinder of additional Astro parties. The Court refused enforcement of the awards against the additional Astro parties, on the basis that there was no valid arbitration agreement between the additional Astro parties and Lippo, and therefore the Tribunal had no jurisdiction to make the awards in favour

[227] *SAA* (n 16).
[228] *PT* (n 193) [143].
[229] Ibid.
[230] Dylan McKimmie and Merial Steadman, 'New Ruling on Active and Passive Remedies for Challenging Jurisdiction' in Norton Rose Fulbright (International Arbitration Report Issue 2, 2014) 26, 27. *Model Law* (n 15) art 36 is reflected in *SAA* (n 16) s 19.
[231] Doug Jones, 'P.T. First Media v Astro Nusantara International: Should Parties Be Allowed a Second Bite at the Cherry?' (2014) 33(1) *The Arbitrator and Mediator* 151, 151.
[232] *PT* (n 193) [159]; *Model Law* (n 15) art 36.
[233] *PT* (n 193) [164].

of the additional parties against Lippo.[234] With reference to r 24(b) of the *SIAC Arbitration Rules*, the Court rejected the interpretation the Tribunal gave to it. The joinder of additional parties by the Tribunal had failed to give the correct construction to r 24(b).[235] The Court found that Lippo had not waived its right to raise the joinder objection, nor is otherwise estopped.[236] Although the Court did not set aside the award, it refused to enforce the awards made in favour of the additional Astro parties. The Court's judgment highlights that Singapore courts are not reticent to refuse the enforcement of awards, in cases where they find the decision-making to result in an unjust outcome for one of the parties.

2 *The Plot Thickens: Astro Nusantara International BV v PT First Media TBK*[237]

This case highlights the challenge courts face in balancing the competing interests in delivery of justice in the overall decision, against strict adherence to the procedural rules of arbitration. One question which arises is, how much weight ought to be given to the judgment at the seat by the courts of other jurisdictions when considering enforcement orders? Strictly speaking, the courts of Hong Kong (which is an enforcement court for the purposes of this case), are not bound by the decision of the court at the seat, which was also acting in its capacity as an enforcement court.[238]

Once the Singapore Court of Appeal had issued its judgment, the dispute that had been stayed in Hong Kong was resumed by Astro. The Hong Kong Court of First Instance had to rule on the enforceability of

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[234] Ibid [186]–[189]; Matthew Townsend and Wan Pui, 'Hong Kong Court of Appeal Refuses to Enforce Astro v Lippo Awards' [2017] (February) *Hong Kong Lawyer - The Official Journal of the Law Society of Hong Kong* <http://www.hk-lawyer.org/content/hong-kong-court-appeal-refuses-enforce-astro-v-lippo-awards>.

[235] *PT* (n 193) [188].

[236] Ibid [230].

[237] For the sake of simplicity, we will continue to refer to PT First Media TBK as 'Lippo', as it is part of the Lippo Group.

[238] *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2016] HKCA 595, [71] ('*Astro v PT Ayunda*').

the awards in its jurisdiction.[239] Lippo was about 14 months late to apply to set aside the order giving leave to enforce the awards.[240] Lippo had sought an extension of time to apply to set aside the orders giving leave to enforce the awards in Hong Kong and to set aside the latter Hong Kong garnishee order.[241] The appeal for an extension of time was refused.

Chow J found Lippo to be unsuccessful on two grounds:

1. The time limit of 14 days to challenge enforcement had passed. In fact, Lippo was late by 14 months;[242]

2. Even if the time limitation had been extended, the awards would be enforced despite the Tribunal's absence of jurisdiction regarding the joinder of additional entities, due to Lippo's violation of the principle of good faith.[243]

The Court found that the question of joinder and whether the Tribunal had jurisdiction to issue the awards had been settled by the Singapore Court of Appeal, thus Astro is bound by that ruling. Accordingly, the Hong Kong High Court of First Instance granted leave to enforce the awards.[244] This meant that the awards could be enforced in Hong Kong, despite the fact the awards relating to the additional Astro parties had not been enforced at the seat of Singapore. The decision was appealed to the Hong Kong Court of Appeal.[245] Although the Court affirmed the decision of the Court of First Instance, it elucidated on the ruling of the lower Court, including the interaction between an award debtor's entitlement to seek 'passive'

