The Asia-Pacific Arbitration Review

2020

Enforcement of Arbitral Awards in the Asia-Pacific
The Asia-Pacific Arbitration Review

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Among the nuggets it contains:

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Enforcement of Arbitral Awards in the Asia-Pacific

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Summary

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Arbitration in Asia continues to be on the rise. In 2018, the Singapore International Arbitration Centre (SIAC) received over 400 new cases from parties in 65 jurisdictions. Compared to 2017, the SIAC also saw an increase in the total sum in dispute for all new case filings, to US$7.06 billion.[1] In Hong Kong, a total of 532 new cases were filed at the Hong Kong International Arbitration Centre (HKIAC).[2] As further testament to the importance of Asia in arbitration, 2018 also saw the International Chamber of Commerce (ICC) Court case management team begin operations in Singapore. This is the second ICC office in Asia.[3] This continued rise may be explained by a number of factors, including growth in the region, the relatively low costs of conducting an arbitration in the Asia-Pacific (as opposed to, for instance, in America or Europe)[4] and the proliferation (and continued development and advancement) of arbitral institutions in Asia.[5]

One further factor – which perhaps explains the popularity of arbitration (as compared to litigation) in general – is the relative ease with which arbitral awards (as compared to court judgments) may be enforced worldwide.[6] But is this really the case? Have countries in Asia generally tended to be arbitration-friendly or arbitration-averse? We consider recent developments in a few jurisdictions – Singapore, India and Australia – to examine if convergence toward or divergence from a uniformed approach in the enforcement of international arbitral awards has been the order of the day.

**THE MODEL LAW**

The UNCITRAL Model Law was designed to ‘assist states in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration’[7] in a bid to achieve uniformity of the law of arbitral procedures across jurisdictions.[8] Of particular importance for the purposes of this article, the Model Law provides guidelines on the setting aside and enforcement of arbitral awards. This is found in articles 34, 35 and 36 of the Model Law.

Legislation based on the Model Law has been adopted in 74 states, with two Asian states – Korea and Myanmar[9] – adopting it as recently as 2016. Even though there remain countries in the region – such as Indonesia – that have yet to adopt the Model Law, these countries typically nevertheless enact domestic legislation that broadly tracks the Model Law provisions in relation to enforcement.[10]

**Singapore**

Singapore is a Model Law country that has enacted local legislation (the International Arbitration Act (IAA) and the Arbitration Act) that gives effect to the Model Law (with seeming exceptions that are discussed below). Three recent cases bear mention.

In Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd (Hilton (CA)),[11] the Court of Appeal partially allowed an appeal against a High Court’s decision[12] to grant a permanent anti-suit injunction to restrain a party from re-litigating in a foreign court matters that have been fully resolved in a final award issued pursuant to an arbitration seated in Singapore. In this case, Hilton commenced ICC arbitration proceedings, claiming damages for Sun Travels’ termination of a hotel management agreement between them. Hilton obtained a favourable outcome in the arbitration and commenced enforcement proceedings against Sun Travels & Tours (a Maldivian entity) before the Maldivian courts. Not only did Sun Travels & Tours resist the enforcement proceedings in Maldives, it went on to commence proceedings in the Maldivian courts against Hilton, seeking relief that would,
in essence, reverse the arbitration awards. The Maldivian courts found against Hilton and Hilton appealed against the Maldivian judgments. Thereafter, Hilton made an application before the Singapore High Court for an anti-suit injunction to restrain Sun Travels & Tours from participating in the Maldivian appeal. Hilton also sought declarations from the High Court that would confirm the valid and binding effect of the arbitration awards and that Sun Travels & Tours had breached the arbitration agreement by commencing the claim against Hilton in the Maldivian courts. The High Court did not grant Hilton's application for a permanent anti-suit injunction. Rather, the High Court granted an injunction that would restrain Sun Travels & Tours from taking any steps in reliance on the first instance Maldivian judgment or any decision that would uphold the first instance Maldivian judgment. The High Court also granted the declaratory reliefs sought by Hilton. On appeal, the Court of Appeal differed from the High Court on the decision to grant what it termed to be an ‘anti-enforcement’ injunction in view of Hilton's delay in making the application before the Singapore courts. Hence, while the Court of Appeal agreed with the High Court’s view that the foreign proceedings were ‘brought in breach of the arbitration agreements and amounted to vexatious and oppressive conduct on the part of [the defendant]', the pending appeal before the foreign courts meant that ‘the dispute [had] been taken out of the hands of the Singapore courts’. [13] The Court of Appeal emphasised that anti-enforcement injunctive relief will only be granted in exceptional circumstances and that such exceptional circumstances entailed notions of unconscionability such as fraud or the lack of a party's knowledge of the foreign proceedings until delivery of the foreign judgment. The Court of Appeal did not find such exceptional circumstances in the present case. Nevertheless, the Court of Appeal affirmed the High Court’s decision to grant declaratory relief which affirmed the final and binding nature of the arbitration award.

