

Chartered Institute of Arbitrators: Singapore Centenary Conference

3 September 2015

Standards in need of bearers: Encouraging reform from within

Chief Justice Sundaresh Menon *

Abstract

Commercial parties, their legal advisors, arbitrators and national courts must come to terms with the full implications of party autonomy in arbitration. This extends to recognising the role of the national courts of the place that the parties have selected to situate the arbitration in. The court that is asked to enforce an award that has been set aside by the seat court should not ordinarily substitute its views on the propriety of the award for those of the seat court. Further and more generally, courts cannot be responsible for ensuring that disputes submitted to arbitration are “correctly” decided. There are, after all, two sides to party autonomy: on the one hand, courts should defer to the choices that the parties have made; but on the other hand, the parties must live with the consequences of that choice. Arbitration’s ability to continue to deliver upon its promises of finality, expediency and commercially informed resolution of disputes depends upon the insiders in the industry adjusting their traditional paradigms to

* Sundaresh Menon, Chief Justice of the Supreme Court of Singapore. I am deeply grateful to my Justice Law Clerk, Ramasamy s/o Nachiappan, for the considerable assistance he gave me in the research and preparation of this Keynote Speech and for his valuable contributions to the ideas which are contained here.

manage the high-stakes involved in arbitration's one-shot dispute resolution model. Guidelines and standards are widely available to assist arbitrators to achieve this end. But they are not often followed. Arbitrators need to be bold in embracing the innovative techniques suggested by these guidelines and standards and counsel must play a supportive role in the reform process.

I. Introduction

1 Arbitration is so much in vogue today that it might even be described as the primary dispenser of justice insofar as disputes relating to international commerce are concerned. But that is not to say that all is rosy. There has, for some time at least, been a chorus of disgruntled voices flagging out the shortcomings of arbitration. I propose today, not to add to that, but to suggest that arbitration *can* continue to deliver upon its promises of finality, expediency, cost-effectiveness and commercially informed resolution of disputes, if the insiders (and by that I refer to arbitrators and the counsel who appear before them) are willing to adjust some of their traditional paradigms. I hasten to add that courts too have a supportive role to play in this endeavour.

II. History of commercial arbitration

2 It is helpful first, to identify some of the problems the industry faces in order to set the context for the discussion on possible ways of addressing them. But rather than launching directly into that, I propose to begin by briefly considering the history and background of commercial arbitration as this might help us better appreciate these issues. This excursion through the annals of the history of commercial arbitration is also instructive inasmuch as it will reveal

that it has always been the insiders who have played an instrumental role in addressing problems that have cropped up in this industry from time to time.

(a) *Commercial arbitration in medieval Europe*

3 It seems to be accepted that it is not possible to trace the origins of commercial arbitration to a single epochal event.¹ That is unsurprising. As with other history-shaping ideas, the notion of submitting commercial disputes to someone perceived to be an impartial arbiter instead of resorting to violence and self-help or the public legal machinery likely sprang up spontaneously in different cultures and at different times. But for our purposes, it seems as good a starting point as any to begin with the merchant guilds and trade fairs of medieval Europe. These might seem very distant, bearing little if any similarity or relevance to arbitration as it exists now. But it is nonetheless instructive to refer to them to renew our acquaintance with some of the foundational ideas as well as to understand just how radically some things have changed now.

4 Merchant guilds were local associations of merchants, to whom mercantile charters were granted and these conferred wide powers as to trade. The chief function of the guild was to regulate merchants and their practices. Often, the right to trade in a borough depended upon membership of a guild. To become a member one was required not just to pay an initiation fee and undertake other sundry tasks, but also to take an oath of fealty to bring disputes with other members to

¹ Michael John Mustill, "Arbitration: History and Background" (1989) 6 *Journal of International Arbitration* 43 at p 43; Earl S Wolaver, "The Historical Background of Commercial Arbitration" (1934–1935) 83 *University of Pennsylvania Law Review* 132 at p 132.

the gild tribunal before litigating the matter elsewhere. The gild tribunals often functioned as pseudo-courts, remaining outside the formal court structure, even as they maintained exclusive power in defined fields.² Although they did not exercise the “fierce remedies” available to courts, they had powers enough and it is not a stretch to say that “[a] merchant who fell out with his guild was finished”.³

5 In those times, there also existed tribunals that dispensed justice at trade fairs. Merchants who peddled their wares at these fairs were often itinerant or foreign and so there was a need to resolve any disputes with expedition before the merchants moved to the next town. The disputes that arose also posed jurisdictional and enforcement obstacles that inferior courts were ill-equipped to overcome. Therefore special tribunals were instituted which likewise existed outside the formal court structure. Various persons, such as constables, mayors, market masters or simply someone appointed as an arbiter from among the merchants, presided over these tribunals.⁴

6 The proceedings at both these types of tribunals were geared towards the simple and speedy determination of a cause, without reference to formal procedure but in accord with the customs of trade. The fact that these tribunals

² See generally, Gary B Born, *International Commercial Arbitration Vol I* (Wolters Kluwer, 2nd Ed, 2014) at pp 30–32; Earl S Wolaver, “The Historical Background of Commercial Arbitration” (1934–1935) 83 *University of Pennsylvania Law Review* 132 at pp 132–135.

³ Michael John Mustill, “Arbitration: History and Background” (1989) 6 *Journal of International Arbitration* 43 at p 45.

⁴ Earl S Wolaver, “The Historical Background of Commercial Arbitration” (1934–1935) 83 *University of Pennsylvania Law Review* 132 at pp 135–138.

applied the law of merchants was an important feature which attracted traders. As one 17th century mercantilist put it, the trader preferred the law of merchants as he considered that it was a “law not too cruell in her frowns, nor too partiall in her favors”.⁵ Additionally, disputes could be resolved more expeditiously at these tribunals than through the formal court system. The other key attraction was that lawyers were excluded from the proceedings. It is perhaps surprising to some in this audience that this was seen as an attraction! John Locke, who drafted the arbitration statute which was enacted in England in 1698, hoped that it would encourage private dispute settlement between merchants without legal entanglement. He listed lawyers among those whom he considered a hindrance to trade.⁶

7 These early arbitral tribunals had a measure of mandatory jurisdiction and hence the proceedings were not strictly “consensual”.⁷ But all the same, I think it is safe to conclude that in these former times, participants who had their trade disputes arbitrated were looking, in Lord Mustill’s words, for “a resolution which would be quick, cheap and informal, and for a decision which would be inspired by practical common sense and a personal knowledge of the trade, and which the loser would accept whether he agreed with it or not”.⁸

⁵ Earl S Wolaver, “The Historical Background of Commercial Arbitration” (1934–1935) 83 University of Pennsylvania Law Review 132 at p 144.