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239 *Astro v PT First Media* (n 209).
240 Ibid [120].
241 Ibid [1].
242 Ibid [129].
243 Ibid [91]. Chow J stated that FM (Lippo) was barred from relying on s 44(2) of the *Arbitration Ordinance* (Hong Kong) cap 341 because it had breached the good faith principle. Therefore, FM could not resist the enforcement of the awards.
244 *Astro v PT First Media* (n 209) [95].
245 *Astro v PT Ayunda* (n 238).

remedies against an award and its obligation to act in good faith in resisting enforcement.[246] The Court affirmed Chow J's ruling to refuse an extension of time to Lippo, but disagreed with His Honour's second basis for refusal of enforcement, being a violation of the 'good faith' principle, thus, overruling it.

The authors are of the view that the decision by the Court of Appeal is important, as it reassures parties that, if a party reserves their right to challenge the tribunal's ruling at a later stage, this will not ipso facto mean the party will be prohibited from challenging enforcement on the basis of breach of good faith subsequently.[247] The Court of Appeal found that Chow J had erred in failing to provide adequate recognition to the judgment of the Singapore Court of Appeal. In particular, with respect to the principle of 'good faith', it found it imperative to consider the law of the seat of arbitration and the judgment from the seat.[248] With this decision, the Court of Appeal thereby re-aligned the Hong Kong jurisdiction with Singapore,[249] although this did not change the result for FM, as the appeal was dismissed.

The Hong Kong Court of Final Appeal granted leave to appeal on the following questions of law, on the basis that they are questions of general or public significance:

1) What is the proper test for determining whether an extension of time should be granted for the purposes of an application to resist enforcement of an arbitral award under the *New York Convention*?

2) In determining whether to extend time for the purposes of an application to resist enforcement of an arbitral award under the *New York Convention*, is the fact that the award has not been set aside by the courts of the seat of arbitration a relevant factor?

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[246] Ibid [69].
[247] Townsend and Pui (n 234).
[248] *Astro v PT Ayunda* (n 238) [47].
[249] 'Astro v Lippo: First Media's Hong Kong Appeal Dismissed' (n 210).

3) What is the proper test for determining whether a party seeking to enforce an award under the *New York Convention* has produced the original arbitration agreement or a duly certified copy of it within the meaning of s 43 of the *Arbitration Ordinance?*[250]

The matter was heard before the highest court in Hong Kong — the Court of Final Appeal ('CFA') in April 2018.[251] The CFA held that the lower courts had erred in principle, by failing to grant sufficient consideration to the crucially significant issue — lack of a valid arbitration agreement between FM and the additional parties. Their failure to take into consideration such a critical fact warranted the CFA's intervention with their exercise of discretion.[252]

The CFA also held that the lower courts had erred in the exercise of their discretion by taking into account that the awards had not been set aside in Singapore. Doing so would be inconsistent with the 'choice of remedies' doctrine.[253] As to the question of delay, the Court found that the critically significant absence of a valid arbitration agreement between FM and the additional parties must be balanced against the 14-month delay. Refusal of an extension would be to deny First Media a hearing, where its application has strong merits and would mean punishing it for a delay, which caused Astro no uncompensable prejudice, to the extent of permitting enforcement of an award for USD130 million.[254] The CFA, therefore, allowed the appeal and granted the appellant an extension of time to apply to set aside the orders of the courts below and the judgment based on those orders.[255] The matter is yet to be heard at the time of writing this paper.

250 *Astro Nusantara International BV v PT First Media TBK* [2017] HKCFA 50, [2]; *Arbitration Ordinance* (n 243) s 43.
251 *Astro Nusantara International BV v PT First Media TBK* [2018] HKCFA 12.
252 Ibid [68].
253 Ibid [72]-[73].
254 Ibid [87].
255 Ibid [89], [96].