Article 5 of the Model Law was considered from two different angles in this case. In its decision, the High Court considered whether such an injunction was governed by the Model Law because ‘if a matter is governed by the Model Law, the court’s intervention is restricted to the extent provided for in the Model Law and nothing else’. In the event, the High Court concluded that article 5 of the Model Law did not prevent the court from issuing a permanent anti-suit injunction as the granting of a permanent injunction or other remedy is not a matter governed by the Model Law. [14] The Court of Appeal also considered the effect of article 5 of the Model Law on its power to grant declaratory relief. In this regard, the Court of Appeal noted that there was no specific provision in the IAA or the Model Law which addressed the specific declarations sought by the applicant. Accordingly, there was nothing in the IAA or the Model Law that circumscribed the court’s power to grant the declaratory relief. The Court of Appeal agreed that there was a ‘compelling basis for relief’ as the declarations would have value as a persuasive tool in the foreign proceedings and to ‘uphold the integrity of the arbitration agreements and the [arbitration awards] rendered on the basis of these agreements’. [15]

Two recent decisions are examples of how Singapore courts will set aside an arbitral award if an applicant is able to satisfy the relevant set aside grounds in article 34 of the Model Law. In BAZ v BBA, [16] the High Court set aside an arbitral award against minors who were parties to the arbitration agreement. The case involved a share sale and purchase agreement, pursuant to which the buyers purchased shares in a company that were held by the sellers (five of whom were minors between the ages of three and eight years old). Pursuant to an arbitration agreement in the share sale and purchase agreement, the buyers commenced ICC arbitration proceedings against the sellers, claiming that the sellers concealed a report
on regulatory transgressions. The arbitral tribunal found against the sellers and held that the sellers (including the minors) were jointly and severally liable in damages for a sum of about S$720 million. The minors (through litigation representatives) applied to the Singapore High Court to set aside the award on the ground that the award would violate the public policy of Singapore. Given that the effect of the arbitral award would have been to enforce an agreement against the minors, the High Court agreed and took the view that enforcement of the arbitral award would violate the protections given to minors in contractual relationships under Singapore law. [17] In the circumstances, the High Court concluded that:

> an award against [minors] that saddles them with legal liability for an amount exceeding S$720 million shocks the conscience, and it violates Singapore’s most basic notion of justice to find [minors] liable under a contract that was entered into when they were only between three to eight years old at the material time. [18]

The High Court therefore set aside the award against the minors pursuant to article 34(2)(b)(ii) of the Model Law.

In Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho, [19] the Court of Appeal affirmed a High Court decision to set aside a Permanent Court of Arbitration (PCA) award issued in an investor-state arbitration. The dispute between the parties in this case spans almost 30 years. In 1988, the first appellant, Swissbourgh, was granted mining leases in regions in Lesotho. Swissbourgh is owned by the second to fourth appellants. The fifth to ninth appellants were Lesotho-incorporated companies that entered into licensing agreements with Swissbourgh for the sub-lease of the mining leases and were the operating companies for the mining operations in Lesotho. In the early 1990s, the government of Lesotho allegedly took steps to unlawfully expropriate the mining leases. As such, the appellants commenced arbitration proceedings against Lesotho before the Southern African Development Community (SADC) Tribunal. The SADC Tribunal was a tribunal established under the auspices of the SADC Treaty, which Lesotho and 14 other Southern African states are party to. However, before the appellants’ claim against Lesotho could be determined, the SADC Tribunal was dissolved due to a series of steps collectively taken by parties to the SADC Treaty. As a result, it was impossible for the appellants to continue to pursue its claims against Lesotho. In June 2012, the appellants commenced PCA arbitration against Lesotho. This time, the appellants alleged that Lesotho had breached its obligations under the SADC Treaty by contributing to the dissolution of the SADC Tribunal. The Singapore-seated PCA tribunal issued an award in favour of the appellants. It found that Lesotho breached its obligations and gave directions for the constitution of a new arbitral tribunal to hear the underlying expropriation claims which the appellants had against Lesotho. Lesotho thus commenced an application under article 34(2)(a)(iii) of the Model Law to set aside the award in its entirety. At first instance, the Singapore High Court allowed Lesotho’s application. The appellants’ appeal was dismissed. Quite apart from the fact that this is the second investor-state arbitration-related matter that has gone before the Singapore courts, the decision is also significant because the Court of Appeal agreed that it had jurisdiction to hear the setting aside application pursuant to article 34(2)(a)(iii) of the Model Law, which states that an award may be set aside if it ‘deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration’ even though the applicant was contesting
the existence of the tribunal’s jurisdiction to hear and determine the claim referred to it. As such:

