THE LAW SOCIETY OF SINGAPORE

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2 April 2018

Law Reform Committee
Attn: Law Reform Co-ordinator
Singapore Academy of Law
1 Supreme Court Lane, Level 6
Singapore 178879

By Email Only
lawreform@sal.org.sg

Dear Dr. Tsen-Ta Lee,

CONSULTATION PAPER ON CERTAIN ISSUES CONCERNING ARBITRATION-RELATED COURT PROCEEDINGS

1. We refer to the Consultation Paper on Certain Issues concerning Arbitration-Related Court Proceedings ('Consultation Paper') issued by the Law Reform Committee of the Singapore Academy of Law ('SAL') in January 2018.

2. The Consultation Paper was first considered by the Law Society's Alternative Dispute Resolution Committee 2018 ('ADR Committee'). The ADR Committee's views have been set out in Annex A.

3. The Council of the Law Society had thereafter considered the Consultation Paper and the ADR Committee's views. The Law Society's views have been set out in Annex B.

4. We are grateful to the SAL for giving the Law Society the opportunity to deliberate on the novel proposals set out in the Consultation Paper.

Yours faithfully,

Gregory Vijayendran
President, The Law Society of Singapore

Annex A

The Alternative Dispute Resolution Committee's Response on the Consultation Paper on Certain Issues concerning Arbitration-Related Court Proceedings

1. In January 2018, the Law Reform Committee of the Singapore Academy of Law issued a Consultation Paper on Certain Issues concerning Arbitration-Related Court Proceedings ('Consultation Paper') seeking feedback from the arbitration community and users of arbitration processes in Singapore.

2. Broadly, the Consultation Paper proposes two reforms:

   (a) That the Singapore High Court should be awarding costs to the successful party on an indemnity basis, save where the unsuccessful party is able to provide compelling reasons otherwise, in the following proceedings:
      (i) Unsuccessful proceedings to set aside an arbitration award; and
      (ii) Proceedings to enforce an arbitration award where the respondent is unsuccessful in resisting enforcement

   (the 'First Proposal');

   and

   (b) That proceedings to enforce an arbitration award, where contested, be fixed at first instance before a High Court Judge instead of an Assistant Registrar

   (the 'Second Proposal')

3. The Alternative Dispute Resolution ('ADR') Committee 2018 ('ADR Committee') of the Law Society has reviewed the Consultation Paper and considered the matters raised therein. In general, the ADR Committee is in support of both the reforms being considered.

First Proposal

4. The ADR Committee considers that the following factors militate in favour of the First Proposal:

   (a) Discouraging unmeritorious challenges to enforcement and setting-aside applications

   The ADR Committee considers that the proposed reform would go some way to discouraging enforcement challenges and setting-aside applications which are no more than an attempt to delay or impede payment. Such applications are inconsistent with the general tenor of the legislative grounds for setting aside and resisting enforcement under the International Arbitration Act and Arbitration Act, which are narrow in scope.

Additionally, the ADR Committee does not consider that the First Proposal will invariably undermine the "losing" party's "access to justice" by having his/her day in court or necessarily discourage legitimate recourse to the court's supervisory jurisdiction in appropriate cases. While the grounds available to set aside or resist enforcement of an award under the International Arbitration Act and Arbitration Act are inherently limited, parties which choose to resolve their disputes by arbitration are aware that this is the case. The ADR Committee considers that parties should only seek to avail themselves of these grounds in cases where they have genuine cause to be aggrieved, and not be quick to challenge an award for purely tactical reasons. In any case, the logical result of the First Proposal is that the Court will retain the discretion to award costs on a standard basis where the unsuccessful party can provide compelling reasons for it to do so – i.e. in the event of an application which is bona fide and/or clearly has some merit.

(b) Encouraging timely compliance with arbitral awards

Regular resort to unmeritorious challenges to enforcement or setting-aside proceedings can also erode the reputation of arbitration amongst end-users which (at least in part) is based on the efficiency and finality of the arbitral process. The proposed reform would encourage timely compliance with arbitral awards and provide additional integrity to the provision typically found in arbitral rules that an award is final and binding from the date it is made (see, for example, Rule 32.11 of the SIAC Rules 2016).