The authors are of the view that there are a number of lessons which may be drawn from this case. One is that the *Model Law* offers a range of active and passive remedies, providing an award debtor with a variety of choices. The failure to avail oneself of an active remedy will not necessarily preclude that party from depending on a passive remedy. This principle appears to have been acknowledged in both Singapore and Hong Kong, therefore it is probable that it will be accepted in Australia. A word of warning should be made at this point. There seems to be a risk in the failure to invoke art 16 of the *Model Law,* in relation to a preliminary decision regarding jurisdiction. It is highly probable that it may result in preclusion of an award debtor from relying on a jurisdictional challenge, which is the subject of the ruling, where there is an action for setting aside the ruling.[256]

C *AJU v AJT*[257]

This decision reasserts the limited purview for challenging awards on public policy grounds in Singapore. AJU was a British entity and AJT, the respondent in these proceedings, was a Thai company. The parties' dispute stemmed from an agreement they entered into for staging tennis tournaments in Thailand.[258] The agreement provided for arbitration under the *SIAC Arbitration Rules*. The claimant, AJT, initiated arbitral proceedings against AJU for purported wrongful termination of the agreement.[259] The award was issued in favour of AJT.[260] Subsequently, the claimant lodged a complaint with the Thai prosecutor's office for fraud, against the respondent's sole director and shareholder, 'O', and two individuals from its related entities, Mr 'P' and 'Q'. The complaint centred on a document that the claimant contended to be forged. Whilst Thai police commenced investigations against O, P and Q, the parties reached a concluding agreement ('CA'). The CA provided that each party would withdraw from, inter alia, all

256 Such action for setting aside would be pursuant to the *Model Law* (n 15) art 34.
257 *AJU* (n 171).
258 Ibid 744.
259 Ibid 739. See also 'Court of Appeal: Narrow Scope of Public Policy Ground for Challenging Arbitral Awards Reaffirmed', *Wong Partnership CaseWatch* (Web Page, August 2011) <https://www.lexology.com/library/detail.aspx?g=810ee7dc-5b4b-4d9a-aa5c-7a284abd58e5>.
260 *AJU* (n 171) 740.

actions and claims against the other, including criminal proceedings.[261]

Although the claimant withdrew its claims from the Thai prosecutor's office, it did not terminate the arbitral proceedings.[262] During the arbitration, the respondent, AJU, claimed that the CA was illegal for the following reasons:

(a) it was for the purpose of avoiding prosecution in Thailand for the charges of forgery and the use of a forged document;

(b) it was a contravention of the law of Thailand; and

(c) thus, a breach of public policy both in Thailand and in Singapore.[263]

The Tribunal ruled that the CA was valid and enforceable, finding no illegality, undue influence or duress was applicable.[264] Upon the respondent's application to set aside the award, Onn J of the Singapore High Court rejected the arbitral Tribunal's findings and found the CA was an agreement to avoid prosecution in Thailand, therefore illegal under the governing law of Singapore, as well as the place of performance being Thai law. His Honour set aside the interim award pursuant to the *Model Law* art 34(2)(b)(ii). The appellant, AJT, appealed to the Supreme Court of Singapore, Court of Appeal, on the basis that Onn J erred in law by rejecting the Tribunal's decision and setting the interim award aside. In doing so, the appellant claimed the Court failed to give effect to the principle of finality in arbitration awards.[265]

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261 Ibid 744–5.
262 Ibid 746.
263 Ibid 740.
264 Ibid 747.
265 Ibid 740. Article 34(2)(b)(ii) relates to the public policy provision of the *Model Law* (n 15) found in *SAA* (n 16) sch 1.

