Omnipresence of Judicial Control over International Arbitral Proceedings

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Abstract

The overriding purpose of this article is to examine the extent of control that national courts possess over arbitral proceedings. In discussing the concept of a private system of justice offered by arbitration, issues of public policy inevitably emerge for consideration. The necessity for limits to be placed upon this freedom of choice through court intervention will be elucidated. This article will also highlight and deliberate on the veracity of claims by proponents of arbitration concerning the virtues of arbitration over the conventional civil litigation process. The underlying thesis of this article is premised on the notion that national courts can exist and function without the assistance, control and interference of arbitral tribunals, but arbitral tribunals are always subject to the ubiquitous clutches of judicial control.

Key Words: Arbitration, Judicial control, Public policy

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I. Introduction

This article is premised on the notion that national courts can exist and function without the assistance, control and interference of arbitral tribunals, but arbitral tribunals are always subject to the ubiquitous clutches of judicial control.

In support of this basic idea, this article will first highlight and discuss the veracity of the claims by proponents of arbitration concerning the virtues of arbitration over the conventional civil litigation process. In highlighting these perceived advantages, by implication, the proponents of arbitration naturally cast misgivings and qualms about the court litigation process and are perceived to argue that arbitral proceedings are immune from the imperfections experienced by parties in court litigation. This article will consider some of these assertions and demonstrate the point that since judicial control will remain an integral aspect in any arbitral process, the negative characteristics of court litigation as highlighted by the proponents of arbitration will equally impact the arbitral process.

This article will then proceed to reveal the extent of judicial control over arbitral proceedings. It will be argued that despite the efforts by the states and policy makers in various jurisdictions to limit judicial intervention in arbitral proceedings through the enactment of national laws and the accords reached by states to ratify international conventions that deal with this aspect of the law, the occasions calling for judicial intervention and control cannot be removed altogether. It will be argued in this article that notwithstanding the avowal by the courts in some jurisdictions concerning their support for arbitration, judicial intervention is inevitable in a wide variety of situations and thus will remain an intrinsic aspect in international commercial arbitration.[1]

Against the backdrop of the above arguments, this article will venture to elucidate the concepts of private justice and party autonomy and reconcile these concepts with the principle of public policy and the doctrine of finality of an arbitral award as understood in the context of an arbitral process. The aim of such an undertaking is to highlight and comment on the underlying

1. A recent decision by the Singapore Court of Appeal in PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV, [2013] SGCA 57 amply demonstrates this point.

policy tensions that are present in this aspect of the law. The tension that pits party autonomy and international comity against the notion of public policy is one such example. Finally, this article will also comment briefly on the concerns relating to the judicialisation of arbitration.

II. Increasing Popularity of Arbitration

There is no denying that arbitration is one of the available techniques or methods for resolving international commercial disputes. However, what is less certain is whether arbitration has become accepted worldwide as the "preferred" or "principal" method of resolving international disputes.[2] Be that as it may, the surveys conducted by the School of International Arbitration at Queen Mary, University of London in 2006, 2008 and 2013 support the view that arbitration remains as a popular dispute resolution mechanism amongst businesses embroiled in commercial disputes.[3]

A. Underlying Reasons

There are a number of reasons why businesses and parties to a commercial dispute prefer arbitration over, say, court litigation or other dispute resolution mechanisms.

1. Neutrality and Fairness

One of the principal reasons why parties choose to arbitrate instead of liti-

2. The term "preferred" is used by the author Gary B. Born in his treatise, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at p. 71, and the term "principal" is used by the authors of REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (5th ed. 2009) at pp. 1 and 30. In the 2006 International Arbitration Survey – 'Corporate Attitudes and Practices' conducted by Queen Mary, University of London, 73% of the participants identified international arbitration as their "preferred" mechanism for dispute resolution.

3. *See* 2006 International Arbitration Survey, Corporate Attitudes and Practices, *available at* http://www.arbitrationonline.org/docs/IAstudy_2006.pdf; 2008 International Arbitration Survey, Corporate Attitudes and Practices, *available at* http://www.arbitrationonline.org/docs/IAstudy_2008.pdf; and the 2013 International Arbitration Survey, Corporate Choices in International Arbitration: Industry Perspective, *available at* http://www.arbitrationonline.org/docs/pwc-international-arbitration-study2013.pdf.

gate in courts is attributed to the perceived advantage that arbitration offers through a "neutral" forum and "neutral" tribunal. The attraction of the principle of neutrality can be best explained by contrasting it with litigation in national courts. When parties are given an opportunity to choose a "neutral" place for the resolution of their dispute and to choose a "neutral" tribunal, the argument is that issues such as home ground advantage and procedural rules and formalities that may be foreign to one of the parties will not arise.[4]

2. Binding Nature of Award

Another principal reason concerns the enforcement of an international arbitral award. Proponents of arbitration argue that an international arbitration, if carried through to the end, leads to a decision which is enforceable against the losing party not only in the place where it is made but also internationally, under the provisions of such treaties as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter the New York Convention).[5]

In addition to the above principal reasons, there are other reasons which make arbitration an attractive alternative to litigation. The authors of the leading English commentary on International Commercial Arbitration, *Redfern and Hunter on International Arbitration*, list the following additional reasons.[6]

3. Flexibility and Adaptability

The flexibility and adaptability of the arbitral process is said to be a positive influence on parties in international commercial disputes to opt for arbitration over litigation.