⁶ James Oldham and Su Jin Kim, “Arbitration in America: The Early History” (2013) 31(1) Law and History Review 241 at p 246

⁷ Earl S Wolaver, “The Historical Background of Commercial Arbitration” (1934–1935) 83 University of Pennsylvania Law Review 132 at p 135

⁸ Michael John Mustill, “Arbitration: History and Background” (1989) 6 Journal of International Arbitration 43 at p 55

8 Arbitration continues to hold out these same promises today, but then some doubts have been raised about its ability to deliver on them.

(b) Commercial arbitration towards the end of the 19th century and early 20th century

9 I invite you now to skip a few centuries ahead. There was growing use of commercial arbitration towards the end of the 19th century particularly to resolve disputes relating to construction, shipping and commodities. This development came on the back of the unparalleled reach of British imperial trade. The Chamber of Shipping first issued standard contracts with arbitration clauses around 1890, with other bodies, such as the London Corn Trade Association and the Oil Seed Association, soon following suit. But alongside this popularity, there also existed a deep distrust of arbitration, especially among legal professionals. An anonymous letter, said to be penned by a judge, published in *The Times* in August 1892, was caustic in its criticism of arbitration. The author set out to explore what it was that drew merchants and traders to what he considered the “hazardous and mysterious chances of arbitration, in which some arbitrator, who knows as much about the law as he does about theology...decides intricate questions of law and fact” by applying “a rough and ready moral consciousness”. He concluded that the answer lay in the fact that arbitration was cheap and that unlike litigation, there was no prospect of it stretching on “interminabl[y]”.⁹ “Quick and dirty” is a description that comes to mind.

⁹ Nigel Watson, *A History of the Chartered Institute of Arbitrators* (James & James (Publishers) Limited 2015) at pp 58–59.

10 Legal professionals also poured scorn on arbitration because of the perceived inadequacy of many arbitrators. Quite apart from their lack of familiarity with the law, arbitrators were also accused of charging excessive fees, disregarding natural justice and failing to impose discipline on proceedings. Instead arbitrators allegedly allowed themselves to be dominated by counsel representing the parties. Some arbitral proceedings were also crippled by intolerable delays caused by arbitrators' various commitments.¹⁰ This, I hasten to add, even if it might seem to ring a bell in some quarters, is in relation to the position more than a century ago. It seems that even as some things have changed dramatically over the years, some of the complaints continue to persist.

11 The Chartered Institute of Arbitrators was founded in 1915 to address precisely these problems. Its aim was to elevate the status and reputation of arbitration. It set out to achieve this end through education, training and the dissemination of knowledge among practitioners. One of the platforms it utilised from its early days was its academic publication titled *Arbitration*. An edition of this journal published in 1923 contained an article listing the duties arbitrators had to observe. These included the duty to treat parties and their evidence even-handedly, to confine any judgment to the evidence led and the documents presented and to make careful and clear awards.¹¹ We should be careful not to assess the utility of such a document with the cynicism that such standards and guidelines might inspire today, given their proliferation in recent times.

¹⁰ Nigel Watson, *A History of the Chartered Institute of Arbitrators* (James & James (Publishers) Limited 2015) at pp 60–61.

¹¹ Nigel Watson, *A History of the Chartered Institute of Arbitrators* (James & James (Publishers) Limited 2015) at p 60.

Presumably, those who acted as arbitrators (non-lawyers in particular) would have appreciated such clear guidance then as they continue to do today. The Institute has also offered practical education from its early days. For instance it carried out mock arbitrations in the 1920s.¹² The Institute, under the Presidency of Lord Askwith, also played a major role in securing the passage of the English Arbitration Act 1934¹³ which consolidated the then existing web of legislation pertaining to arbitration and also made important advances in the law of arbitration in the UK – for example by granting arbitrators the power to order specific performance of contracts and to make interim awards.¹⁴ I reiterate the point I made earlier: insiders have often risen to the occasion to address the problems that have arisen from time to time in the field of commercial arbitration.

(c) *International commercial arbitration today*

12 The aftermath of the First World War saw the rise of what has been termed “idealistic internationalism”. The arbitration community recognised that there were real obstacles to commercial arbitration being truly effective in resolving cross border disputes. Two key problems were identified: first, agreements to refer disputes to arbitration were unenforceable in many countries; and second, there was no expeditious method of enforcing in one country an award made in another. In the spirit of internationalism, the arbitration

¹² Nigel Watson, *A History of the Chartered Institute of Arbitrators* (James & James (Publishers) Limited 2015) at p 95.

¹³ (c 14) (UK).

¹⁴ Nigel Watson, *A History of the Chartered Institute of Arbitrators* (James & James (Publishers) Limited 2015) at p 63.

community set about attempting to redress these problems under the auspices of the League of Nations. The 1923 *Protocol on Arbitration Clauses in Commercial Matters*¹⁵ and the 1927 *Convention on the Execution of Foreign Arbitral Awards*¹⁶ were the fruits of the efforts that were undertaken during this period. The 1923 *Geneva Protocol* recognised the validity of arbitration agreements and the 1927 *Geneva Convention* provided for the recognition of the binding effect of arbitral awards and the conditions for their enforcement amongst parties to the convention.¹⁷ The goal of internationality that inspired these treaties was not fully realised until they were superseded by two further instruments. I refer, of course, to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*¹⁸ (commonly known as the *New York Convention*) and the *United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration*¹⁹ (commonly referred to as the *Model Law*).

13 The *New York Convention* and the *Model Law* now establish the governing framework for international commercial arbitration. These instruments together with the impressive body of national laws and jurisprudence interpreting

¹⁵ 24 September 1923, 27 L.N.T.S. 158 (entered into force 28 July 1924) (“1923 *Geneva Protocol*”)

¹⁶ 26 September 1927, 92 L.N.T.S. 301 (entered into force 25 July 1929) (“1927 *Geneva Convention*”)

¹⁷ Michael John Mustill, “Arbitration: History and Background” (1989) 6 *Journal of International Arbitration* 43 at pp 48–49.

¹⁸ 10 June 1958, 330 U.N.T.S. 3 (entered into force 7 June 1959).

¹⁹ GA Res 40/72, UN GAOR, 40th Sess, Supp No 17, Annex I, UN Doc A/40/17 (1985), 24 ILM 1302, as amended by GA Res 61/33, UN GAOR, 61th Sess, Supp No 17, UN Doc A/61/17 (2006).

and applying them may perhaps be described as the foundations, pillars and columns of the edifice that is modern international commercial arbitration.

14 The *New York Convention* currently has 156 state parties.²⁰ The widespread subscription by states to the *New York Convention* provides comfort to commercial parties that agreements to arbitrate *will* be upheld and that awards in their favour will not merely be vindication on paper of their rights.²¹

15 Unlike the *New York Convention*, the *Model Law* was never intended to be an international convention. It was devised as a model legislation which countries could assimilate in to their national arbitration laws, so that local peculiarities could be eliminated and international consistency could be achieved.²² Legislation based on the *Model Law* has been adopted in more than 60 countries including the US, Japan, Germany, India and Singapore.²³

16 The grounds which are prescribed for judicial intervention under both the *New York Convention* and the *Model Law* are limited. They are mainly concerned first, with establishing whether the dispute is or is not within the scope of the

²⁰ New State party to the New York Convention, <http://www.newyorkconvention1958.org/index.php?lvl=cmspage&pageid=7&id_news=679> (accessed on 2 September 2015).