The appellant had two primary issues before the Court of Appeal:

a) whether the Judge was correct in going behind the interim award and reopening the Tribunal's finding that the CA was valid and enforceable ('Issue (a)'); and

b) in any event, whether the Judge was correct in finding that the CA was illegal ('Issue (b)').[266]

The Court held that this was not an appropriate case for the Judge to reopen the Tribunal's finding that the CA was valid and enforceable. The Tribunal did not ignore palpable and indisputable illegality. The CA does not, prima facie, suggest that the appellant was required to do anything other than to receive evidence of the withdrawal of 'the Criminal Proceedings' as per the CA from the Thai prosecution authority, or other relevant authority. Further, it was found that the Judge was not entitled to reject the Tribunal's findings and substitute his own findings for them. Section 19B(1) of the *SAA* stipulates for the court to show deference to the factual findings of the tribunal. Arbitration under the *SAA* is international, which is why s 19B(1) provides that a *SAA* award is final and binding on the parties, subject only to narrow grounds for judicial intervention. Accordingly, findings of fact made in a *SAA* award are binding on the parties and cannot be reopened, except where there is fraud, breach of natural justice or some other recognised vitiating factor. The Court made its stance clear by noting that even if an arbitral tribunal's findings of law and/or fact were incorrect, such errors would not per se invoke the public policy of Singapore.[267]

In allowing the appeal, the Court concluded in the following manner on the issues. Issue (a): the Tribunal's findings in the present case on the intention of the appellant and the respondent when they signed the CA are findings of fact which are not correctable, since they are final and binding on both parties. Public policy, based on the alleged

[266] *AJU* (n 171) 753.
[267] Ibid 740–1.

illegality of the CA, was not committed by such findings of fact. Hence, the Judge should not have reopened the Tribunal's findings.[268] As to Issue (b), it was held that the Judge erred in reopening the Tribunal's finding of fact and that the CA was not illegal under Thai or Singapore law.[269] The Court stated that any agreement to stifle the prosecution of a non-compoundable offence would be illegal and against public policy, as such an agreement would undermine the administration of justice.[270] This decision underscores that Singapore courts are reluctant to review the merits of the tribunal's decision, unless there exists a ground for judicial intervention, recognised by the *SAA*.[271]

Some authors have disagreed with the decision and have called for a more flexible approach in that

> parties should not be allowed to hide behind the principle of finality of arbitral awards to enforce a contract, that would otherwise not be enforced by the courts on public policy grounds. This is not to say that parties to an arbitration agreement should not be held to their bargain of minimal curial intervention … Where the State's public policy may be contravened in the course of the promotion of arbitration policy, a balance needs to be achieved.[272]

The authors, however, are in agreement with this decision as it is in line with the underlying legislative spirit of the *SAA*.[273] A less strict approach in relation to public policy opens the door to increased curial intervention, which in turn risks undermining international arbitration's efficacy as a private dispute resolution system. If errors of facts, unless in the most crucial of circumstances, could undermine enforcement, then this would undermine the *SAA* and rob proceedings of the sense of finality.

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268 Ibid 774.
269 Ibid 775.
270 Ibid 750.
271 *SAA* (n 16).
272 Nicholas Poon, 'Striking a Balance Between Public Policy and Arbitration Policy in International Commercial Arbitration: *AJU v AJT*' [2012] (July) *Singapore Journal of Legal Studies* 185, 189–90.
273 *IAA* (n 7).

Others have observed that the decision makes it clear that the Court of Appeal 'did not see a difference between the meaning of public policy under each regime, because each brings in the essential element of internationalism' and that the judgment 'sets a high, but not unattainable threshold for what will be required to exist in a particular matter before an award can be set aside under this [public policy] ground'.[274]

D *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*[275]

This case had a lengthy procedural history, including two arbitrations, and was ultimately heard by the Singapore Court of Appeal. The appellant, PT Asuransi Jasa Indonesia, was an Indonesian government entity. It guaranteed a series of US dollar notes (BI Notes) to be issued to the respondent, by the issuer Rekasaran BI Ltd, an entity incorporated in the Cayman Islands, pursuant to a debt issuance programme.[276] The respondent, Dexia Bank, remained unpaid even though the BI Notes matured and were payable in 1999. The appellant sought to discharge itself of its obligation to pay the BI Notes by initiating a restructuring scheme pursuant to the debt issuance programme whereby the BI Notes would be replaced with new notes by a different issuer. The respondent objected to this proposal, but the proposal was accepted by other BI Noteholders in a February 2000 meeting. In September 2000, other BI Noteholders were granted a High Court of Singapore injunction prohibiting the implementation of the proposed scheme. Another meeting was held in June 2001, ratifying the February 2000 meeting resolutions.[277]

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[274] Jaclyn Smith, 'The Enforcement of International Arbitral Awards in the Asia-Pacific Region – a Comparative Study of Recent Cases' (2014) 30(3) *Building and Construction Law* 148, 160.
[275] *PT Asuransi* (n 176).
[276] Ibid [4].
[277] Ibid [6].