4. Confidentiality

Since many business entities shun adverse publicity resulting from protract-

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4. *See*, for example, the 2013 International Arbitration Survey – 'Corporate Choices in International Arbitration: Industry Perspective' at pp. 6-8.
5. *See* Nigel Blackaby et al., Redfern and Hunter on International Arbitration 31-32 (5th ed. 2009).
6. *Id.* at 33-34.

ed or highly publicized legal proceedings, they see confidentiality as another powerful attraction to have their disputes resolved by arbitration.

5. Powers of Arbitrators and Continuity of Role

The additional powers of arbitrators and the continuity of role in an arbitration are also said to be the contributing factors to the popularity of arbitration. The power of an arbitral tribunal to award compound interest rather than simple interest can be cited as an example of a positive reason as to why arbitration is more advantageous than court litigation. As for continuity of role, the authors in *Redfern and Hunter on International Arbitration* explain this reason in the following terms:

> Finally, there is a continuity of role in an arbitration, since the arbitral tribunal is appointed to deal with one particular case and to follow it from beginning to end. This enables the arbitral tribunal to get to know the parties, their advisers, and the case as it develops through the documents, the pleadings, and the evidence. It should speed the process, and the familiarity with the case which is engendered may facilitate a settlement of the dispute.[7]

The above rationalization underscores two additional aspects concerning the merit of arbitration. The first relates to the speeding up of the process and the second concerns the prospect of facilitation of a settlement. The issue of settlement is in turn closely linked to the question of costs.

6. Subject Matter Expertise

The fact that arbitrators are often experts in the field or in the matter under dispute goes quite a long way in making it the choice of dispute resolution mechanism. The fact that disputes are decided by experts or specialists in a given area is also seen as a plus factor or advantage, when compared with litigation.

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7. *Id.* at 34.

B. The Perceived Disadvantages of Litigation

Do the reasons outlined in II.A.1-II.A.6 truly weigh in favour of arbitration over court litigation? The answer depends on whether a decision to arbitrate will inevitably oust the court from any form of control over the arbitral proceedings. If the answer is in the negative, the aspersions cast against the conventional civil litigation process will, to some extent, blemish the arbitral process. In other words, the reasons put forward by proponents of arbitration to espouse the qualities of arbitration may not hold water.

1. Delay

Delay in the traditional civil litigation process may have been the catalyst for the increase in popularity of arbitration.[8] The very characteristics of arbitration, namely the flexibility and lack of formality in the conduct of arbitral proceedings would have led many to believe that resolution of disputes through arbitration could be done more speedily when compared to court litigation. However, civil justice reforms introduced in jurisdictions such as Hong Kong, Singapore and Malaysia have had a very positive impact on the time taken for the disposal of civil claims in these jurisdictions.[9] Such a development, at least in these jurisdictions, would mean that the advantage of arbitration in terms of the speed in which disputes are resolved is no longer a factor that may influence parties to opt for arbitration.

In more recent times, concerns have also been raised regarding delay in arbitral proceedings. It has been argued that the time taken to constitute an arbitral tribunal may be too long. Likewise, there have been complaints that some arbitral tribunals take too long to make their award.[10] In fairness, the

8. In his reports on *Access to Justice*, one of the defects in the Civil Justice System identified by Lord Woolf is that "it is too slow in bringing cases to a conclusion". *See* Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995); and Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

9. The time taken for the disposal of civil claims, that is, from the time of the filing of a suit to the time of judgment, in these jurisdictions varies anywhere from 6 -12 months. In the case of arbitration, it has been said that nowadays, the average time for a final award to be rendered is 12 – 24 months.

10. Blackaby, *supra* note 5, at 35-36.

latter negative aspect may also exist in court litigation. In the 2013 International Arbitration Survey, some of the largest corporate users were asked about this issue of delay. It was confirmed that delay is indeed regarded as a real concern. Interestingly, the 2013 Survey cited the availability of arbitrators as the cause of delays in arbitration.[11]

It is noteworthy that even if parties were to fully "cooperate" and go through the entire arbitral process, delay has been shown to be an issue of grave concern. Delay will become more serious when one of the parties to the proceedings makes an attempt to sabotage the arbitral proceedings by resorting to the courts for assistance or to seek intervention. As will be demonstrated in the second part of this article, although parties may have agreed to not have interference from national courts, judicial interference in arbitral proceedings may in some circumstances become a necessity and cannot be avoided.