²¹ Sundaresh Menon, “Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence” (2013) *Singapore Journal of Legal Studies* 231 at p 239.

²² *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [52] and [56].

²³ Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> (accessed on 2 September 2015).

agreement between the parties since this is the source of the tribunal's mandate and its jurisdiction; and second, with whether there has been any patent or obvious unfairness in the process. Errors of law or of fact do not provide a basis for judicial intervention. As the Singapore Court of Appeal stated recently:

The parties to an arbitration do not have a right to a "correct" decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.²⁴

17 I suggest that from that very brief review of the history of arbitration, a few broad points may be deduced:

- (a) Arbitration has sought from its origins to support commerce by providing a reliable legal framework for the enforcement of commercial disputes and differences. From roots in domestic trade fairs, through a unique role in specialised segments, arbitration today has come into its own in the field of international trade and commerce;
- (b) Historically, a premium was placed on such values as speed, commercial sensitivity, finality, economy and enforceability;
- (c) As and when problems or issues have arisen, the industry has generally responded by generating solutions from within;
- (d) The relationship of the lawyers to arbitration went from, being wholly outside it, to viewing it with some disdain because arbitrators were

²⁴ *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [38].

seen as unschooled in the law and prone to deciding in accordance with a sense of rough justice, to being the dominant players in the industry; and

(e) Today, although the lawyers are the dominant players in the industry, this does not extend to the courts, which, at best, have a supporting role to play. But as we shall see, the courts do play a gate-keeping role in regulating the entry of arbitral awards into domestic legal systems and with the internationalisation of arbitration, this raises special concerns.

III. Consumer concerns with international commercial arbitration

18 Against that review, I believe we are now well placed to consider the concerns that have been raised in recent times about this method of dispute resolution.

19 The School of International Arbitration at Queen Mary University of London has been carrying out surveys of various key players in the field of international arbitration since 2006. The results of these surveys provide useful insight into the level of consumer satisfaction with the arbitration services that practitioners offer. In 2006, the survey was targeted at in-house counsel in leading corporations involved in significant cross border transactions.²⁵ Those surveyed raised the following concerns with international arbitration:

²⁵ International arbitration: Corporate attitudes and practices 2006, <http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf> (accessed on 2 September 2015).

(a) The primary concern for more than 50% of those surveyed was the level of cost involved in the process. 70 of the 80 respondents cited expense as one of their top three concerns. 65% of the respondents perceived international arbitration to be more expensive than transnational litigation while 23% considered that the costs involved with either mode of dispute resolution were about the same. To put it another way, 88% saw no cost advantage in arbitration.

(b) The second most commonly expressed concern was that it was taking longer to complete an arbitration from filing to the eventual enforcement of the award.

(c) Finally, intervention by national courts and the difficulty of joining third parties to proceedings were also identified as concerns.

20 Those surveyed seven years later in 2013²⁶ again highlighted concerns related to the rising costs of international arbitration and the delays in the arbitration process. This goes some way towards suggesting that these problems may have gone largely unaddressed over this period.

21 The factors that have contributed to the current concerns can perhaps be categorised into four broad areas:

²⁶ Corporate choices in International Arbitration: Industry Perspectives <<https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>> (accessed on 2 September 2015).

(a) First, attitudes towards dispute resolution in general have changed. As John Wilding wrote in the Chartered Institute's journal in 2008, "[d]ispute resolution is often used more as a weapon than a means of overcoming disagreement".²⁷ One manifestation of this is that parties fight every small point. The time when parties sought resolution of their disputes in good spirits appear to be long gone. Perhaps the change has been brought about by the fact that disputes between commercial parties now often involve staggering amounts of money. Where the stakes are high enough, any tempering effect that the desire to maintain business relations would ordinarily have on the parties is likely to be nullified, and the process of dispute resolution devolves into "total warfare". Moreover, the specific character of arbitral proceedings lends itself to some particular issues:

(i) The absence of appeals has encouraged parties to approach the process as a "one-shot" contest in which the winner takes all. There is an undue emphasis at the front end, in covering every single issue in the case and in applying equal effort and emphasis into each issue because parties do not know what will and will not resonate with the tribunal.

(ii) The absence of appeals has also diverted more resources towards collateral challenges against the award. The anecdotal experience at least, suggests that parties attempt to an increasing

²⁷ Nigel Watson, *A History of the Chartered Institute of Arbitrators* (James & James (Publishers) Limited 2015) at p 75.

degree to have the award set aside in the seat and also to resist enforcement.²⁸ Additionally, the rate of voluntary compliance with awards also seems to be somewhat on the decline. All of this adds to the cost and time it takes to go from filing a reference to arbitrate to eventually having legal rights vindicated. The statistics from Singapore provide some evidence of this. Over a 20-year period between 1985 and 2005, there were only five reported challenges against an award on the specific ground of an alleged breach of the rules of natural justice, all of which were unsuccessful. However, in the 10 years that followed, there were 19 reported challenges with applicants succeeding entirely in only three of those cases.²⁹ It is also worth noting that there was approximately a 33% increase in the number of applications that were taken out to enforce arbitral awards in Singapore between 2013 and 2014. In the same period, there was approximately an 80% increase in the number of applications that were taken out to set aside arbitral awards. The good news however, is that the average time it took from commencement to conclusion of court proceedings, in respect of

²⁸ Sundaresh Menon, Patron's Address Chartered Institute of Arbitrators London Centenary Conference (2 July 2015) at paras 37–40 <[http://www.ciarb.org/docs/default-source/centenarydocs/london/ciarb-centenary-conference-patron-39-s-address-\(for-publication\).pdf?sfvrsn=0](http://www.ciarb.org/docs/default-source/centenarydocs/london/ciarb-centenary-conference-patron-39-s-address-(for-publication).pdf?sfvrsn=0)> (accessed on 2 September 2015).

²⁹ *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80; *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125; and *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305. The applicant succeeded in part in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488.

applications to set aside awards, declined from about 9.5 months to about 6.9 months.³⁰

(b) This segues into the second factor, which is that the parties' dissatisfaction might also, to some degree, be attributed to their failure to understand the proper role that courts play in controlling the arbitral process. A worrying finding in the Queen Mary University of London survey carried out in 2006 was that just about as many respondents chose the seat of arbitration based on convenience as they did based on legal considerations. This might suggest that parties do not fully appreciate the extent of control that the seat court may exercise over the arbitral process. There is a view in some jurisdictions that arbitration "float[s] ethereally"³¹, completely delocalised from any jurisdiction. In a lecture to the Singapore Academy of Law delivered last week, Lord Mance argued forcefully against the correctness of such a notion and his is a view I associate myself with.³² Indeed, despite arbitration's roots in party choice, national courts remain the final gatekeepers of the legal fitness of arbitral awards and processes.³³ It is up to the courts to decide how narrow or broad an

³⁰ These statistics are derived from a survey of cases where counsel selected "arbitration" as the descriptor of the nature of the claim involved.