The Committee tends to agree with the views expressed by Reyes J in A v R [2009] 3 HKLRD 389 (set out at Paragraph 10 of the Consultation Paper) where he states that challenges to an award should be an "exceptional and high-risk strategy" rather than a standard obstacle in the path of the successful party in arbitration.

(c) Equitable allocation of risks and costs

A party which obtains an arbitral award in its favour should expect the award to be complied with from the date it is made in accordance with the contractual agreement between the parties. The decision whether to resist enforcement or apply to set aside an award lies in the hands of the "losing" party, and when such an application is unsuccessful, the Committee considers that the successful party should not be penalised. This is currently what happens when a successful party is required to subsidise the costs of the unsuccessful application on the basis of a standard costs award.

(d) The standard of the costs order and parties' tactical considerations

The ADR Committee has assessed whether the First Proposal may change the psyche of disputants towards arbitration and encourage a "kitchen sink approach", which might render arbitration an even more costly and lengthy ADR process.

The ADR Committee considers that the standard of the costs order in setting aside or enforcement proceedings in court would, in reality, be a factor which is unlikely to have a significant influence on the tactics adopted by the parties in arbitration proceedings. At the time of contesting the merits, the prospect of challenge proceedings (and any costs order in such proceedings) is still – generally speaking – sufficiently remote that it will not weigh heavily on the parties' tactical considerations.

Second Proposal

5. The ADR Committee considers that if this is a question of a change in the case management policy within the Supreme Court Registry which streamlines the setting-aside proceedings and contested enforcement proceedings to eventually save time and costs for parties, the ADR Committee is in support of the Second Proposal.

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Annex B

The Law Society's Response on the Consultation Paper on Certain Issues concerning Arbitration-Related Court Proceedings

INTRODUCTION

1. In January 2018, the Law Reform Committee of the Singapore Academy of Law ("Law Reform Committee") issued a Consultation Paper on Certain Issues concerning Arbitration-Related Court Proceedings ("Consultation Paper") seeking feedback from the arbitration community and users of arbitration processes in Singapore

2. Broadly, the Consultation Paper proposes two reforms:

   (a) That the Singapore High Court should be awarding costs to the successful party on an indemnity basis, save where the unsuccessful party is able to provide compelling reasons otherwise, in the following proceedings:
   (i) Unsuccessful proceedings to set aside an arbitration award; and
   (ii) Proceedings to enforce an arbitration award where the respondent is unsuccessful in resisting enforcement

   ("Proposal 1");

   and

   (b) That proceedings to enforce an arbitration award, where contested, be fixed at first instance before a High Court Judge instead of an Assistant Registrar

   ("Proposal 2")

3. The Consultation Paper was deliberated extensively by arbitration practitioners within the Council of the Law Society ("Council") and the Alternative Dispute Resolution Committee 2018.

4. In light of the diverse views received from the arbitration practitioners, particularly in relation to Proposal 1, the Council has resolved to put forward the different views for the Law Reform Committee's consideration.

VIEWS IN RELATION TO PROPOSAL 1

5. The views received in relation to Proposal 1 have been summarised into two categories of "FOR" and "AGAINST".

AGAINST

6. In Singapore, indemnity costs have been ordered as a matter of course in cases where a party, in breach of an arbitration agreement, has initiated court proceedings but such proceedings were stayed in favour of arbitration. Some arbitration practitioners however consider that there is a conceptual distinction between breaches of an arbitration agreement on one hand, and challenging or resisting enforcement of an arbitral award on the other.

7. Where the commencement of court proceedings in breach of an arbitration agreement is concerned, as pointed out in paragraph 12 of the Consultation Paper, the case of *Tjong Very Sumito v Antig Investments*[1] ("*Tjong Very Sumito*") observed that:

> "*The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court*" [emphasis added].

8. The arbitration practitioners suggest that the observations in *Tjong Very Sumito* are in line with the cardinal principle that costs on an indemnity basis, as opposed to the standard basis, should only be ordered in a special case or where there are exceptional circumstances which justify such an order[2]. This principle was recently restated in the Singapore High Court decision of *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd*[3] ("*Airtrust*"), which set out a non-exhaustive list of conduct which may provide proper reasons for the Court to order indemnity costs:

   (a) where the action is brought in bad faith, as a means of oppression or for other improper purposes;
   (b) where the action is speculative, hypothetical or clearly without basis;
   (c) where a party's conduct in the course of proceedings is dishonest, abusive or improper; and
   (d) where the action amounts to wasteful or duplicative litigation or is otherwise an abuse of process.

