Judicial Attitudes towards Arbitration and Mediation in Singapore

The Honourable the Chief Justice Sundaresh Menon*

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I. INTRODUCTION

1. Allow me to begin by thanking the Right Honourable Chief Justice of Malaysia, Tun Arifin bin Zakaria, for having invited me to address you this evening. It is truly a pleasure for me to be here at His Lordship’s invitation and earlier today, I had the great honour and pleasure of visiting and admiring the magnificent Istana Kehakiman in Putrajaya.

2. I have been asked, this evening, to address you on a topic that has been the subject of much discourse and continuing debate, namely, judicial attitudes to arbitration and mediation with particular reference to our experience in Singapore. It is useful to consider the role, relationship and relevance of the courts to these processes, which in fact have as their primary mission to divert the resolution of disputes away from the courts. This raises the question of just what the judicial function is. The judicial function can be seen from two perspectives. The first is its core function of resolving disputes. From this viewpoint, the focus is on outcomes that are achieved for private disputants

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*I am very grateful to my colleague, Ms Germaine Boey, Justices’ Law Clerk of the Supreme Court of Singapore, for her considerable assistance in the research and preparation of this lecture.
seeking resolution of their differences. There is however a second, and equally, if not even more important, perspective. The courts define, explicate and develop the law by declaring the common law and by their authoritative interpretation of the Constitution and statutes of the land. Where the written laws of the land furnish a legislative framework for law and order, in many jurisdictions, including ours, this is supplemented in important areas by judge-made law including in contract, tort, administrative law and equity amongst others. Moreover, even in the realm of legislation, it is left to the courts to fill in the interstitial gaps between the standards and rules articulated by the legislature and their application in the concrete situations that concern the subjects of the State.

3. The source of judicial power is not in the agreement of the disputants, but in the judiciary being conferred the power of the State to decide controversies between its people; and between the State and its people. In a constitutional model of government which adheres to the principle of separation of powers, as is the case with both our jurisdictions, the judiciary is one of the three arms of government, serving as an independent check on the exercise of legislative and executive power. Thus, the judicial function is concerned with more than just dispute resolution; it lays down the boundaries on permissible and impermissible conduct; provides remedies; enforces the law between the people and the State; gives authoritative interpretations of the written laws; and develops important areas of the common law. In the words of Professor Owen

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1 Huddart Parker Pty Ltd v Moorehead (1908-1909) 8 CLR 330
3 Chan CJ at para 2
Fiss, the different facets of this second aspect of the judicial function are concerned with “enforcing and thus safeguarding the integrity of the existing public norms or by supplying new norms”.

4. Seen in this light, it will become readily apparent that arbitration and mediation in fact partner the courts in the first dispute resolution aspect of the judicial function. In this aspect, there has and must always be room for party autonomy. To be sure, in earlier times, the courts had been suspicious of the ability of private tribunals to dispense justice with integrity. But this is by no means a truism; nor is it even widely true that private justice lacks integrity. There are numerous examples of mercantile bodies being entrusted by the mercantile community with the function of the resolution of disputes. As early as the 18th and 19th centuries, commercial arbitration was established under the auspices of trade associations, mercantile guilds, stock exchanges and chambers of commerce, and the emphasis was on the settlement of disputes according to trade usages and practices. In 1919, the first international arbitral institution, the International Chamber of Commerce, was set up to provide assistance in conducting arbitration and conciliation; and this was followed by the establishment of the Court of Arbitration in 1923 at the ICC’s headquarters in Paris. Today, arbitral institutions around the world enjoy much success with an ever-growing number of new filings emanating from a global pool of users. Indeed, it has been said that the complexion of the arbitral process has been

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4 Owen M Fiss, Foreword: The Forms of Justice (1979) 93 Harvard Law Review 1 at p 30
undergoing a process of transformation from an “informal ‘merchant’s justice’ towards professionalism, legalism and proceduralization”.  

5. Today, having regard to the way in and degree to which arbitration has developed as a profession and as an important adjudicatory process for the resolution of transnational commercial and mercantile disputes, there can no longer be any option for the courts but to adopt a sensible attitude of cooperation and collaboration with arbitration. Through the establishment of a widely accepted framework of international norms and instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (that we all know as the New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration, a consensus has emerged such that the prevailing mainstream philosophy is to accord a substantial degree of judicial deference to the outcomes and processes of international arbitration in recognition of the autonomy of the parties to choose how they will resolve their disputes and differences.