³¹ Jeremy Gauntlett, "The place of arbitration" (2014) 80(4) *Arbitration* 377 at p 379.

³² Lord Mance, "The Law and Arbitration – A Jigsaw Relationship", Singapore Academy of Law Distinguished Speaker Lecture at para 3 (pending publication)

³³ Sundresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution", Opening Lecture for the DIFC Courts Lecture Series 2015 at para 8
<<https://www.supremecourt.gov.sg/data/doc/ManagePage/5741/Opening%20Lecture%20-%20DIFC%20Lecture%20Series%202015.pdf>> (accessed on 2 September 2015).

interpretation they wish to take of the grounds that are provided for in the *New York Convention* and/or the national arbitration laws for judicial intervention. Counsel will likely appeal to a judge's sense of justice to persuade him or her to correct errors of fact and law. Given the sheer volume of materials that are placed before arbitrators, the chances of arbitrators committing errors of fact and law are not negligible. Moreover, because of the one-tier feature of arbitration, issues will often not have been distilled and become crystallised by the time the award is presented to the court, as they ordinarily would be where a case progresses through the appellate structure in commercial litigation.³⁴ This also increases the chances of errors. Such errors can often give rise to a justifiable sense of grievance which in turn results in the aggrieved party resorting to various legal manoeuvres to have them rectified. A judge who accedes to an invitation for him to intervene and correct errors of fact and law, will often be promoting an outcome which runs completely contrary to the expectations of finality with which the parties agreed to arbitration in the first place. The point I make here is that judges may well be persuaded to do so and parties must be advised of this possibility upfront so that they can either choose a different seat court or adjust their expectations from the start. Some of the dissatisfaction parties have with arbitration may be a result of their not having been so advised.

³⁴ Sundaresh Menon, "The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions" (2014) 108 *American Society of International Law Proceedings* 219 at pp 226–227.

(c) Third, it is said, perhaps unfairly to courts, that arbitral proceedings have seemingly been “judicialised” to an increasing degree and this makes it more difficult to resolve disputes expeditiously. Long gone are the days when the arbitrator would decide matters without undue reference to formal procedure. Now, arbitration tends to be conducted with “the procedural intricacy and formality” that is native to litigation.³⁵ Given that the failure to comply with the procedure that the parties had agreed to may be a ground, both for setting aside and for refusing to enforce an award, arbitrators are fastidious about observing procedural rules to the last detail in order to make their awards resistant to collateral attacks.

(d) The fourth broad factor I wish to touch upon relates to causes of discontent which are arbitrator-specific. Parties look to appoint arbitrators who have an established reputation in the international arbitration community and a depth of experience in a particular industry and/or area of law. The pool of arbitrators who satisfy these criteria is not very deep. This means that the arbitrators that the parties often look to tend to be busier and sometimes may tend to over commit themselves and this inevitably results in delays in the arbitral process.³⁶ Additionally, arbitrators may not have the time to adequately prepare for hearings and the consequent lack of familiarity will often contribute to the hearing

³⁵ Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 1.115.

³⁶ International arbitration: Corporate attitudes and practices 2006, <http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf> (accessed on 2 September 2015) at pp 16–17.

being unwieldy because critical issues have not been identified beforehand.

IV. Traditional paradigms need to be adjusted

22 Some of the causes of discontentment I have touched on may be related to shortcomings of the modern framework governing international arbitration. But, it seems to me that what is needed is not a seismic overhaul of the governing framework. Rather, there is room for much progress to be made in addressing these concerns if all the key players in the field, including judges, adjust some of their traditional paradigms.

(a) Judges should strive for convergence

23 I begin by exploring the contribution that judges can make. In this connection, I believe it would be useful to be clear about the ethos of the *New York Convention* and the *Model Law*. In gist, these instruments aim to define a transnational legal framework to govern arbitration, and which is consistent across national borders as far as this can be achieved while at the same time recognising that arbitration cannot exist entirely divorced from national courts and systems of law. This is because arbitration depends upon the machinery of national courts to avail of the coercive power of the sovereign state to give effect to arbitral decisions within the state. The fact that arbitrators are not confined to any jurisdiction-specific mode of dispensing justice makes arbitration a viable method of resolving disputes where the disputants are from multiple jurisdictions. But at the same time, it falls upon judges to bear in mind the internationality of arbitration, by which I mean the endeavour to render the legal framework governing arbitration as consistent as possible across borders, when

they are invited by a party to an arbitration to intervene in the arbitral proceedings.

24 The fact is that the way judges have defined their roles in relation to arbitration has not been uniform across jurisdictions. There can be several reasons for this:

(a) First, while the Model Law has made commendable strides in bringing about a degree of uniformity in national arbitration laws, there is still much diversity across the globe insofar as such laws are concerned.

(b) Second, the grounds for intervention which national arbitration laws prescribe often leave considerable scope for interpretation and ingenious argumentation. For example, we have observed in challenges coming before our courts that counsel are willing to advise their clients to allege a breach of natural justice not just where there is clear and obvious injustice done to one party because it was not afforded an opportunity to present its case, but also when the award raises any doubt, however slight, that a particular argument that was run before the tribunal had been misunderstood or not fully considered by the tribunal.

(c) Third, we would have to be wilfully blind to pretend that the rule of the law is understood consistently in every jurisdiction. Tightly drafted national arbitration laws may not always deliver as well as they should depending on the judicial environment in which they are expected to operate.

25 These points essentially lead me to the conclusion that it is fanciful to hope for complete uniformity in the way judges deal with applications to intervene in arbitration proceedings. However, I believe that there is a need for a degree of principled judicial restraint insofar as applications for curial intervention are concerned, if we are to preserve and enhance the internationality of arbitration. I say principled restraint because I am not advocating the abdication of the oversight that courts *should* exercise over the arbitral proceedings. An appropriate degree of judicial scrutiny is in fact necessary to maintain the legitimacy and integrity of the arbitral process.

26 I suggest that this can be achieved, if judges are mindful of the arbitration jurisprudence in other jurisdictions and do what they can to strive for convergence. To this end, among the things that can be done to promote this is to encourage greater judicial collaboration and dialogue. I have spoken elsewhere about the periodic dialogues that take place among the commercial judges of Hong Kong, New South Wales and Singapore and it is hoped that this will be supplemented with the inclusion of commercial judges from Shanghai and Mumbai. In a similar vein, the judiciaries of ASEAN have established a joint platform for judicial training and development and it is anticipated that such training in arbitration will be conducted in the near term. Moreover, the judiciary chapter of ICCA has been conducting training programmes for judges on arbitration generally and particularly in relation to the *New York Convention* for some time. Such efforts are undoubtedly to be encouraged in the context of an endeavour to promote convergent approaches towards defining and understanding the relationship between the courts and arbitration. Courts would

also do well to have regard to the decisions of other courts with similar legal frameworks as they develop their own jurisprudence.