a dispute that is referred to arbitration by an investor who purports to rely on the arbitration clause contained in the investment treaty, but which is found to fall outside the scope of that clause . . . should be considered to fall outside the scope of the arbitration agreement and ‘the terms of the submission to arbitration’ under Article 34(2)(a)(iii).

Having found in the case that the dispute referred to arbitration fell outside the scope of the arbitration clause contained in the material investment treaty, the Court of Appeal affirmed the High Court’s decision to set aside the award.

It is apparent from these recent decisions that the Singapore courts have steered a course in line with the Model Law — upholding the principle of double control yet intervening in a principled manner (again in line with the Model Law regime) in exercising their supervisory jurisdiction.

Australia

In a recent decision by the Court of Appeal of Western Australia, Duro Felgura Pty td v Trans Global Projects Pty Ltd (in liq), the court took an expansive view of the court’s power to grant interim orders in aid of international arbitration proceedings. Trans Global Projects sought a freezing order against Duro Felgura before arbitration proceedings had commenced. The freezing order was granted at first instance, and it required Duro Felgura to hold assets of at least A$20 million in Australia. The freezing order was to be effective ‘until further order’, that is, after the constitution of the arbitral tribunal. The Court of Appeal dismissed the appeal and upheld the orders granted at first instance. Notably, the Court of Appeal agreed that the orders ought to be upheld in view of the ‘danger that a prospective judgment based on an arbitral award will be wholly or partly unsatisfied because [Duro Felgura’s] assets might be dealt with’. The Court of Appeal also agreed that the freezing order ought to continue ‘until further order’; and that on the facts of the matter, it was an appropriate case for such an order to be granted, given that on appeal, there was no dispute that Trans Global Projects had a good arguable case. The case is a reminder that the Australian courts continue to have a significant role in supporting international arbitration proceedings, especially to ensure that a party is able to satisfy an award at the conclusion of proceedings.

In another recent arbitration decision by the Supreme Court of Victoria, Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd, the court provided guidance on what was a final award and whether an arbitrator was functus officio. Although the court’s determination was in relation to the Commercial Arbitration Act 2011 (CAA) (that is, a ‘domestic statute in the State of Victoria’), the Supreme Court itself noted that ‘it should be interpreted in conformity with international norms with respect to the Model Law, “so far as practicable”.

In this regard, the Supreme Court’s analysis would be relevant to the other states in Australia and other Model Law jurisdictions in general.

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

In the first set of proceedings, Blanalko alleged Lysaght breached a design and construction contract. This led to court proceedings beginning in 2012, which culminated in a settlement
deed. Through the settlement, part of the dispute was resolved and the remaining part was directed to arbitration. In the arbitration, the arbitrator delivered an interim award on 15 June 2016, which resolved most of the dispute and invited parties to make submissions on, among other things, costs. A further award, which was named a final award, was delivered on 9 August 2016. In this, the arbitrator found that he had the jurisdiction to consider the matter of costs of the court proceedings but did not go on to decide the issue because he did not have the requisite information. Neither party thereafter requested an additional award under section 33(5) of the CAA, which is substantially similar to article 33(3) of the Model Law:

Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

Blanalko thereafter applied to court for an order that Lysaght pay its costs of the court proceedings that commenced in 2012. Lysaght applied to stay Blanalko's application on the basis it should be arbitrated (pursuant to section 8 of the CAA, which is substantially similar to article 8 of the Model Law).