6. The relationship between the courts and mediation is equally interesting even as it is evolving. The rise of court-annexed mediation is accounted for by the recognition that finite judicial resources have to be carefully and effectively

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6 *Arbitration and Mediation in International Business* at p 32
9 Sundaresh Menon, SC, “International Arbitration: the Coming of a New Age for Asia (and Elsewhere)” (ICCA Congress 2012, Opening Plenary Session) (“ICCA Speech”) at paras 4 and 5
managed and applied, if we are to ensure that those disputes which must be resolved in the courts can be so resolved, fairly and expeditiously.

7. In Singapore, the Subordinate Courts have taken impressive strides in incorporating mediation and other methods of dispute resolution as part of the court system to ensure fair and affordable justice is dispensed. This is especially important because it is at the Subordinate Courts that the vast majority of Singaporeans and residents encounter the law.\(^\text{10}\) If I might highlight just a few of the key initiatives:

   a. First, the Court Mediation Centre, now known as the Primary Dispute Resolution Centre or the PDRC, is a judiciary-led initiative.\(^\text{11}\) Set up in 1994,\(^\text{12}\) the Centre provides court-based mediation, and early neutral evaluation for motor accident cases that do not involve personal injuries, and since May 2011, for personal injury matters as well.\(^\text{13}\) These sessions are conducted by District Judges who are trained in the conduct of judicial mediation.\(^\text{14}\)

   b. Second, in 2011, to encourage greater use of ADR processes, we introduced the option of neutral evaluation for all civil cases\(^\text{15}\) alongside the existing options of mediation in the PDRC and arbitration under the

\(^{10}\) Response by Chief Justice Sundaresh Menon at the Opening of Legal Year 2013 and Welcome Reference for the Chief Justice (“OLY Address”) at para 13

\(^{11}\) An Asian Perspective on Mediation (Joel Lee and Teh Hwee Hwee gen eds) (Academy Publishing, 2009) (“Lee and Teh”) at para 1.7

\(^{12}\) Lee and Teh at para 1.7; http://app.subcourts.gov.sg/civil/page.aspx?pageid=3779


\(^{14}\) Associate Mediators may also conduct mediation at the PDRC: see para 25F(7) of the Subordinate Courts Practice Directions

\(^{15}\) This refers to all civil cases other than motor accident and personal injury matters: see para 25A(1) of the Subordinate Courts Practice Directions
Law Society’s Arbitration Scheme.\textsuperscript{16} In neutral evaluation, a third party neutral makes a non-binding assessment of the merits of the case so that the parties would have an idea of the prospects of success at trial and in that light consider the possibility of settlement. This is in contrast to mediation which is a form of facilitated negotiation that does not focus on legal rights but on achieving solutions that address the parties’ interests.\textsuperscript{17}

c. And third, in 2012, the Practice Directions were amended to provide that all civil disputes must be considered for ADR on pain of the parties facing possible costs sanctions if they decline ADR despite a determination by the judge managing the pre-trial processes that the dispute is suitable for ADR.\textsuperscript{18}

8. There is an especially strong judicial emphasis on mediation as the primary process for the resolution of family disputes. The adversarial system of justice can be extremely damaging to familial relationships or at least of what is left of them and this can have significant downstream consequences in that it makes it more difficult and hence unlikely that parties will co-operate in adhering to these obligations which will continue even after the divorce. Early this year, I


\textsuperscript{17} This is what has been defined as a “facilitative” form of mediation, as opposed to a “directive” or “evaluative” form of mediation where the settlement judge discusses substantive issues in a dispute and assesses the merits of the case in the facilitation of a settlement. The mode of mediation at the PDRC has been described by some as “evaluative” rather than “facilitative” (Lee and Teh at para 1.23), but the focus of mediation is still on achieving a settlement rather than assessing the merits of the case unlike in neutral evaluation (see http://app.subcourts.gov.sg/civil/page.aspx?pageid=54106).