27 But aside from the relationship between courts and arbitration, one area of particular interest concerns the relationship between courts themselves and specifically the approach that an enforcement court should take towards decisions taken by a seat court in another jurisdiction in relation to a given arbitration that later comes before it. I suggest that an enforcement court should be slow to enforce an award that has already been set aside in the seat of arbitration. At the most general level, I say this because the selection of the seat court will generally be a matter of contract and where the parties have chosen either directly or through the tribunal to subject the arbitral proceedings to the supervision of a particular national court, that too is an exercise of party autonomy and the parties should be expected to live with the consequences of that choice.

28 Having said that, it has to be acknowledged that a variety of views has been expressed on this question. Much of the debate in this area has been sparked by the fact that Art V(1) of the *New York Convention* uses permissive rather than obligatory language. That provision, as applied to subparagraph (e), states that recognition and enforcement of an award *may* be refused if the award has not yet become binding, has been set aside, or has been suspended in the country where the award was made. It is worth considering some of approaches that have been advanced to address this question.

29 First, there is what has been termed the “territorial approach”³⁷, under which the annulment of the award at the seat renders the award non-existent. On this basis, it is said that the award can have no validity in that jurisdiction or any other jurisdiction and the word “may” in Art V(1) of the *New York Convention*, cannot confer a discretion when applied to subparagraph (e). This approach has been codified in Italy in its Code of Civil Procedure under which, the annulment of an award at the seat of the arbitration creates a mandatory, not discretionary ground, for refusing to enforce the award.³⁸ Although this issue was not directly engaged in *PT First Media v Astro Nusantara*, the Singapore Court of Appeal observed that “the *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there is simply no award to enforce”.³⁹

30 At the other extreme, lies the approach which regards arbitration as a “transnational” or “supranational” method of dispute resolution. This view of arbitration holds that awards do not derive their validity and legitimacy from a particular local system of law. As such, awards are not integrated into the legal order of the seat and therefore continue to exist notwithstanding the fact that they may have been set aside at the seat. It is open for the enforcement court to

³⁷ Andrew Tweeddale, “Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration” (2015) 81(2) *Arbitration* 137 at pp 137–138.

³⁸ Andrew Tweeddale, “Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration” (2015) 81(2) *Arbitration* 137 at p 138.

³⁹ *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [77].

enforce such award without regard to the foreign judgment setting the award aside. French courts appear to adopt this approach.⁴⁰

31 A further approach is not as categorical as either of the two I have already mentioned. This view proceeds on the basis that Art V(1)(e) of the *New York Convention* grants the enforcement court the discretion to enforce an award which has been set aside in the seat court and attempts to articulate a test to control the exercise of that discretion. But there does not appear to be widespread consensus on the precise terms of the test.

32 On one end of the spectrum, there are academics and courts that suggest that such an award should only be enforced when the traditional conflict of laws grounds for refusing to recognise a foreign judgment are made out.⁴¹ At the other end, there are cases that suggest that the enforcement court can have regard to domestic laws and standards of propriety in deciding whether to exercise the discretion to enforce an award which has been set aside by the seat court. For example, in *Dallah Real Estate v Ministry of Religious Affairs, Government of Pakistan*, Lord Collins, suggested that the discretion could be exercised in a case where English law would refuse to apply a foreign national law which makes the arbitration agreement invalid where the foreign law outrages its sense of justice

⁴⁰ *Hilmarton Ltd v Omnium de traitement et de valorisation* (1995) XX Yearbook Comm Arb 663–665; *The Arab Republic of Egypt v Chromalloy Aeroservices, Inc* (1997) XXII Yearbook Comm Arb 691–695; see also Sundaresh Menon, “Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence” (2013) Singapore Journal of Legal Studies 231 at p 241–242.

⁴¹ *Dicey, Morris and Collins on the Conflict of Laws* (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012); *Yukos Capital Sarl v OJSC Oil Company Rosneft* [2014] 2 CLC 162 at [12].

or decency.⁴² In a similar vein, in *Dowans Holding SA v Tanzania Electric Supply* Justice Burton suggested that the discretion could be exercised when the award has been set aside on “grounds which a court subsequently asked to enforce the award...would deprecate”.⁴³ In between these two ends, there are approaches such as Jan Paulsson’s. He has suggested that the discretion should be exercised so long as the award has been set aside on some ground which does not fall within the scope of the first four paragraphs of Art V(1) of the New York Convention. According to the typology he advances, such annulments constitute “local” as opposed to “international standard annulments”. He argues that enforcement should only be refused when the foreign judgment setting aside the award constitutes an international standard annulment.⁴⁴

33 In my view, and I emphasise, this is offered as a number of provisional thoughts without the benefit of argument, there is something to be said for the territorial approach. Before I develop this, I should make it clear that when I speak of the territorial approach, I am speaking specifically of the special role of the seat court, that being the court which specifies the conduct of the arbitration and gives the award its nationality. On that basis, let me make the following points:

⁴² *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 All ER (Comm) 383 at [128]; see also *Renato Nazzini*, “Consistency and divergence in international arbitration: evolutionary reflections on res judicata and abuse of process under the New York Convention: the fourth annual CIARB Roebuck lecture” (2014) *Arbitration* 80(3) 273 at p 276.

⁴³ *Dowans Holding SA and another v Tanzania Electric Supply Co Ltd* [2012] 1 All ER (Comm) 820 at [41].

⁴⁴ Jan Paulsson, “Enforcing Arbitral Awards Notwithstanding Local Standard Annulments” (1998) 6(2) *Asia Pacific Law Review* 1.

(a) First, the territorial approach does the most to safeguard the international character of arbitration. It prevents vaguely defined domestic normative values of the enforcement court from intruding into the realm of international arbitration.

(b) Second, as I have already observed, the territorial approach upholds party choice. Where there is an enforceable bargain to submit to arbitration, there is also an equally enforceable bargain to submit to the supervision of the courts at the seat of arbitration. In other words, parties should be taken to have expressly or implicitly embraced the laws and judicial system of the seat of arbitration, “warts and all”. Allowing enforcement courts to appeal to vaguely defined domestic normative values in deciding whether to enforce an annulled award materially alters the bargain between the parties and also introduces a significant unstable variable into the arbitral process. It would significantly increase transaction costs if parties had to take into account the laws and judicial system of not just the seat, but all the places where enforcement may possibly be sought subsequently when deciding whether to include an arbitration agreement.⁴⁵ Related to this, there may be an implicit, perhaps, unarticulated, premise in the view that enforcement courts should have a larger measure of discretion when deciding whether to recognise and uphold a seat court decision, that the enforcement courts have a better rule of law framework than the seat court. But if this idea of a wider discretion

⁴⁵ M B Holmes, “Enforcement of annulled arbitral awards: logical fallacies and fictional systems” (2013), 79(3) 244 at pp 251, 253–254.

takes hold, it can easily work the other way where an award that really should be and is set aside is subsequently upheld in another jurisdiction perceived as having a weaker rule of law framework.