1 *Procedural history*

The respondent commenced arbitration proceedings against the issuer and the appellant. The issues to be determined by the Tribunal were:

(a) whether any obligation arose under the BI Notes to make payment to the respondents;

(b) whether the obligations under the BI Notes were restructured pursuant to the February 2000 meeting; and

(c) whether the appellant was immune from the proceedings pursuant to its purported sovereign immunity.[278]

It should be noted that the arbitral Tribunal was not made aware of the June 2001 meeting. The Tribunal found in favour of the respondent, namely, that the appellant and issuer 'failed to restructure their obligations under the BI Notes in accordance with the terms of the Debt Issuance Programme and were therefore liable to pay the respondent the face value of the BI Notes held by it'.[279] The Tribunal ordered the appellant and issuer

> to pay a sum in excess of US$8.6m, on the following basis:
>
> (a) that the Issuer and the appellant were under an obligation to pay under the BI Notes;
>
> (b) that the obligations of the Issuer and the appellant under the BI Notes were not restructured pursuant to the February 2000 meeting; and
>
> (c) that the appellant was not entitled to plead sovereign immunity.[280]

The appellant commenced a second arbitration against the respondent, seeking a declaration that '(a) the June 2001 meeting was valid and binding on all BI Noteholders, including the respondent; and

[278] Ibid [5].
[279] Ibid [13].
[280] Ibid.

(b) the restructuring scheme was valid and binding on all BI Noteholders, including the respondent'.[281] The appellant also raised matters relating to jurisdiction. In response, the second Tribunal gave directions that the issue relating to 'whether the tribunal has jurisdiction to entertain the present proceedings in light of the history of the earlier proceedings between the Parties' be heard.[282]

The second Tribunal found that it had no jurisdiction to adjudicate on the substantive issues submitted to the second Tribunal. The Tribunal also found that 'the [appellant] chose not to participate in the First Arbitration'[283] and that:

> The First Tribunal specifically found that the meeting of 29 February 2000 was improperly convened … The [appellant] says that the [June 2001 meeting] was to ratify the resolutions passed at the 29th February 2000 meeting … Thus the [June 2001 meeting] would have been directly relevant for the First Tribunal to consider. The Statement of Case in its present form should have been submitted by the [appellant] to the [First] Tribunal. This the [appellant] clearly did not do. This smacks of a collateral attack on the First Award. [284]

The second Tribunal's award was

> that the appellant was entitled to proceed with the arbitration even though the respondent had disposed of the BI Notes and ... on the basis of the rule in *Henderson v Henderson* [1843] EngR 917, the 'action in this proceeding is a misuse of the process of the Court in that the [appellant] could and should have brought the present claims in the [First Arbitration]', and the appellant was estopped from raising the issue of the June 2001 meeting, which they should have properly done at the First Arbitration.[285]

The appellant commenced proceedings in the High Court to set aside the second award. The appellant relied on the following grounds:

[281] Ibid [15].
[282] Ibid [16].
[283] Ibid [20].
[284] Ibid.
[285] Ibid [18].