\textsuperscript{18} Notice on the Practice Directions Amendment No 2 of 2012 accessible at <http://app.subcourts.gov.sg/Data/Files/File/cdr/PD%20Amendment%20No%202%20of%202012%20May2012.pdf>; para 25A(9) of the Subordinate Courts Practice Directions
announced that an inter-agency group, the Committee for Family Justice, would be established to consider a radical shift towards a much greater use of counselling and mediation in family disputes. The Committee will take its recommendations to consultation in the coming months. We envisage that a newly-established Family Justice Court will develop customised techniques to address family disputes. Already, a differentiated case management system has been introduced under which parties must show that they have made genuine attempts to resolve the dispute out of court or that the dispute is not suited for dispute resolution other than by litigation, particularly in cases where children are involved.\(^{19}\) This year, we also introduced mandatory mediation and counselling in cases where parents with children under 14 years of age file for divorce.\(^{20}\)

9. In Singapore, the courts also collaborate closely with the Singapore Mediation Centre and other stakeholders in promoting the consensual resolution of disputes. The Subordinate Courts have embarked on the “Primary Justice Project” which will institutionalise the practice of referring disputes to ADR before proceedings have been filed in court.\(^{21}\) Plans are also under way to collaborate with the Law Society of Singapore to establish a scheme of paid, basic legal services that are geared towards settlement, with lawyers providing

\(^{19}\) Committee for Family Justice Concept Paper for the Vision of the New family Justice System at para 12; also note the Child Focused Resolution Centre which is an extension of the dispute resolution services at the Family Court and provides dedicated mandatory counselling and mediation for divorcing parents to focus on the welfare of their children during legal proceedings.

\(^{20}\) Subordinate Courts of Singapore, Practice Directions, Notice on Amendment No 5 of 2013, accessible at <http://app.subcourts.gov.sg/Data/Files/PD%20Amendment%20No%205%20of%202013.pdf>

\(^{21}\) Subordinate Courts Workplan 2013, Keynote Address by the Honourable the Chief Justice Sundaresh Menon (“Sub Courts Workplan Speech”) at para 18
basic legal advice and facilitation of settlement negotiations at a fixed fee.\textsuperscript{22} And as for cases at the High Court level, judges and registrars managing the pre-trial processes are expected to assess the suitability of a dispute for mediation at an early stage and where it is appropriate, the parties are encouraged to consider mediation or neutral evaluation, before proceeding further along the litigation process. With the parties’ consent, cases that are considered appropriate for mediation may be referred to the Singapore Mediation Centre. As the Singapore High Court moves towards a modified docket system of litigation, there are opportunities to augment these efforts. We are currently considering how other processes, such as early neutral evaluation by judges or retired judges, may be integrated into the litigation process.

10. The increasing use of mediation beyond inter-personal disputes rests on two primary drivers: party autonomy and the saving of costs. Parties in mediation are conferred great control over the process in the hope of ensuring that a mutually-satisfying outcome is achieved. Unlike international commercial arbitration which has become saddled by prohibitive costs and what some have termed “judicialisation”,\textsuperscript{23} mediation, with its more flexible and informal process, delivers resolution more quickly and at lower cost.

11. The judicial function can never be replaced by ADR processes, but a system of adjudication supported by such processes will be better equipped to deliver access to justice. Mr Wong Meng Meng, Senior Counsel, and then President of the Law Society of Singapore, wrote in the Law Gazette last year that the time

\textsuperscript{22} \textit{Sub Courts Workplan Speech} at para 19
\textsuperscript{23} \textit{ICCA Speech} at paras 30 and 35
had come to assess whether recourse to the courts should be “the automatic and only avenue for the redress of a grievance”. I agree and have said on other occasions that while it is customary to think of “access to justice” in terms of access to justice in the courts, this need not be so. It is often possible and indeed preferable for users to access and achieve justice through acceptable consensual outcomes that can be reached outside the courts. Consensual outcomes are amongst the best ways of achieving affordable access to justice.