(c) Third, the territorial approach, if widely accepted, would tend to discourage forum shopping. When the award is set aside in the seat, the game would by and large be over. Thus a party would not be incentivised to shop around the world in order to find a court somewhere which is willing to enforce the award.⁴⁶

34 I do note that judges may have reservations about adopting this approach given the express language of the *New York Convention* which seemingly grants the enforcement court the discretion to enforce an award which has been set aside in the country where it was made. M B Holmes has provided a possible way of reconciling the language of the New York Convention with the territorial approach. He points out that the *travaux* to the Convention contains no discussion on the issue of whether and when an enforcement court should be able to enforce an annulled award. He takes this to mean that it is likely that the drafters of the *New York Convention* were not alert to the likelihood that Art V(1)(e) would be construed as conferring a discretion to allow enforcement of an award which had been annulled.⁴⁷ A similar point is made by Albert Jan van den Berg. He argues that the drafters of the *New York Convention* did not consciously

⁴⁶ M B Holmes, “Enforcement of annulled arbitral awards: logical fallacies and fictional systems” (2013), 79(3) 244 at p 250.

⁴⁷ M B Holmes, “Enforcement of annulled arbitral awards: logical fallacies and fictional systems” (2013), 79(3) 244 at p 246.

choose the word “may” as the *travaux* does not reveal any discussion regarding a choice between “may” and “shall” in relation to Art V(1)(e).⁴⁸ He also points out that Professor Piet Sanders, one of the drafters of the *New York Convention*, has expressed the view that courts *will* refuse the enforcement of an award set aside in the country of origin “as there no longer exists an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement”.⁴⁹

35 Holmes considers that it is possible that Art V(1)(e) of the *New York Convention* was inartfully drafted. Conceivably, the drafters had only hoped to give the enforcement court the discretion to enforce an award notwithstanding the fact that it had not yet become binding on the parties or when it had been suspended in the seat. The drafters might have chosen not to include a separate provision stating that an award which had been set aside would not be enforced because such a provision would be meaningless unless they also proceeded to stipulate the grounds on which an award could be validly set aside⁵⁰ and that was a matter which the international community did not seek to reach a degree of uniformity on until the drafters of the *Model Law* set about that task nearly three decades later. It is worth noting that the Secretary General suggested that the

⁴⁸ Albert Jan van den Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, April 29, 2009” (2010) 27(2) *Journal of International Arbitration* 179 at p 186.

⁴⁹ Albert Jan van den Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, April 29, 2009” (2010) 27(2) *Journal of International Arbitration* 179 at p 187

⁵⁰ M B Holmes, “Enforcement of annulled arbitral awards: logical fallacies and fictional systems” (2013), 79(3) 244 at p 246.

United Nations Conference on Commercial Arbitration, which produced the *New York Convention*, might consider “enumerating the grounds on which an award could be...annulled” in the country of origin.⁵¹ However the drafters did not take up this suggestion. The Summary Records of the 25 meetings of the Conference contains no reference to any attempts to enumerate grounds for annulment. I should also mention that this matter eventually proved to be one which was difficult to reach consensus on. This is borne out by the fact that the *travaux* for the article of the *Model Law* that stipulates the grounds for setting an award aside are longer than those of any other single article of the *Model Law* except Art 1 which deals with the scope of the law’s application.⁵²

36 In addition, it may also be noted that Art V(1) applies not just to subparagraph (*e*) but also to (*a*) to (*d*). The discretionary language might have been included in Art V(1) because it makes sense in the context of some of the other subparagraphs. For example, under subparagraph (*d*), the enforcement court can refuse to enforce an award when there has been a breach of the agreed arbitral procedure. It should not be the case that every inconsequential breach of arbitral procedure entitles one party to frustrate enforcement. Rather, the enforcement court should be entitled to consider whether the breach has caused substantial or material prejudice in deciding whether to refuse enforcement. In that context, the discretion granted by Art V(1) seems clearly sensible. Of course

⁵¹ *Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (6 March 1958), UN DOC E/CONF.26/2 at para 16.

⁵² Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation, 1989) at p 911.

one could then ask why the drafters did not split the provision to demarcate the discretionary grounds from mandatory grounds. Perhaps that could be attributed to drafting convenience. My final observation is that the territorial approach does not *require* the enforcement court to recognise a foreign judgment setting aside an award irrespective of the integrity of the annulment proceedings. It is open to the enforcement court to refuse to recognise the foreign judgment on traditional principles of comity although the difficulties inherent on this should not be overlooked and would probably be overcome only infrequently.⁵³ Nonetheless, in these situations, the arbitral award survives being set aside at the seat of the arbitration. Therefore, the enforcement court would not be detracting from the *ex nihilo nil fit* principle, which undergirds the territorial approach, if it chooses to enforce the award to the extent this follows from its refusal to recognise the decision of the seat court on traditional common law conflicts of laws principles..

37 It would be remiss of me to leave this point without once again referring to Lord Mance's lecture to the Singapore Academy of Law where he advances similar and also some further reasons for arriving at a view that is not far removed from that which I have put forward to you today. To sum up this point: parties choose to submit to the supervision of the national courts of the place they have selected to situate the arbitration in; the enforcement court should generally respect this choice instead of bailing out parties who come to regret the choice they have made. Many salutary effects flow from national courts taking the

⁵³ Sundaresh Menon, Patron's Address Chartered Institute of Arbitrators London Centenary Conference (2 July 2015) at paras 56–58 <[http://www.ciarb.org/docs/default-source/centenarydocs/london/ciarb-centenary-conference-patron-39-s-address-\(for-publication\).pdf?sfvrsn=0](http://www.ciarb.org/docs/default-source/centenarydocs/london/ciarb-centenary-conference-patron-39-s-address-(for-publication).pdf?sfvrsn=0)> (accessed on 2 September 2015).

position that they will not enforce an award which had been set aside in the seat save in exceptional circumstances where the conflict of laws rules for refusing to recognise foreign judgments are met. This would introduce a higher degree of finality into arbitral proceedings. Parties would also not be incentivised to take out enforcement proceedings in various jurisdictions to try their luck. Lastly, once the award is set aside in the seat, the beneficiary of the setting side would generally not have to worry about being embroiled in further litigation over attempts to enforce that award.