2. Costs

Closely related to the concern of delay is the issue of costs. Indeed, Lord Woolf in his Interim and Final Reports on *Access to Justice*, noted that civil litigation is too expensive in that the costs often exceed the value of the claim.[12]

Proponents of arbitration may argue that arbitration is a speedy and relatively inexpensive method of dispute resolution. However, such a contention cannot possibly be sustained, particularly in the area of international commercial arbitration. The respondents to the 2013 International Arbitration Survey rightly expressed concerns relating to costs. Be that as it may, the study showed that the respondents did not rank costs amongst the most important factors when deciding whether to initiate arbitration proceedings. The findings were that costs are a concern, but on their own, are not usually a deterrent to initiating arbitration proceedings.[13]

It is common knowledge that in a major arbitration, the fees and expenses of the parties' legal advisers and expert witnesses may easily run into the millions of dollars. One case can be cited here to illustrate the point. The case

11. 2013 International Arbitration Survey, *supra* note 4, at 21.
12. Lord Woolf, *supra* note 8.
13. 2013 International Arbitration Survey, *supra* note 4, at 22.

is *VV v. W*,[14] a reported decision from Singapore. One of the issues before the High Court of Singapore was whether the awards on costs was in conflict with public policy in Singapore in that it offended against the principle of proportionality. The salient facts were that the plaintiffs claimed $927,000 Singapore dollars from the defendant in an arbitration. The defendants raised two defenses and ten counterclaims which amounted to $20,000,000 Singapore dollars. The arbitrator held, on an interim application, that he had no jurisdiction to award the defendant payment of any money as any cross-claim established by the defendant would only go to diminish the amount to be awarded to the plaintiffs if they were successful in their claim. Nonetheless, the defendant adduced evidence on its counterclaim during the main hearing. The arbitrator went on to dismiss the plaintiff's claim. On the question of costs, he granted the defendant costs of the arbitration, including the costs of its counterclaim, which amounted to $2,800,000 Singapore dollars.[15]

How does the issue of costs relate to the hypothesis in this article? Pro arbitration commentators will persist to argue that despite the high cost, arbitration is still a form of "one-stop shopping". The argument is that although the initial cost is not likely to be less than that of proceedings in court (and indeed may be more), the award of the arbitration is unlikely to be followed by a series of costly appeals to superior local courts. This argument presupposes that arbitral awards can easily be enforced and will not be challenged by the losing party. It is submitted that such a contention is flawed for the following reasons. First, while it is true that it is relatively easy for arbitral awards to be enforced as compared to court judgments, they can still be challenged. The fact that an award may not often be challenged does not detract from the fact that it may still be denied recognition or enforcement by the courts in the country where the award is sought to be enforced. This aspect is discussed in the ensuing sections. Second, although awards are usually not subject to appeals to superior courts like court proceedings, applications can still be made to the courts where the award is made to set aside or vary the award. Although the grounds for the setting aside of an award and for opposing the enforcement of an award are narrow, courts are nevertheless empowered to intervene and this adds to the costs of the entire arbitral process.

14. [2008] SGHC 11, [2008] 2 S.L.R. 929 (Sing.).

15. [2008] SGHC 11 at [11]-[14], [2008] 2 S.L.R. 929 at [11]-[14].

3. Neutrality and Flexibility

The neutrality and flexibility argument in favour of arbitration is indeed very credible. These attributes refer to both the neutrality of the forum and the neutral procedures which are said to be "flexible, efficient, and capable of being tailored to the needs of their particular dispute, without reference to the formalities and technicalities of procedural rules applicable in national (or foreign) courts".[16] According to Gary B. Born, "the parties' procedural autonomy and the arbitrators' procedural discretion figure centrally in most discussions of the arbitral process".[17] The element of neutrality also provides a sense of assurance to the disputing parties that fairness has been achieved. Such a sense of assurance may be lacking if a dispute were to be litigated in foreign courts.

Be that as it may, the advantage arising from the neutrality of the forum and the flexibility of the procedures are only enjoyed to the extent that parties cooperate in upholding the spirit of their prior agreement to arbitrate the dispute. The opportunities for parties to resort to their national courts and thus offsetting the advantages of neutrality and flexibility offered by arbitration are aplenty. If one of the parties reneges on his or her earlier promise to arbitrate by, for example, now raising an issue pertaining to the validity or enforceability of the arbitration agreement or alternatively refusing to perform an arbitral award, resort will have to be made to the court to consider an application for an order for a stay of proceedings or to enforce the award respectively.

4. Finality and Enforcement of Award

Subject to certain limits, an arbitral award will be final.[18] However, a judgment of a court of law will, as a general rule, be appealable to the superior courts. An arbitral award differs from a judgment of a court of law in another very important aspect. This concerns the issue of enforcement of awards and

16. Gary B. Born, International Commercial Arbitration 64-90 (2009).

17. Gary B. Born, *The Principle of Judicial Non-Interference in International Arbitral Proceedings*, 30(4) U. Pa. J. Int'l L. 999, 1000 (2009).