9. Therefore, where the Court considers the question of costs in the exercise of the its discretion, the focus is on the "*unreasonableness of the party's conduct*", where "*[a]s a baseline enquiry, it may be useful for a Court to ask itself whether the party's conduct was so unreasonable as to justify an award of indemnity costs*"[4]. In addition, there is "*in general a penal element to the ordering of indemnity costs; a stigma attaches to the making of such an order*"[5].

10. However, challenging or resisting enforcement of an arbitral award may not, by itself, constitute such behaviour as to warrant a default award of indemnity costs. An application to challenge or resist enforcement of an award could be said to be merely an invocation of statutory and/or treaty rights expressly set out in the provisions of the *Arbitration Act*[6] ("AA"), and the *International Arbitration Act*[7] ("IAA"), which

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[1] [2008] SGHC 202
[2] For example, *Lee Kuan Yew v Vinocur John and others* [1996] 1 SLR(R) 840 at [30]; *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 at [32]
[3] [2016] 5 SLR 103
[4] *Airtrust* at [50]
[5] *Ibid* at [53]
[6] Cap. 10 (Rev. Ed. 2002)
[7] Cap. 143A (Rev. Ed. 2002)

incorporates the *Model Law*[8] and the *New York Convention*[9]. All four instruments contain a right to challenge or resist enforcement. It is arguable that merely invoking one's right should not be said to be conduct deserving of indemnity costs.

11. Where, however, the basis for the challenge is so unreasonable or brought in bad faith, the court has discretion to award indemnity costs. Additional powers include personal costs orders against solicitors[10] (see a recent example in *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal*[11] where personal costs orders were so ordered against counsel in his conduct of arbitration-related court proceedings).

12. Apart from the risk of conflating the important conceptual distinction between breaches of an arbitration agreement and merely challenging an award or resisting its enforcement, the case for changing the default at this stage is unclear. Although Hong Kong has taken the approach suggested by the Committee, perhaps some caution should be urged as no other country has taken the same position. Further, there is at present no empirical data to show whether Hong Kong has become more favoured as a seat of arbitration or that "unmeritorious applications" have declined as a result of their practice.

13. Moreover, there appears to be little support in the drafting history of the *Model Law* or the *New York Convention* for the view that challenges should always be regarded as an "exceptional and high-risk strategy" (as per Reyes J in *A v R*[12]). It is true that the grounds for challenge were limited as a means of striking an appropriate balance between the finality of the award and the need to ensure minimum standards. However, that may not be the same as saying that invoking these grounds should always be viewed sceptically. In fact, two grounds of challenge – these being arbitrability and public policy – are grounds which are regarded as so fundamental that the court may itself raise *sua sponte*. The IAA also reiterates certain grounds of challenge under s. 24. The reasoning in the *A v R* judgment that if parties agree to arbitration, then any challenge in court must be regarded as exceptional is an oft-touted line, but the international instruments do seem clear that while an award is intended to be final and binding particularly as to merits, a party is entitled to challenge an award under circumscribed circumstances, and the award may be set aside or refused enforced so long as the challenger can bring its case within the prescribed grounds.

14. Indeed, on one view, parties may agree to arbitration *precisely* because they have the safeguard of curial review, albeit limited. Recent conversations with users and corporates reveal increasing dissatisfaction with arbitration but little alternative for transnational transactions. Even seasoned practitioners and judges have argued that curial review is essential to the proper functioning of international arbitration and it is not antithetical to it.