12. In relation to the second aspect of the judicial function, there is some anecdotal evidence to suggest a hollowing out of cases especially in fields such as shipping, international contracts, construction and energy law, where arbitration has narrowed the courts’ role in building jurisprudence. But even so, there will always be a volume of cases that will come before the courts. Further, some types of disputes are, by their nature, not suited to be referred to ADR. In arbitration, the doctrine of objective arbitrability, for example, is founded on the notion that arbitration “is possible only [with] a dispute that is entirely consensual” and for which “the damage subject to the dispute is emendable”. Where public interest considerations are implicated, the dispute ought to be

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25 Opening Address of the Honourable the Chief Justice at the Litigation Conference 2013 (31 January 2013) at paras 7 and 18; Sub Courts Workplan Speech at para 4

26 Loukas A Mistelis, “Is Arbitrability a National or an International Law Issue?” in Arbitrability: International and Comparative Perspectives (Kluwer Law International, 2009) (Loukas A Mistelis and Stavros L Brekoulakis eds) at para 1-6: “objective arbitrability” refers to the “question of what types of issues can and cannot be submitted to arbitration and whether specific classes of disputes are exempt from arbitration proceedings”; this is a limitation to party autonomy to submit any dispute to arbitration.

adjudicated by the courts, and party autonomy cannot trump this.\textsuperscript{28} Thus, while the second aspect of the judicial function may have narrowed for certain types of commercial disputes, we can remain confident that the judicial function to generate jurisprudence and enforce norms cannot and will not be displaced.

13. Moreover, even in relation to the dispute resolution function, the first aspect which is discharged in part by arbitration and mediation, the courts play a significant role in providing support, and in the process assuring effectiveness and legitimacy, in particular, to arbitration as a chosen mode of dispute resolution.\textsuperscript{29} The relationship between the courts and these methods of ADR is thus best seen as one of partnership and collaboration rather than of competition.

II. ENFORCEMENT OF MEDIATION CLAUSES

14. Let me explore this further by first focusing on judicial support for the use of mediation, in the context of whether and how the courts will enforce mediation clauses in Singapore. The backdrop to this issue is that under the common law, courts have traditionally been reluctant to enforce agreements to mediate. This reluctance was founded on a number of grounds: one, that these clauses are void for uncertainty because they are akin to agreements to agree; two, that the requirement to mediate or negotiate in good faith suffers from a lack of objective criteria for enforcement; three, that mediation agreements do not

\textsuperscript{28} Sornarajah and Menon at para 55
provide for a specific procedure for the resolution of disputes;\textsuperscript{30} and four, that it is impossible for the court to assess the loss caused by the breach if it can never be known whether a mediation or negotiation conducted in good faith would have produced a settlement at all.\textsuperscript{31}

15. In the seminal case of \textit{Walford v Miles},\textsuperscript{32} the respondents had an oral agreement to deal exclusively with the appellants on the sale of their company and to terminate any negotiations with other parties, provided the appellants furnished a comfort letter from their bankers. The appellants did so, but the respondents broke off negotiations and sold the company to another party. The appellants’ case was that the oral agreement carried an implied term to negotiate in good faith. The issue before the House of Lords was whether the respondents were liable for damages for breach of the oral agreement. Lord Ackner, who delivered the only reasoned speech, with which the other members of the House agreed said that an agreement to negotiate was unenforceable because it lacked the necessary certainty, since a court will not be able to decide whether a proper reason existed for the termination of negotiations. Lord Ackner thought that the concept of a duty to carry on negotiations in good faith was inherently repugnant to the adversarial position of the parties involved in negotiations.\textsuperscript{33}

\textsuperscript{31} \textit{Petromec Inc Petro-Deep Societa Armamento Navi Appoggio SpA v Petroleo Brasileiro SA} [2006] 1 Lloyd’s Law Reports 121 ("Petromec") at [116]
\textsuperscript{32} \textit{Walford v Miles} [1992] 2 AC 128 ("Walford") at 138
\textsuperscript{33} \textit{Walford} at 138
16. *Walford v Miles*, though still good law in England, has been heavily criticised. Indeed, the decision does not seem congruent with the current trend of strong judicial support for consensual dispute resolution processes. Its continued viability even in England is uncertain. Justice Colman in *Cable & Wireless* said that for the courts to decline to enforce contractual references to ADR on the ground of intrinsic uncertainty would fly in the face of public policy as expressed in the English Civil Procedure Rule 1.4, which provides that the court must actively manage cases, and to this end, encourage parties to use ADR if the court considers use of such a procedure appropriate. Mr Justice Colman upheld the validity of a contractual clause which provided that the parties shall attempt to resolve disputes through an ADR procedure recommended to them by the Centre for Dispute Resolution. He reasoned that this clause was not simply one to negotiate in good faith. Rather, it required participation in a procedure recommended by the CEDR. These were engagements, he thought, of sufficient certainty for a court to readily ascertain whether they have been complied with. Justice Colman also said that the court should “not be astute to accentuate uncertainty (and therefore unenforceability)” of ADR clauses, in the light of how mediation has developed into a recognised and well-developed dispute resolution process. Similarly, in *Petromec v Petroleo*, Lord Justice Longmore, when asked to decide on the validity of a contractual clause providing for negotiation in good faith, said that “[t]o decide that [such a clause]...
has ‘no legal content’... would be for the law deliberately to defeat the reasonable expectations of honest men”. He thought that it would be a “strong thing to declare unenforceable a clause” that the parties had deliberately and expressly entered into.