18. For a discussion on the doctrine of finality, *see*, for example, Blackaby, *supra* note 5, at 585-620; and Gary B. Born, International Arbitration: Law and Practice 303-367 (2012).

judgments. It is trite that international treaties that govern the enforcement of arbitral awards like the New York Convention has much greater acceptance internationally than treaties for the reciprocal enforcement of foreign judgments. This is indeed a valid and powerful argument in favour of arbitration. However, enforcement of arbitral awards can only be made by court actions, both nationally and internationally. When enforcement is challenged, the courts are once again required to intervene. This amply demonstrates the omnipresence of judicial control over arbitral proceedings and whatever benefits supposedly offered in arbitral proceedings will be diminished.

III. Situations When Intervention Become Necessary

In the foregoing sections, we have looked briefly at the arguments pertaining to the advantages of arbitration over litigation. The objective was to illustrate the point that since the opportunity for judicial control over arbitral proceedings will always be present, many of the perceived advantages of arbitration are merely just that. This section will elaborate on the situations when judicial control and court intervention become necessary. This will in turn show the impact of judicial control over arbitration.

It is generally accepted that the stages at which intervention by the courts may become necessary are (1) prior to or at the beginning of the arbitration, (2) during the arbitral proceedings, and (3) at the end of the arbitration.

The stages at which intervention may become necessary will now be discussed separately.

A. Prior to or at the Beginning of the Arbitration

The large-scale control that courts have over arbitral tribunals is evident even though there is an arbitration agreement and the arbitral proceedings have not even been commenced. Indeed, the principle is that courts should, and often do give effect to arbitration agreements. This principle is evident from Article II(3) of the New York Convention[19] and Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (herein-

19. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S.3.

after the Model Law)[20]. The former provides that:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

In almost identical terms, Article 8(1) of the Model Law provides that:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Thus, the fact remains that if a party reneges on an earlier promise to have a dispute resolved by arbitration and commences proceedings in a court of law, the courts will be called upon to give effect to the arbitration agreement. In hearing an application by a party seeking to enforce an arbitration agreement, the courts are required to apply certain established principles to determine whether an order for a stay of proceedings ought or ought not to be granted. Even before an action is commenced in breach of an arbitration agreement, an application may be made by a party anticipating the breach for an anti-suit injunction.[21] Alternatively, a party anticipating the enforcement of an arbitration agreement may apply for an anti-arbitration injunction.[22] These scenarios are not farfetched as courts are constantly required to intervene based on the above situations.

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20. UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. GAOR, 40th Sess., Supp. No. 17 (Annex I), U.N. Doc. A/40/17 (Annex I) (Dec. 11, 1985).

21. *See*, for example, the decision of the Supreme Court of the United Kingdom in Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP, [2013] UKSC 35.

22. For a discussion of these injunctions, *see* Hakeem Seriki, *Anti-Arbitration Injunctions and the English Courts: Judicial Interference or Judicial Protection?*, 16 Int'l Arb. L. Rev. 43 (2013).

Article II(3) of the New York Convention and Article 8(1) of the Model Law are not couched in absolute terms. A court may not grant an order for a stay of proceedings that is pending before it if it finds that the arbitration agreements are null and void, inoperative or incapable of being performed. Likewise, a court may also refuse to give effect to an arbitration agreement if it finds the subject matter as one that is not arbitrable or that to do so would go against the doctrine of public policy.[23] A detailed discussion of these exceptions is beyond the scope of this article. Suffice to say that public policy is a nebulous concept. Furthermore, what amounts to "null and void, inoperative or incapable of being performed" is a combination of question of facts and construction of the arbitration agreement.

Even if parties to an arbitration agreement agree to proceed to arbitration, intervention by a national court may also become necessary at the beginning of the arbitral process. This is because there may be circumstances requiring the court to intervene and assist in establishing the arbitral tribunal or to decide any challenge that may be made to the independence or impartiality of an arbitrator.

A party who is resolute in derailing an arbitral process, after having agreed to arbitrate, may, rightly or wrongly, challenge the jurisdiction of the arbitral tribunal. When a challenge is made, the final decision on jurisdiction rests with the national court at the seat of arbitration or the national court of the State or States in which recognition and enforcement of the judgment is sought.

B. During the Arbitral Proceedings

Unlike the situations before or at the beginning of the arbitral proceedings, it is rare for a national court to have to intervene once the arbitral tribunal has been constituted. This is true even if one of the parties fails or refuses to take part in the proceedings. However, the occasions for a national court to

23. *See*, for example, Section 3(2)(a) of the Hong Kong Arbitration Ordinance (Cap 609, L.N. 38/2011); Section 4(1) of the Malaysian Arbitration Act 2005 (Act No. 646/2005); and Section 11(1) of the Singapore International Arbitration Act (Act No. 23/1994). *See also* cases such as Larsen Oil and Gas Pte. Ltd. v. Petropod Ltd. (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore), [2011] SGCA 21, [2011] 3 S.L.R. 414 (Sing.); and Paquito Lima Buton v. Rainbow Joy Shipping Ltd., Inc., [2008] 4 H.K.C. 14 (H.K.).

intervene and exercise control over the arbitral process are still present.