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

the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

The court dismissed the setting aside application and found that the 'final award', despite its label, was not in fact a final award. This was because it 'did not decide all issues put to the arbitrator within the arbitrator’s mandate and did not involve an order or direction that might be characterised as an invalid delegation of power to a third party'. The court also gleaned from the UNCITRAL Secretarial Notes that a party is not constrained by the 30-day time limit in section 33(5) of the CAA (and in general article 33 of the Model Law) to seek a further award where, as was the case in this instance, the arbitrator made 'a conscious decision not to deal with an issue'. Necessarily, the court found that the arbitrator’s mandate in respect of costs of the court proceedings commenced in 2012 remained.

What is noteworthy about the judgment for the purposes of this article is twofold. First, the court emphasised from the outset the need to interpret the CAA in line with the Model Law. Second, the court thereafter conducted a rigorous analysis relying not only on local authorities but court decisions from neighbouring Model Law jurisdictions (including New
Zealand [33] and Singapore) [34] as well as the UNCITRAL Analytical Commentary [35] and the Model Law drafting history. [36] Both signal steps toward convergence.

More directly, on the topic of enforcement, the Victorian Court of Appeal in Gutnick and another v Indian Farmers Fertiliser Cooperative Ltd and another [37] upheld an arbitration award, [38] dismissing an application to resist enforcement on the basis of public policy.

There, the arbitral award declared certain agreements involving the sale of shares to be rescinded and ordered the return of the purchase price with interest and costs. [39] By then, the shares had already been transferred pursuant to the agreements but no provision was made in the award for the return of the shares. The applicants argued the award should not be enforced in Australia because enforcement would be contrary to public policy. This was based on section 8(7)(b) of the International Arbitration Act 1974 (Cth), [40] which is materially similar to article 36(1)(b)(ii) of the Model Law. [41]

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

• the award permits ‘double recovery’ as the award allows the respondents to have their money back and keep the shares (which had already been transferred pursuant to the agreements); and

• double recovery was contrary to public policy (and that therefore enforcement of the award should not be allowed). [42]

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

29. It needs to be recalled that the applicants are contending that the award should not be enforced because it would fundamentally offend principles of justice and morality. We accept the contention of the respondents that the effect [the orders in the award], was that both [agreements] were set aside ab initio and that the parties were restored to the positions that they were in before the agreements were entered into. As the applicants themselves conceded, the effect of the order that the agreements ‘are rescinded’ was to revest equitable title in the shares in the applicants. We also accept the contention of the respondents that for the applicants to have made good the proposition that enforcement of the award would be contrary to public policy, they would have had to have established that the primary declaration of rescission would or should not have been made under the domestic law of Australia or England without express consequential orders providing for the revesting of the shares.

30. When the tribunal made its award declaring that the agreements had been rescinded, it did not declare that the respondents were entitled to retain ownership of the shares; nor did it say anything that implied such an entitlement. It is plain from the award that the respondents case was a conventional claim for rescission involving the return of what was purchased with a refund of the purchase price. The arbitral tribunal accepted those claims and made an award and order accordingly. As the judge put it, ‘the declaration of rescission in the award necessarily entails the avoidance of the transactions from the beginning and the restoration of the parties to their
previous positions. With respect, we agree. Far from being contrary to public policy, we consider that the award conforms with the public policy of Australia.

In short, the court's approach was consistent with the notion of minimal curial intervention (particularly in the arena of resisting enforcement on the basis of public policy) marked clearly in the portion quoted above (Gutnick at (29)) by the court's acknowledgement of the high threshold the applicants needed to meet. Incidentally, this strict approach to considering public policy-based applications to resist enforcement – or to set aside – has been adhered to by the Singapore courts as well. [44]

In line with this approach of being a pro-arbitration jurisdiction, 2017 also saw the Federal Court of Australia in Lahoud v Democratic Republic of Congo [45] enforcing two investment arbitration awards for the first time.

India

In a previous edition of The Asia-Pacific Arbitration Review, [46] we referred to India's amendment, in December 2015, to its domestic arbitration legislation (the Arbitration and Conciliation Act 1996) as manifesting India's ambition to be a pro-arbitration jurisdiction.

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

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

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

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

While the Bombay High Court had ruled that the Amendment Act would apply to proceedings in court filed after the Amendment Act came into force, [47] there were decisions in other high courts of India going in the opposite direction, [48] which added to the confusion.