17. The Australian, New Zealand and Singapore courts have taken a markedly different approach from *Walford v Miles*. In *Hooper Bailie v Natcon Group*, Justice Giles emphasised that an agreement to conciliate or mediate is not to be likened an agreement to agree. Depending upon the express terms and any terms implied by the court, such clauses require a minimum obligation to participate in the prescribed or chosen dispute resolution process. Elsewhere, the applicability of *Walford v Miles* has been confined to bare agreements to negotiate, in contrast to dispute resolution clauses found within an existing contractual framework. The content of good faith is also no longer seen as inherently uncertain but rather, as reducible to a core meaning of a duty to act in accordance with commercial standards of fair dealing in the performance of identified obligations. The requirement of certainty in the context of mediation and negotiation clauses must therefore be interpreted in a sensible manner consistent with the modern approach that strives to give efficacy and meaning to contractual terms.

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37 Petromec at [121]  
38 Petromec at [121]  
39 Hooper Bailie Associated Ltd v Natcon Group Ltd [1992] 28 NSWLR 194 at 206  
40 HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd [2012] 4 SLR 738 at [37] and [39]  
41 Toshin at [45]  
42 Keith Han and Nicholas Poon, “The Enforceability of Alternative Dispute Resolution Agreements” (2013) 25 SAcLJ 455 (“Han and Poon”) at para 10
18. The case of *HSBC Institutional Trust Services v Toshin Development*<sup>43</sup> demonstrates the willingness of the Singapore courts to uphold negotiation and mediation clauses. The clause in question in that case was a rent review mechanism within a 20 year lease agreement. The lease was divided into six rental terms of successive three year periods, and a final term of two years. The rent review mechanism stipulated how the rent for each new rental term was to be determined. At the first stage, the parties had to endeavour to agree in good faith on the prevailing market rental value of the premises. If the parties failed to reach an agreement within three months from the commencement of the new rental term, the second stage would be engaged such that the parties had to jointly appoint “three international firms of licensed valuers” which would separately determine the prevailing market value of the premises, and the average of the three valuations produced would constitute the new rent. If the parties could not agree on the three valuation firms to be appointed, a designated third party would nominate the valuers. Before the last rental term commenced, the respondent, without notifying the appellant, approached all eight international firms of licenced valuers present in Singapore to prepare valuation reports on the market rental value of the premises. Seven of these eight firms agreed and did prepare the reports. This was not disclosed to the other party.

19. The parties met to discuss the new rent, and due to the lack of consensus, they agreed to proceed to stage two of the rent review mechanism. The respondent’s conduct subsequently came to light and the appellant sought a

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<sup>43</sup> *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 ("Toshin")
declaration that the rent review mechanism was rendered inoperable by the respondent’s actions. The appellant argued that the valuers would not be able to act independently because they would have a “confirmation bias” in not wanting to deviate from the valuation they had given to the respondent previously. The Court of Appeal considered the issue of whether the “good faith” obligation in the rent review mechanism had been breached, and if so, whether the mechanism was rendered inoperable as a result.44