An issue of central importance during arbitral proceedings relates to the powers of a tribunal to grant interim measures of relief. These powers are necessary to support the arbitral process. The Model Law and the UNCITRAL Arbitration Rules[24] recognize the need to have provisions empowering arbitral tribunals to provide interim measures of protection such as issuing orders to preserve evidence and protect assets.[25] However, Article 17J of the Model Law[26] demonstrates that:

> A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

Moreover, not all interim measures can be granted without the coercive powers of national courts. For example, in the taking of evidence, resort to the court may still be necessary. This is recognized by the Model Law. Article 27 provides that:

> The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

In addition, recognition and enforcement of interim measures can only be carried out with the assistance of the courts.[27] As for measures relating to the attendance of witnesses, an arbitral tribunal does not in general possess the

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24. UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/RES/31/98 (Dec. 15, 1976); UNCITRAL Arbitration Rules (as revised in 2010), G.A. Res. 65/22, U.N. GAOR, 65th Sess., Supp. No. 77, U.N. Doc. A/RES/65/22 (Dec. 6, 2010).
25. *See*, for example, Article 17 of the Model Law.
26. UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 61/33, U.N. GAOR, 61st Sess., Supp. No. 17 (Annex I), U.N. Doc. A/61/17 (Annex I) (Dec. 4, 2006).
27. *Id.* at Article 17H.

power to compel the attendance of relevant witnesses. Hence, resort to the courts will become necessary.

In the circumstances discussed above, the national courts may not be "interfering" with the arbitral process. Nevertheless, they are still required to be "involved" in the proceedings. This, to all intents and purposes, amounts to judicial control over arbitral proceedings.

C. At the End of the Arbitration

It has been noted earlier in the section concerning the finality and enforcement of an award that judicial control over arbitral proceedings may still be invoked even after an award has been made.

A losing party who refuses to perform an award made by an arbitral tribunal has the following option. She may challenge an award made by an arbitral tribunal by applying to the national court at the seat of arbitration to have the award modified or set aside.[28] The recent decision of the Singapore Court of Appeal further confirms that an unsuccessful party to an international arbitration award rendered in Singapore, in this case, a "domestic international award", has the option to choose whether to make an active challenge to an award or instead wait until the award is sought to be enforced in Singapore. The principle from *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV*[29] is that a losing party can choose to wait and invoke a passive remedy only in response to enforcement proceedings at the seat.[30]

In addition to mounting a challenge to an award at the national court at the seat of arbitration, the losing party may choose to wait until the winning party makes the first move to enforce the award in a foreign jurisdiction. It is at this stage that the losing party will resist the attempt to enforce the award at the national court at which the award is being enforced.[31]

Whichever option is exercised by the losing party is a matter of strategy. What is important is the fact that whichever strategy the losing party adopts,

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28. *See* Article 34 of the Model Law.
29. [2013] SGCA 57 (Sing.).
30. This judgment confirms Singapore's commitment to the philosophy of "choice of remedies" contained in the Model Law.
31. *See* Article V of the New York Convention and Article 36 of the Model Law.

resort to the courts is a prerequisite. This is where the courts wield considerable power over arbitral proceedings.

It is indeed the law that national courts must adhere to the principle of finality and enforce an arbitral award. This can be seen in Article III of the New York Convention and Article 35(1) of the Model Law. Be that as it may, it would be erroneous to assume that challenges to arbitral awards will inevitably fail and enforcement of awards will, as a matter of course, be a formality. The law as contained in Article III of the New York Convention and Article 35(1) of the Model Law is subject to exceptions.

The grounds to challenge arbitral awards, whether by way of an application to have an award modified or set aside or by way of an application to resist the enforcement of an award are clearly set out in the New York Convention,[32] the Model Law[33] and the various national arbitration legislation. The grounds set out in the Model Law are almost identical to those set out in the New York Convention. The various national arbitration legislation also enact similar grounds.[34] Under Article V(1)(a)-(e) of the New York Convention, the first five grounds are: (i) party incapacity or agreement invalidity, (ii) violation of due process, that is, lack of notice or fairness, (iii) arbitrator acting in excess of authority, (iv) irregularity in procedure or composition of arbitral tribunal, and (v) award not yet binding or has been set aside. Two additional grounds are stated in Article V(2)(a)-(b) of the same Convention and these are (i) the subject-matter of the dispute is not capable of settlement by arbitration, and (ii) contrary to public policy.

It is settled law that the grounds set out in the New York Convention and in the Model Law are exhaustive. They are the only grounds on which recognition and enforcement may be refused. While enforcement "may" be refused under any of the following seven grounds, neither the New York Convention nor the Model Law uses the term "must". Thus, it is permissive and not man-

32. *See* Article V of the New York Convention.