(b) Arbitrators and counsel should embrace innovation

38 As would be evident from what I have said thus far, I believe judges can support international arbitration. But their role is a limited one. Put simply, they can support international arbitration by respecting and preserving its internationality. This requires them to exercise principled restraint when asked by parties to intervene in the arbitral proceedings. In a sense, they do more by doing less because it is just not within the court's ambit in the context of arbitration to intervene to correct errors of law and fact. But given that the courts should play only a limited supervisory role over arbitral proceedings, the bulk of the responsibility for addressing the causes of dissatisfaction which I identified earlier must be borne by arbitrators and the counsel who appear before them. Solutions to the problems I identified must come from within the industry.

39 Lord Mustill once observed that arbitration had taken on the worst features of court processes without the accompanying power that judges have in

order to get things done.⁵⁴ Perhaps he underestimated the real influence that arbitrators can have over the arbitral process.

40 The success of a good commercial court boils down in my view to effective, involved case management marked by judicial fearlessness. Arbitrators can discharge a similar role in the context of arbitral proceedings. There is no shortage of good ideas that arbitrators can have recourse to. Arbitral institutions, think tanks and leading practitioners have played a vital role in drawing upon their institutional and practical experience to come up with various innovative techniques which arbitrators can adopt to prevent arbitral proceedings from spiralling out of their control.⁵⁵ The various Guidelines prepared by the Practice and Standards Committee of the Chartered Institute which are being launched today are a welcome addition to the pool of available standards and guidelines. In some senses, they draw together what is already available into a clear and reliable document. In other ways, they also go beyond what is now available. I will make two points here. First, I hope to draw attention to the fact that several of the problems I identified earlier can be addressed by the innovative techniques which have been available but regrettably, have not widely been resorted to. It is my hope that this would encourage more industry participants to embrace these techniques. Second, I will speak specifically about the Guidelines that are being launched today.

⁵⁴ Michael John Mustill, "Arbitration: History and Background" (1989) 6 *Journal of International Arbitration* 43 at p 56

⁵⁵ For an overview of the various innovative techniques, see Paul Tan & Samuel Seow, "An Overview of Procedural Innovations in International Commercial Arbitration" (*Law Gazette*, 2014); Neil Kaplan, "If It Ain't Broke, Don't Change It" (2014) 80(2) 172.

41 I noted above that arbitration's "one-shot" dispute resolution model encourages counsel to place equal emphasis on each and every point they make. This in turn results in extensive document production. Arbitrators then have to take the time and effort to plough through all the materials before them and fastidiously address every point raised in their awards so as to fend off any accusations of breach of the rules of natural justice. It appears to me there is a simple solution which would ameliorate these problems. Arbitrators need to get involved in the decision making process from an early stage, even before the main hearing commences. They should not just issue a Procedural Order setting the matter down for hearing with a set of standard directions and then defer or delay meeting the other members of the tribunal or the parties until commencement of the actual hearing. Should they do this, they are in truth deferring coming to grips with the issues in the dispute. The dangers are twofold. On the one hand, the parties may be clueless about what appeals to or concerns the tribunal prior to the commencement of the hearing and hence would prepare for the hearing on the footing that they must place equal emphasis on each and every point. On the other hand, the tribunal might not fully appreciate the parties' cases and hence might take a hands-off approach during the actual hearing. The Reed Retreat and the Kaplan Opening are among the devices developed to avoid this from happening.

42 The Reed Retreat in essence refers to a gathering of the tribunal prior to the commencement of the hearing to discuss the impending hearing and to consolidate the issues it would like parties to address. The understanding is that individual members of the tribunal will be encouraged to start grappling with the

case from an earlier stage than they otherwise would have, so that they can have a meaningful dialogue with the other members of the tribunal at the gathering.

43 The Kaplan Opening also takes place in advance of the main hearing. It is usually scheduled after the first round of written submissions and witness statements but well before the main hearing. At this hearing, both counsel open their respective cases before the tribunal. After this, expert witnesses make a presentation of their evidence. Areas where expert opinions differ are identified upfront. All of this allows the tribunal to gain a better understanding of the case, thus facilitating preparations for the main hearing. It also allows the tribunal to steer the process to some extent by putting issues to the parties which the parties can go away and consider and eventually address. Lastly, the tribunal can point out gaps in the evidence. This might result in parts of the case being settled or points of disagreement being minimised.

44 It seems to me that the Reed Retreat and the Kaplan Opening used in tandem will likely make the main hearing more manageable. The early identification of key issues would also limit unnecessary document production.

45 There are a number of other obvious and practical things which arbitrators can do to streamline the arbitral process. For instance, they can carry out expert witness conferencing or “hot tubbing” as it is sometimes called. The expectation is that the “peer pressure and debate which typically results from opposing experts sitting at the same table” will help to moderate extreme stands that the expert witnesses might otherwise take and consequently reduce the number of

issues on which experts disagree.⁵⁶ Arbitrators can also impose short time limits for the exchange of substantive written submissions; page limits for substantive written submissions; and time limits for oral submissions and/or examination of witnesses. The ICC Commission's Report on Controlling Time and Costs in Arbitration contains various other recommendations which arbitrators can consider adopting as well.⁵⁷

(c) *The Guidelines can play a valuable role*

46 I now turn to the Guidelines that are being launched today. I believe they are a valuable addition to the existing pool of standards and guidelines for three reasons.

47 First, they serve an integrative function by pulling together proposals by various practitioners, academics and arbitral institutions into a single document. Given that these proposals are scattered in multiple places, arbitrators may only be aware, if at all, of some but not all of them. This is regrettable because there are often synergies to be gained from using them in tandem. The Institute's Guidelines will go towards ensuring that these synergies are realised. To illustrate the point, I refer to the Guideline on Managing the Arbitral

⁵⁶ 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, <http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf> (accessed on 2 September 2015) at p 28.

⁵⁷ ICC Commission Report: Controlling Time and Costs in Arbitration, <<http://www.iccwbo.org/Data/Policies/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration,-2012/>> (accessed on 2 September 2015).

Proceedings, which I understand is at an advanced stage of drafting and will be made available shortly. This Guideline proposes various techniques to manage the case, the evidence and the oral hearing. Some of the techniques will sound familiar. For example:

- (a) Arbitrators are encouraged to meet each other and discuss how to proceed with the case shortly after their appointment;
- (b) They are also encouraged to convene a preliminary meeting with the parties where, among other things, they are asked to come up with a procedural timetable for the conduct of the proceedings in consultation with the parties;
- (c) Next, arbitrators are advised to decide whether to bifurcate the hearing. They are provided with a list of factors to consider in making that decision, such as whether the documentary and testimonial evidence on various issues would overlap and whether there would be any prejudice to any party if the hearing were bifurcated.
- (d) Lastly, they are asked to consider the suitability of allocating fixed time to each party during the oral hearing.

48 The Guideline does not stop there but proceeds to suggest sanctions that arbitrators may impose when parties refuse to comply with their procedural orders. For example, the Guideline suggests that the tribunal can take a party's dilatory or unreasonable behaviour into account when allocating costs. I believe this is valuable because it not only highlights the ways in which arbitrators can

play a more involved role in managing the arbitral proceedings but also emphasises that arbitrators are not powerless in managing the proceedings. Awareness of the latter fact might actually encourage arbitrators to take on a more involved role in managing the proceedings.