A recent judgment of the Indian Supreme Court in Board of Control for Cricket in India v Kochi Cricket Pvt Ltd [49] issued on 15 March 2018 (the BCCI case), may have finally put these issues to rest even though it remains to be seen whether this decision will be uniformly applied across the Indian courts. Eschewing a literal interpretation that would do violence to what the Supreme Court recognised to be the legislature's intention behind the passing of the Amendment Act (to make India an arbitration-friendly jurisdiction), the Supreme
Court held that arbitration-related applications filed in court after the coming into force of the Amendment Act will be governed by its provisions even if the underlying arbitration proceedings were commenced before the Amendment Act came into force. The Supreme Court arrived at such a conclusion by reading the last phrase in section 26 (‘this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act’) to mean that the Amendment Act shall apply to any court proceeding ‘in relation to arbitral proceedings’ commenced on or after the commencement of the act. Thus, even if the underlying arbitration proceedings had commenced prior to the Arbitration Act, the act will apply so long as the application to the Indian court was made after the Amendment Act came into force. [50]

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

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

In another recent decision of M/s Emkay Global Financial Services Ltd v Girdhar Sondhi [51] (Emkay Global Financial Services), the Indian Supreme Court ruled that a challenge to an arbitral award under section 34 of the Arbitration and Conciliation Act 1996 should ordinarily be determined only by reference to the arbitral tribunal’s record. However, the Supreme Court added that, if there are additional factual matters not contained in the arbitration record (and that are relevant to the determination of issues in the challenge to the award), parties may bring this to the court’s attention by way of affidavits. Cross-examination of the deponents will not be allowed unless absolutely necessary. In reaching its decision, the Indian Supreme Court had regard [52] to a recent report on the review of the institutionalisation of arbitration mechanism in India, 2017, in which the committee expressed concern about the ‘inconsistent practices in some High Courts’ that have led to ‘section 34 proceedings being conducted in the manner as a regular civil suit’. In light of this, the committee proposed an amendment to section 34(2) of the Arbitration and Conciliation Act 1996, which would ensure that the proceedings under section 34 are ‘conducted expeditiously’. In particular, the committee proposed that section 34(2)(a) be amended to make it clear that challenges to an award under this section should be established on the ‘basis of the arbitral tribunal’s record’. The Arbitration and Conciliation (Amendment) Bill of 2018 (Bill No. 100 of 2018) also contains an amendment in line with the committee's proposal:
In section 34 of the principal Act, in sub-section (2), in clause (a), for the words ‘furnishes proof that’, the words establishes on the basis of the record of the arbitral tribunal that shall be substituted. [53]

The Supreme Court’s decision in this case is significant. Not only is it consistent with the proposed amendments to the Arbitration and Conciliation Act 1996, it has also paved the way for speedier resolution of applications to challenge an arbitral award by streamlining the procedure for such applications. No doubt, this decision is in the right direction given India’s ambition to be a pro-arbitration jurisdiction.

DEVELOPMENTS IN ASEAN

There have also been developments in the arbitration laws of other countries in the Association of Southeast Asian Nations (ASEAN). Legislative reform in Malaysia took place through the Arbitration (Amendment) (No. 2) Act 2018 (No. 2 Amendment Act). The No. 2 Amendment Act came into force in May 2018 and is geared towards the objective of ensuring that Malaysian arbitral law remains progressive. It has been described as having the effect of ‘heralding the new era of Arbitration in Malaysia’. [54] The amendments follow the revisions made to the UNCITRAL Model Law in 2006 and ensures that it is consistent with leading jurisdictions. The amendments are extensive and include:

- extending the definition of an arbitral tribunal to include an ‘emergency arbitrator’. This ensures that decisions and awards issued by emergency arbitrators can be enforced under the Malaysian Arbitration Act 2005;
- clarifying that a party to arbitral proceedings can be represented by ‘any representative’ appointed by the party. This means that a party does not necessarily have to be represented by a lawyer in arbitration proceedings;
- clarifying that the Malaysian courts have power to look into the subject matter of the dispute when deciding on its arbitrability;
- amending the definition of an ‘arbitration agreement’ to include agreements made or recorded by electronic means; and
- amendments to ensure that the Malaysian Arbitration Act 2005 is aligned with the UNCITRAL Model Law 2006, by introducing a framework for interim measures that can be issued by the tribunal and the Malaysian court. By way of example, the amendments empower the Malaysian court to grant interim relief in support of foreign arbitration proceedings that are not seated in Malaysia.