33. The grounds for refusing recognition and enforcement of awards are set out in Article 36 of the Model Law. As for the setting aside of an arbitral award, the grounds set out in Article 34 of the Model Law are similar to those in Article 36 but with slight differences in language.

34. *See*, for example, Sections 83 and 81 of the Hong Kong Arbitration Ordinance (Cap 609, L.N. 38/2011); Sections 31 and 24 of the Singapore International Arbitration Act (Ch. 143A, Act No. 23/1994); and Sections 39 and 37 of the Malaysian Arbitration Act 2005 (Act No. 646/2005).

datory to refuse enforcement. The enforcing court is not obliged to refuse enforcement even if grounds for refusal of recognition and enforcement of an award are proved to exist. In other words, enforcing court can still enforce the award.[35] Finally, the general principle is that the grounds should be applied restrictively. They have to be construed narrowly.[36]

Does this mean that the role played by national courts in this regard will be at best minimal or at worst insignificant? It is submitted that national courts play a crucial role when the grounds to set aside arbitral awards or to thwart enforcement of awards are invoked. The concept of public policy provides an interesting illustration for purposes of our discussion.

IV. Public Policy as a Judicial Control Device?

The concept of public policy may be thrust to the forefront when a party opposes an application to enforce an arbitration agreement or challenges the enforcement of an arbitral award. In relation to the former, the key issue is the concept of arbitrability. In other words, public policy is always available to parties in arbitration proceedings as a ground that can be invoked to resist an application to enforce an arbitration agreement or to thwart an application to enforce an arbitral award. The ambit of public policy in these contexts is not easily determinable. This is because public policy is a nebulous concept. Public policy is a variable thing and it must fluctuate with the circumstances of the time.[37] More importantly, the conception of public policy is a matter for the national courts. As was rightly noted by the High Court of Malaysia in *Banque Nasionale de Paris v. Wuan Swee May*, "the public policy in one country, even at the same point in time, may be different from that of another country".[38] In that same case, Abdul Hamid Mohamed J said that "the public

35. *See*, for example, Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 265 (1981); and Albert V. Dicey, Conflict of Laws 624 (J.H.C. Morris & Lawrence Collins eds., 12th ed. 1993). For an English decision, *see* China Agribusiness Development Corp. v. Balli Trading, [1998] 2 Lloyd's Rep. 76.

36. van den Berg, *supra* note 35, at 267-68.

37. Naylor Benzon & Co. Ltd. v. Krainische Gesellschaft, [1918] 1 K.B. 311, 342 (Eng.). *See also* The Aspinall Curzon Ltd. v. Khoo Teng Hock, [1991] 2 M.L.J. 484 (Malay.).

38. [2000] 3 M.L.J. 587, 597 (Malay.).

policy in the same country may be different at different times".[39]

In view of the very nature of the concept of public policy, it may be argued that it can be used as a "judicial control device" or an "escape route" by the courts to arrive at a certain result or outcome. Whether such labels are appropriate remains an open question. However, what is certain is that courts are always at liberty to adopt a liberal or narrow interpretation to this concept and this will have a profound effect on the way an issue is resolved or on the legislative policy in a given jurisdiction. Three pertinent points may be raised at this juncture.

First, national courts do not use the concept of public policy to strike down an arbitration agreement or refuse to recognize and enforce an arbitral award on their own motion. In order for the courts to have an opportunity to apply the doctrine and deliberate on the ambit of public policy, it must first be invoked by the parties embroiled in the arbitration process. Hence, even if public policy could indeed be considered as a judicial control device or an escape route by national courts to achieve a certain result favourable to one or the other party, the value of this concept as a "judicial control device" or an "escape route" by the courts is very much hampered.

Second, in the common law jurisdictions of Hong Kong, Singapore and Malaysia, the courts have been steadfast in holding that public policy is a narrow ground. An appraisal of the decisions from the courts in Hong Kong points to the fact that the courts have consistently adopted the conservative approach.[40] Likewise, the courts in Singapore have not demonstrated their willingness to move from a "less-interventionist" to a "more-interventionist" approach.[41] The courts in Malaysia have also shown their commitment to uphold foreign arbitral awards and interpreted the public policy exception narrowly.[42]

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39. *Id.*

40. *See*, for example, cases such as Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd., [1999] 2 H.K.C. 205, [1999] 1 H.K.L.R.D. 665 (C.F.A.) (H.K.); Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [2007] 5 H.K.C. 91 (C.A.), [2009] 2 H.K.C. 303 (C.F.A.) (H.K.); and Gao Haiyan v. Keeneye Holdings Ltd., [2011] 3 H.K.C. 157, [2012] 1 H.K.C. 335 (C.A.) (H.K.).