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[8] *Ibid*, First Schedule
[9] *Ibid*, Second Schedule
[10] O 59 r 8 of the *Rules of Court (Cap. 332, R. 5, 2014 Rev. Ed.)*
[11] [2018] 1 SLR 1
[12] A v R (Arbitration: Enforcement) [2009] 3 HKLRD 389; cited in paragraph 10 of the Consultation Paper

15. In a notable speech by Mr Sundaresh Menon, SC (currently The Honourable the Chief Justice of Singapore) at the ICCA Congress in 2012, His Honour noted the growing criticism of the arbitral process and of arbitrators, and pointed out the moral hazards of leaving the system unchecked. His Honour also noted "*a modest return to greater judicial oversight of arbitration*" in order to "*ensure the integrity of the decision-making process*" and to ensure the tribunal has properly assumed jurisdiction.[13] In *AKN v ALC*[14], the Court of Appeal held that while parties do not have a right to a correct decision from a tribunal that can be vindicated by the courts, they do 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.*"

16. The right to due process and to ensure that a tribunal has properly assumed jurisdiction (which, together with public policy,[15] form the bases of the prescribed grounds for challenge) distinguishes a challenge from a breach of an arbitration agreement, which a party is plainly *and necessarily* disentitled to do. A party is not *necessarily* wrong to bring a challenge, even if the challenge may fail. Therefore, changing the default in relation to the award of costs is not consistent with the structure of how the arbitral process and courts interact.

17. While it is true that the choice of whether to challenge an award or resist enforcement lies with the award-debtor, it could be said that this is no different from, for example, a party appealing a high court judgment or resisting enforcement of a judgment, or even taking out a writ to begin with. No other aspect of civil procedure automatically assigns indemnity costs as the default even when the decision to commence a particular process lies in the hands of the other party, and where the other party is unsuccessful.

18. In any event, it is doubtful if awarding indemnity costs will achieve significant practical result. If the arbitral award in question is of a sufficiently high value, the threat of cost sanctions in the form of an award of indemnity costs would not deter parties from making an application to challenge or resist enforcement of such award, regardless of whether the application is with or without merit. In this regard, Proposal 1 may not serve its intended purpose.

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[13] The speech may be found at http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf

[14] [2015] 3 SLR 48

[15] Although this ground is often invoked improperly by challengers, it could become a useful basis for the courts to scrutinise ethical behaviour by counsel and tribunal members. The growing concern over ethical conduct of those involved in arbitration was also noted in The Honourable the Chief Justice's speech, and has been echoed since. See also, Christopher Lau, "May award setting aside or annulment proceedings help limit the employment of guerrilla tactics?" 2 *Transnational Dispute Management* (2010) ("So an award obtained by a party found to have engaged in spying, wiretapping, threats of violence, stalking, blackmailing or kidnapping is likely to be set aside for having violated natural justice and/or public policy.")

FOR

19. Some arbitration practitioners, however, agree with the views expressed by Reyes J in *A v R* (cited in paragraph 10 of the Consultation Paper) that challenges to an award should be an "*exceptional and high-risk strategy*" rather than a standard obstacle in the path of the successful party in arbitration.

20. In particular, it was felt that a party which obtains an arbitral award in its favour should expect the award to be complied with timeously from the date it is made in accordance with the contractual agreement between the parties. This is in line with provisions typically found in arbitral rules that an award is final and binding from the date it is made[16]. Since the decision whether to resist enforcement or apply to set aside an award lies in the hands of the "losing party", when the "losing party" makes the decision and is unsuccessful in its applications under the AA or IAA, the financial risk of engaging with such a litigation strategy should therefore lie with the "losing party" in the form of an indemnity costs order. Otherwise, under the current position, it can be said that the "winning party" is being penalised, by virtue of the "winning party" being required to 'subsidise' the costs of the "losing party's" unsuccessful application on the basis of a standard costs order.

21. Nevertheless, even these arbitration practitioners suggest that perhaps more evidence of the effects of awarding indemnity costs in Hong Kong should be gathered and studied, particularly as it remains the only country with this practice at the moment.

VIEWS IN RELATION TO PROPOSAL 2

22. The arbitration practitioners consider that if Proposal 2 is a question of a change in the case management policy within the Supreme Court Registry which streamlines the setting-aside proceedings and contested enforcement proceedings to eventually save time and costs for parties, they are in support of Proposal 2. However, there may be cases where the enforcement is not contested or not likely to be, so it need not be heard by a Judge. Perhaps one solution might be to simply change the default – so such applications will be heard before a Judge save where parties have indicated or consented otherwise.

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[16] See, for example, Rule 32.11 of the SIAC Rules 2016