The examples cited above are, of course, not exhaustive. Nevertheless, it is apparent from these amendments that they will have the effect of reforming and modernising arbitration law in Malaysia. These amendments, together with the renaming of the Kuala Lumpur Regional Centre for Arbitration as the Asian International Arbitration Centre (Malaysia) [55] bear testament to Malaysia’s commitment to developing its reputation as an arbitration hub.

CONCLUSION

From the foregoing, the trend in Asia towards convergence, based on the countries surveyed, continues unabated. That said, parties (and parties’ counsel) may still face practical challenges in enforcement, whether as a function of needing to familiarise themselves with
the nuances (convergence not being complete) of a foreign jurisdiction (where enforcement is being considered) or being dissuaded as a matter of perception. It is apparent (or perhaps it has always been) that the endgame of arbitration is recourse to the courts whether through applications for setting aside or resisting enforcement. And although courts can go far in ensuring these processes are not abused (as the courts above have), as the continuing saga of Yukos epitomises, efforts at convergence will often be challenged by divergent interests.

Alessa Pang, a senior associate with the International Arbitration Construction & Projects practice group at Rajah & Tann Singapore LLP assisted with the drafting of this article.

Notes
[5] See www.jonesday.com/files/Publication/d5d0b710-b68a-4254-9abf-c97d9209fd40/Presentation/PublicationAttachment/14c7619-75be-4258-b7f9-cde1c6d98a10/Intl%20Com%20Arb%20In%20Asia.pdf
[6] It remains to be seen if the reception of the Hague Convention on Choice of Court Agreements around the world – which would typically entail lowering the bar to recognition and enforcement of foreign judgments – would make court judgments more attractive. In the Singapore context, the convention was ratified in June 2016: see www.mlaw.gov.sg/content/mlaw/en/news/press-releases/singapore-ratifies-hague-convention-on-choice-of-court-agreement.html
[9] See Hilton (CA) at [125].
[10] See Hilton (HC) at [44] and [46].
[14] BAZ at [180].
[15] BAZ at [180].
[16] [2018] SGCA 81.
[18] HiltonManage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd [2018] SGHC 56 (Hilton (HC)).
[19] See Hilton (CA) at [125].
[20] See Hilton (HC) at [44] and [46].
[21] See Hilton (CA) at [142].
[22] See Hilton (HC) at [44] and [46].
[23] See Hilton (CA) at [142].
[26] Blanalko at [45].
[27] For the court’s detailed reasoning, see in particular [47]–[50].
[28] Blanalko at [66].
[29] Blanalko at [66].
[31] Blanalko at [66].
[32] Blanalko at [22].
[33] Blanalko at [35], [51], [53] and [58].
[34] Blanalko at [31].
[35] Blanalko at [32].
[36] [2016] VSCA 5.
[37] The arbitration was seated in Singapore; English law applied (Gutnick at [6]).
[38] Full order set out in Gutnick at [7].
[39] Section 8(7)(b) provides: ‘In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that and to enforce the award would be contrary to public policy’. For a general introduction to the International Arbitration Act 1974 (Cth) (and section 8 in particular), see www.lexology.com/library/detail.aspx?g=58063fca-b0fe-4c05-9080-12be459d4806.
[40] In fact, the similarity – and the relationship between the International Arbitration Act 1974 (Cth) and the Model Law – was highlighted at footnote 2 of Gutnick (and further at [17]).
[42] See Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another [2006] 3 SLR(R) 174 at [75]–[76]; AJU v AJT [2011] 4 SLR 739 at [38]; BLB and another v BLC and others [2013] 4 SLR 1169 at [100] (the point was undisturbed on appeal – BLC and others v BLB and another [2014] 4 SLR 79 at [50]).
[43] [2017] FCA 982.
[44] See Ministry of Defence, Govt of India v Cenrex SP ZOO & Ors, (Justice Mr Valmiki Mehta. (Appeal (Civil), 2879-2880 of 2018).
[45] BCCI case [para 23,25].
[46] Emkay Global Financial Services Ltd at [18].
[47] Section 34(2)(a) of the Arbitration and Conciliation Act, 1996 currently provides ‘An arbitral award may be set aside by the court only if and the party making the application furnishes proof that’.
[49] See generally www.aiac.world/About-AIAC.
[50] www.ft.com/content/b08965b4-c675-11e6-8f29-9445cac8966f.