41. *See*, for example, cases such as VV v. W, [2008] SGHC 11, [2008] 2 S.L.R. 929 (Sing.); PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA, [2006] SGCA 41, [2007] 1 S.L.R. 597 (Sing.); and AJU v. AJT, [2011] SGCA 41, [2011] 4 S.L.R. 739 (Sing.).

42. *See*, for example, cases such as Open Type Joint Stock Co. Efirnoye ("EFKO") v. Alfa Trading Ltd., [2012] 1 M.L.J. 685 (Malay.); Infineon Technologies (M) Sdn Bhd v. Orisoft Technology Sdn Bhd, [2011] 7 M.L.J. 539 (Malay.); and Colliers International Property Consultants (USA) v. Colliers Jordan Lee and Jaafar (Malaysia), [2010] MLJU 650 (Malay.).

Be that as it may, the approach adopted by the national courts in these jurisdictions, while it is to be lauded, does not in any way render the concept of public policy as dead letter. So long as public policy remains as a ground in the international conventions and national legislation governing arbitration and so long as national courts continue to be called upon to make a ruling on this ground, public policy as a judicial control device will remain as a potent weapon in the hands of national courts.[43]

V. The Race to Promote Arbitration

The race to promote arbitration is evident in jurisdictions such as Hong Kong, Singapore and Malaysia. The governments in these jurisdictions play an active role in promoting arbitration. One way of supporting and promoting arbitration – and to make their jurisdictions as the arbitration destinations of choice – is to ensure that the laws on arbitration in these jurisdictions are simplified and modeled the Model Law. This is evident from the recent amendments made to the arbitration laws in these jurisdictions in recent years.

An incentive to mold arbitration laws based on the Model Law and to introduce further changes may be based on the desire to ensure that arbitration is placed on firmer footing – to underscore the legislative policy of, *inter alia*

(i) giving due effect to commercial decisions to enter into arbitration agreements;
(ii) giving primacy to the autonomy of arbitral proceedings; and
(iii) upholding the finality of arbitral awards.

In short, the arbitration legislation in these jurisdictions are strengthened to ensure certainty and healthy respect for the arbitral process.

For purposes of this article, it is submitted that despite the laudable efforts by, for example, of the government in these jurisdictions to promote and facilitate arbitration, the courts cannot be "sidelined". National courts

43. *See* the recent decision of the Indonesian Supreme Court in Astro Nusantara International BV v. PT Ayunda Prima Mitra, available at http://putusan.mahkamahagung.go.id/putusan/73d70652df9f8dd8f1dc240f600650d3. In this case, the public policy ground was successfully raised to thwart the enforcement of an international arbitral award in Indonesia.

will continue to play a very significant role in the arbitral process. This is chiefly based on the following grounds. First, an agreement to refer a dispute to arbitration does not and cannot oust the jurisdiction of the courts. Even if parties to an arbitral process do not challenge, for example, the validity of an arbitration clause or an arbitral award, national courts may be called upon to exercise supervisory jurisdiction over the entire arbitral proceedings.[44]

Second, the reality is that courts are often "forced" to intervene. A typical scenario is when a party to an arbitration agreement resists an attempt to enforce an arbitration agreement by opposing an application by the other party to the agreement for a stay of proceedings or applies to the court to disallow the enforcement of a foreign arbitral award on the ground of public policy. In both of these situations, the courts will be required to consider the public policy exception and how the courts interpret this doctrine will have an immense impact on the legislative intent and policy of promoting arbitration.[45]

VI. Private System of Justice and Limits upon this Freedom of Choice

We have seen in the foregoing sections that parties in commercial transactions enjoy the freedom of deciding for themselves which mechanism of dispute resolution they should use. We have also seen that states also adopt many measures to promote arbitration and encourage parties to opt for arbitration over litigation. Despite the availability of such a private system of justice, there are limits upon this freedom of choice and tensions between the private and public dichotomy become evident. As noted by the authors of *Redfern and Hunter on International Arbitration*, "a party who agrees to

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44. *See*, for example, Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd., [1999] 2 H.K.C. 205, [1999] 1 H.K.L.R.D. 665 (C.F.A.) (H.K.).

45. Be that as it may, the discretion of the courts may be curbed or controlled to a certain extent. For example, in the case of Australia, Section 39(2) of the International Arbitration Act (Act No. 136/1974) requires the court to have regard to (a) the objects of the Act, and (b) the fact that: (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes, and (ii) awards are intended to provide certainty and finality when considering the public policy ground for purposes of recognition of foreign awards under Section 8 of the said Act. For a discussion of the above, *see* the judgment of the Federal Court of Australia in Uganda Telecom Ltd. v. Hi-Tech Telecom Pty. Ltd., [2011] 277 ALR 415.

refer disputes to arbitration chooses a private system of justice and this, in itself, raises issues of public policy."[46]

It must be accepted that the principle of party autonomy is not absolute. Regardless of what may have been agreed between the parties to a contract and regardless of how desirous the policy makers or legislators in a given jurisdiction may be in their attempt to ensure that arbitration is entrenched as a mechanism for dispute resolution, there are matters that the law would regard as not arbitrable. This rule itself is premised on the public policy that the larger public interest should prevail over the interest of the individual parties to a contact. In short, the policy of encouraging arbitration as encapsulated in arbitration statutes is subject to another competing policy consideration, namely that matters which have public interest elements are not arbitrable. It is based on this competing policy consideration that the law regards that only the courts can be entrusted to ensure that the interests of the public at large are accorded due protection and hence only the courts should exercise jurisdiction over such matters.