49 Second, the Guidelines go beyond proposing procedural techniques that arbitrators can adopt to manage arbitral proceedings to address substantive issues that have from time to time vexed arbitrators. For example, the Guideline on Applications for Interim Measures formulates a test comprising four cumulative factors that a tribunal has to generally satisfy itself of, before it allows a party's application for interim measures. This is not an area which is free of all controversy. For example, there is some dispute over the level of potential harm that is required to justify an interim measure. I am certain arbitrators will appreciate the fact that the Guideline does not simply allude to the existence of such controversies, but also sets out guidance as to how these might be resolved.

50 The Guideline on Drafting Arbitral Awards, which I understand will also be made available shortly, also makes valuable contributions in providing guidance on substantive issues. One area worth noting is its attempts to distinguish between interim, partial, provisional and final awards. It is important that arbitrators are alive to the distinctions between the various types of awards because not all categories of awards are capable of being enforced *as awards* under national arbitration laws.⁵⁸ This issue was directly implicated in a recent

⁵⁸ In Singapore, s 19B of the International Arbitration Act (Cap 143A, 2002 Rev Ed) proscribes provisional awards. Provisional awards are those which do not definitely or finally dispose of any issue or claim in the arbitration but rather are issued for the
(*cont'd on next page*)

case which the Singapore Court of Appeal had to deal with. There, the court proceedings concerned the issue of whether the award in respect of which enforcement was sought was a provisional award proscribed by the Singapore International Arbitration Act.⁵⁹ The confusion was caused partly by the language the tribunal used in drafting the award. I believe that the present set of Guidelines will result in arbitrators being more careful in the way they draft their awards. This will help to prevent future disputes over the category an award belongs to.

51 Third, the Guidelines portray a realistic picture of arbitration as a mode of dispute resolution which is not entirely divorced from national systems of law by repeatedly emphasising the role that these systems of law and national courts play in controlling the arbitral process. I reiterate a point I made earlier: there is some evidence to show that parties may not fully appreciate the extent of control that national courts exercise over the arbitral process. This may be a result of counsel and arbitrators seeing arbitration as a free-standing system of resolving disputes. This is not reflective of reality and can cause dissatisfaction when parties' expectations of finality are undermined by subsequent court intervention. The Guidelines will help to present a more realistic picture of arbitration. I will identify just a few instances where the Guidelines alert arbitrators to the various systems of national law and decisions of national courts that they should have regard for in conducting the arbitration. For example, the Guideline on Drafting

purposes of safeguarding a party from damage during the course of the arbitral proceedings. These awards are inherently capable of being varied in due course (see *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30 at [49], [50] and [105]).

⁵⁹ Cap 143A, 2002 Rev Ed

Arbitral Awards advises arbitrators to render awards that would be enforceable under the law of the seat; the law of the place where the debtor resides and/or has assets; and any other place of likely enforcement. The Guideline on Jurisdictional Challenges addresses the issue of how arbitrators should proceed in the face of a national court making any determination on the arbitrators' jurisdiction to hear the matter. Finally, the Guideline on Applications for Interim Measures makes clear that the power to grant interim measures is not just a matter of party agreement, but rather the arbitrators need to take the law of the seat of arbitration into account as well when considering whether to allow applications for interim measures. I believe that parties will be better advised as to the merits and downsides of arbitration when arbitrators and counsel internalise the fact that arbitration is not a free-standing method of resolving disputes.

V. Conclusion

52 I commenced by undertaking a historical review. I close by suggesting that some things have changed forever. For one thing, arbitration today is the dispute resolution mode of choice for international disputes. With the growth in the scale of international commercial contracts and the disputes that arise out of them, we must acknowledge that rough justice will generally not be sufficient. It is unsurprising that counsel and arbitrators active in this field count in their number some of the ablest commercial lawyers in the world.

53 On the other hand, some of the concerns that have been raised can be met by returning to the basics. For one thing, I suggest the courts can play an important role by promoting convergence so as to enhance the internationality of arbitration – internationality that rests on core ideas of principled judicial

restraint and a firm commitment to the norms reflected in the *New York Convention* and the *Model Law*.

54 Secondly, the insiders can do much to enhance the level of the services they provide by being mindful of such basic things as not overcommitting themselves and by ensuring that they can and do manage the proceedings better. Various parties have long called on arbitrators to adopt these techniques. The Chartered Institute's Guideline on Managing the Arbitral Proceedings endorses many of these techniques implicitly and encourages arbitrators to play a more involved role in managing the arbitral proceedings. It seems there is broad all-round support for arbitrators playing a more involved role. The Queen Mary University of London survey carried out in 2012⁶⁰ found that 64% of the respondents believed that the most effective method of expediting proceedings was for the tribunal to identify issues to be determined as soon as possible after constitution; 62% of the respondents believed that expert witness conferencing should take place more often; and 57% were in favour of imposing some form of time limits on oral submissions and examination of witness. Those surveyed in 2012 were primarily private practitioners, arbitrators, in-house counsel, counsel from arbitral institutions, academics and expert witnesses.

55 Arbitrators and arbitral practitioners are in the business of providing private dispute resolution services. As with every other service provider, they

⁶⁰ 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process,
<http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf
> (accessed on 2 September 2015).

should be sensitive to the demands and needs of those they serve. Therefore the fact that parties want arbitrators to take charge should, in and of itself, provide an adequate reason for them to do so and for counsel to support them. But there is a stronger reason for arbitrators to exercise greater control over the proceedings. This has to do with the fact that arbitrators play a central role in the administration of justice. I can do no better than to quote Lord Neuberger's remarks on this point⁶¹:

When performing their function, arbitrators are participating in the rule of law: they are giving effect to the parties' contract in accordance with substantive and procedural legal principles. If they perform, and appear to perform, that role honestly, impartially, expeditiously, and openly, confidence in the rule of law will be maintained.

This means they owe duties not just to their clients, but also to the wider public. This should drive arbitrators to constantly be on the lookout for ways to make arbitral proceedings fairer, quicker and more cost efficient. The good news is that standards and guidelines are widely available. Our urgent need now is for standard bearers who will fearlessly embrace what is available. Often boldness tends to be contagious. When a critical mass is reached, the practice of using these techniques and measures may well take off. It would be most encouraging to see these techniques and measures being widely adopted.

56 Lastly, it seems to me that just as courts around the world have begun to face up to the reality that the same set of rules cannot apply to all cases, arbitral

⁶¹ Lord Neuberger, Address to property arbitrators at the ARBRIX Annual Conference, London (12 November 2013) at para 16 < <https://www.supremecourt.uk/docs/speech-131112.pdf>> (accessed on 2 September 2015).

institutes would do well to do more to promote alternative and simplified processes for smaller cases.

57 It has been a great honour for me to deliver this address. Thank you.