(a) that the second award is in conflict with the public policy of Singapore and thus in breach of art 34(2)(b)(ii) of the *Model Law*;

(b) that the second award deals with disputes or issues not contemplated by, or, alternatively, not falling within the terms of the submission to arbitration and/or contains decisions on matters or issues beyond the scope of the submission to arbitration, thus leading to a breach of art 34(2)(a)(iii) of the *Model Law*;

(c) that a breach of natural justice under s 24(b) of the Act has occurred in connection with the making of the second award by which the rights of the appellant have been prejudiced; and

(d) that the appellant had not been given a full opportunity to present its case and/or was otherwise unable to present its case and thus there was a breach of arts 34(2)(a)(ii) and 18 of the *Model Law*.[286]

The appellant sought the following orders:

(a) the second award ordering that the second arbitration be dismissed, on the basis that the second Tribunal had no jurisdiction to entertain the proceedings, be set aside;

(b) the preliminary issues/objections raised by the respondent (in the second arbitration) be dismissed; and

(c) the arbitration be remitted back to the second tribunal for hearing.[287]

The case was dismissed by the High Court and the grounds relied upon by the appellant were rejected. Instead, the Court found that there was no breach of natural justice. The Court also found that there is no

[286] Ibid [21].
[287] Ibid.

default right to an oral hearing in an arbitration.[288] The matter was then appealed to, heard and dismissed by the Court of Appeal. The Court of Appeal spelled out Singapore's position with respect to setting aside awards. The Court stated that awards would be set aside on grounds of public policy if upholding the award would 'shock the conscience' of the public, is injurious or offensive to the public or 'violates the forum's most basic notion of morality or justice'.[289] Although the parties did not plead this issue, the Court also dismissed the case as the Court did not form the view that the second Tribunal's findings constituted an award on the basis that the Tribunal's findings did not deal with the substance or merits of the dispute.[290]

The findings in this case illustrate Singapore's narrow approach to setting aside an award on grounds of public policy and breaches of natural justice. The Court of Appeal clarified that an error of law does not activate refusal on grounds of public policy.[291] The Court of Appeal made clear Singapore's judicial position and stated that 'judicial and expert opinion is that public policy under the Act encompasses a narrow scope'.[292] The Court also stated that the narrow scope will not be applied where not setting aside the award would shock the public's conscience or would be clearly injurious to the public good.[293] The Court's position in this case has continued to be followed by a long list of Singaporean cases where time and again courts have applied a narrow reading and refused to set aside awards.

The authors are in agreement with this decision. Adopting a narrow approach to the interpretation of public policy ensures the ongoing enforcement of properly dispensed awards. On the contrary, the adoption of a wider approach to the consideration of public policy would run the risk of having too many awards set aside and undermine the very essence of international arbitration.

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[288] Ibid [22].
[289] Ibid [59].
[290] Ibid [61]–[74].
[291] Ibid [57].
[292] Ibid [59].
[293] Ibid.

Similarly, others have observed that the decision 'demonstrates the finality of the arbitral process in Singapore and the High Court's commitment to upholding foreign arbitral awards' and 'sets a high threshold for the court to be able to set aside an award on public policy grounds'.[294]

X CONCLUSION: COMPARING AND CONTRASTING AUSTRALIAN AND SINGAPOREAN APPROACHES TO ENFORCEMENT

As foreshadowed in the introduction of this paper, the foregoing discussion has illustrated that both Australia and Singapore are not only strongly in support of international commercial arbitration as a method of dispute resolution, but actively support the recognition and enforcement of international awards. The jurisdictions share a strong convergence and no substantive differences. Both jurisdictions have generally subsumed the *Model Law* into their national laws on arbitration and are signatories to major conventions such as the *New York Convention* and *ICSID*.

Further, the *IAA* of Australia and recent judgments of Australian courts, particularly following amendments to the *IAA* in 2010, indicate that Australian courts use the *Model Law* as the template to conduct international and domestic commercial arbitrations. A string of recent curial judgments at both Commonwealth and state levels have reinforced this view, a case in point being *Aircraft Support Industries Pty Ltd v William Hare UAE LLC.*[295] Similarly, there are numerous recent court judgments making it clear that at both state and Commonwealth tiers, Australia is a pro-arbitral award jurisdiction and will require the strictest proof, consistent with the law, to contest a commercial arbitration or to challenge the enforcement of an award. This applies as much to foreign arbitral awards where applications are

[294] Smith (n 274) 159.
[295] *Aircraft Support Industries* (n 105).

made to enforce them under the *New York Convention,* as to arbitration awards made in Australia, whether international or domestic.[296]