When public policy is raised as a ground to thwart an attempt to enforce a foreign arbitral award, courts have to strike a balance between the following two competing interests. On the one hand, there is a need to support the principle of international comity and finality of an award. On the other hand, courts are also required to give effect to their own country's own notions of morality and justice. The role that courts play and the approach that they adopt concerning this area of arbitration law is significant. The courts can adopt a liberal or restrictive interpretation to the notion of public policy when considering applications to recognize and enforce foreign arbitral awards. If the courts were to adopt the "less interventionist" approach, this will give credence to the principles of international comity and finality of an award and thus will augur well for the policy of promoting arbitration. On the other hand, if the courts were to espouse the "more interventionist" approach, this will pose a serious challenge to the principles of international comity and finality of an award and accordingly be an obstacle to the legislative scheme to promote arbitration.

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46. Blackaby, *supra* note 5, at 438.

VII. Judicialisation of Arbitration

Users of arbitration have rightly raised concerns relating to one negative development. The concerns here relate to what is known or referred to as the judicialisation of arbitration. These concerns are real. The findings in the 2013 International Arbitration Survey – 'Corporate Choices in International Arbitration: Industry Perspective' revealed as follows:

> A recurrent theme in interviews with respondents from various sectors was the risk of "judicialisation" of arbitration. Interviewees expressed concern about their perception that the process of arbitration has become more sophisticated and more "regulated", with "control" over the process moving towards law firms – and away from the actual users of this process. Several interviewees linked concerns over increases in the costs of arbitration with this encroaching judicialisation.[47]

This trend is no longer confined to any particular jurisdiction but across jurisdictions.[48] It is obvious that such a tendency, if left unabated, will further exacerbate the predicament relating to the issue of judicial control of arbitral proceedings.

VIII. Conclusion

As noted in the opening paragraph in this article, the underlying thesis of this article is based on the notion that national courts can exist and function without the assistance, control and interference of arbitral tribunals but arbitral tribunals are always subject to the ubiquitous clutches of judicial control. It is not the suggestion here that courts are practically malicious meddlers in the arbitration process. There is no evidence to suggest that there is widespread misuse of judicial resources by parties that have opted for arbitration. Nor is it the suggestion here that parties embroiled in an arbitration process are constantly required to approach the courts to intervene or to seek assis-

47. 2013 International Arbitration Survey, *supra* note 4, at 22.

48. Blackaby, *supra* note 5, at 40-41.

tance. In relation to the issue of enforcement of awards, available statistics suggest that most arbitral awards are in fact carried out voluntarily, that is to say, without the need for enforcement proceedings in national courts. In a survey conducted by the School of International Arbitration at Queen Mary, University of London in 2008, the findings were that only in 11% of cases did participants need to proceed to enforce an award. In those cases, less than 20% of the enforcing parties encountered difficulties in enforcement.[49]

Despite the above realities, one cannot escape from the veracity that arbitral processes cannot be totally free of court involvement. As the arbitration law provisions permit court intervention, albeit in very limited circumstances, this will mean that arbitral processes are not immune from typical abuses and antics experienced in litigation, if one of the parties were to embark on such a course.

In referring to the relationship between courts and arbitrators, Lord Mustill likened this relationship to a relay race.[50] This is indeed true if parties agree to have their disputes settled by arbitration. The race cannot be completed without the assistance or intervention by the courts. Even if the parties were to cooperate and shun any form of intervention by the courts, the assistance by the courts may still become inevitable. One such example would be if an arbitrator becomes incapacitated and a replacement has to be appointed. Although the court in such an instance may be exercising its supervisory jurisdiction, its presence is nevertheless still pervasive. However, if parties choose to litigate instead of opting for arbitration, the courts will not be involved in a relay race but instead the race may well be an individual event.

Efforts to promote arbitration by the legislature across many jurisdictions around the world may indeed prove to be a success. The pro-arbitration approach adopted by the courts in many jurisdictions may further help the cause in making arbitration the dispute resolution mechanism of choice. However, because of the very nature of the arbitral process, judicial assistance, control and intervention in arbitral proceedings can never be done away with.

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49. *See*, for example, the 2008 International Arbitration Survey – 'Corporate Attitudes and Practices', at pp. 8 and 10.

50. Lord Mustill, Comments and Conclusions, *in* Conservatory Provisional Measures in International Arbitration 118 (1993).

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