In Australia, the notion of 'public policy' is defined in s 8(7A) of the *IAA*, so that an Australian court may refuse to enforce an award only on the grounds provided in the *Model Law* and not on local grounds of public policy, which previously might have been invoked to prevent recognition or enforcement of a foreign judgment.[297] This is a much stricter application of the principle of 'public policy'. Similar to the situation in Australia, public policy is also grounds for refusal of awards in Singapore. The *SAA* states that in 'any proceedings in which the enforcement of an award is sought … the court may refuse to enforce the award if it finds that … enforcement of the award would be contrary to the public policy of Singapore'.[298] The Singaporean approach to interpreting public policy has been one of significant and continuous narrowness.

This approach was demonstrated in *PT Asuransi Jasa Indonesia v Dexia Bank SA*[299] and *AJU v AJT* discussed above, where enforcement of an award will be refused if it would 'violate' the jurisdiction's notions of morality or 'shock' its conscience.[300] For instance, where awards are tainted with fraud, it would be contrary to public policy.[301] In line with these decisions, Singaporean courts have overwhelmingly, time and again, refused to set aside an arbitral award. Singaporean courts are also ready to set aside awards where there has been a breach

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[296] Derek Luxford, 'Enforcement of Arbitral Awards in Australia: Overview', *Thomson Reuters Practical Law* (Web Page, 1 September 2015) <https://content.next.westlaw.com/Document/I52fc19316d6311e598dc8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1>.

[297] Patrick Keane, 'The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House Our Rules' (Speech, AMTAC, 25 September 2012) <https://www.fedcourt.gov.au /digital-law-library/judges-speeches/speeches-former-judges/chief-justice-keane/keane-cj-20120925>.

[298] *SAA* (n 16) s 31(4)(b).

[299] *PT Asuransi* (n 176).

[300] *AJU* (n 171) 753.

[301] See, eg, *PT Asuransi* (n 176).

of natural justice that has resulted in a party being prejudiced, with the relevant question being whether the prejudice would be actual.[302]

Commenters have observed that both Australia and Singapore 'adopt a narrow approach' to the meaning of public policy.[303] In Australia, the natural justice ground is considered within the conceptions of public policy and therefore has potentially broader application. It covers both principles of substantive justice (e.g. fraud and bribery) as well as procedural justice. To set aside an award for breach of public policy in Australia, it must offend fundamental principles of justice and morality. That is to say, real unfairness or real practical injustice must be demonstrated. In Singapore, an arbitral award will not be set aside on grounds of breach of public policy, unless upholding the arbitral award would 'shock the conscience'.[304]

Despite the strong judicial tradition of enforcing awards in Singapore, there have been slight inconsistencies. For instance, where proceedings were stayed when a functional arbitration clause was agreed between the parties in *TMT Co Ltd v The Royal Bank of Scotland plc*.[305] The decision by the Singapore Court of Appeal in *PT* has also come under criticism for allowing award debtors to take two bites at the cherry — by failing to take an active remedy at the preliminary ruling stage, then taking the passive remedy of resisting enforcement at a later stage. The case highlights the competing interests which courts must attempt to balance: whether to deliver substantive justice or to uphold formalism?[306] The decision of the Hong Kong Court also indicates that it is unlikely for a court of enforcement to enforce an award which has previously been ruled to have been made without jurisdiction. This may be attributable to the principle of comity.

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302 See, eg, *LW Infrastructure* (n 179) 126.

303 See Locknie Hsu, 'Public Policy Considerations in International Arbitration: Costs and Other Issues' (2009) 26(1) *Journal of International Arbitration* 101, 110. See also Smith (n 274) 156.

304 Edwards (n 136) 241.

305 *TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21, [62]–[69].

306 *PT* (193).

Looking forward, it is predicted that Singapore will maintain its lead as the preferred destination for international arbitration in the Asia Pacific region for the foreseeable future. With Australian courts also continuing to embrace arbitration as an effective and efficient platform for the resolution of disputes, Australia will continue to shape up as an attractive alternative seat to Singapore.