20. For present purposes, it is sufficient to note that the court found that the good faith obligation in the rent review mechanism was sufficiently certain and capable of being observed by the parties. It required the parties to faithfully cooperate with each other to determine the rent for the new term and not to unfairly profit from the known ignorance of the other.45 Reasonable commercial standards of fair dealing called for the disclosure of all material information which could have an impact on the negotiations for the rent.46 The respondent breached this obligation by failing to provide full disclosure of the valuation reports in a timely manner.47 Of particular significance were the court’s views in favour of giving effect to mediation and negotiation clauses.48 The Court of Appeal thought that there was no good reason why an express agreement to negotiate in good faith should not be upheld.49 The clause in question had been agreed to by the parties within a wider contractual framework, and was not akin

44 Toshin at [44]
45 Toshin at [50]
46 Toshin at [51]
47 Toshin at [54]
48 Toshin at [43]
49 Toshin at [43]
to pre-contractual negotiations.\textsuperscript{50} Such an agreement was not contrary to public policy.\textsuperscript{51} In fact, it was thought to be in the public interest and consistent with the cultural values in Asian business relationships to promote the consensual disposition of disputes.\textsuperscript{52} The overall tenor of \textit{Toshin} is that, as with arbitration,\textsuperscript{53} the court will be keen to give “practical effect to agreements entered into by commercial persons, rather than be quick [to find] abstract difficulties”.\textsuperscript{54}

21. While some level of certainty is required for a mediation or negotiation clause to be enforceable, the courts will not demand or require complete specificity. Rather what the courts will look for is some minimum objective criteria by which it would possible to determine what the parties’ obligations are and what would constitute a breach. Justice Hildyard in \textit{Tang Chung Wah v Grant Thornton}\textsuperscript{55} has laid down helpful guidelines on the criteria that would bolster the enforceability of a mediation clause. Such a clause must evince an unequivocal commitment to commence a process, and the court must be able to discern what steps ought to be taken to put that process in place. The process must also be sufficiently defined to enable the court to assess what is the minimum required of the parties in terms of their participation in the process, and when or how the process will be considered exhausted or determined.

\begin{itemize}
  \item [50] \textit{Toshin} at [37]
  \item [51] \textit{Toshin} at [40]
  \item [52] \textit{Toshin} at [40]–[45]
  \item [53] See \textit{Insigma Technology Co Ltd v Alstom Technology Ltd} [2009] 3 SLR(R) 936 at [31]
  \item [54] \textit{Toshin} at [45]
  \item [55] \textit{Tang Chung Wah (aka Alan Tang) and another v Grant Thornton International Limited} [2012] EWHC 3198 (Ch) at [60]
\end{itemize}
22. Just last week, we gave judgment in *International Research Corp v Lufthansa Systems*. The Singapore High Court had there upheld the enforceability of a multi-tiered dispute resolution clause, finding that the clause contained an unqualified referral of any dispute to a series of dispute resolution procedures with a clear purpose and defined process. On appeal, we agreed with the High Court’s findings on the enforceability of the dispute resolution clause, although we allowed the appeal against the High Court’s decision on different grounds which I will touch on later.

23. Of course, what is sufficiently certain to be enforced would depend very much on the precise terms of the clause and the dispute in question. But I raise these examples to illustrate the point that the courts I think will take a commercially sensible approach in the search for certainty in dispute resolution clauses.

### III. ARBITRATION AND THE COURTS

#### A. The case for judicial support and intervention

24. I now turn to judicial support for arbitration. At the heart of arbitration law is the need for a delicate balance between upholding the consensual nature of the arbitral process and maintaining a degree of judicial oversight to ensure that fundamental standards of procedural fairness are abided by and public policy is not contravened. The Model Law has struck this balance in favour of speed.

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56 *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] 1 SLR 973 at [96]–[97]; see also Han and Poon at [21]

57 *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55 ("IRC") at [54]

58 Lew at p 491
and efficiency in arbitration by articulating a paradigm of minimum curial intervention and confining it to specific, restricted circumstances which are carefully defined and spelt out. Article 5 of the Model Law, which captures the essence of this paradigm, provides:

In matters governed by this Law, no court shall intervene except where so provided in this Law.

25. This is not intended to signify hostility to court intervention in the appropriate cases; rather its primary object is to enhance certainty as to the permitted extent of judicial intervention in international commercial arbitration by stipulating that it will be in the instances spelt out in the Model Law and not otherwise.\(^{59}\) Similarly, the New York Convention, which was adopted on 10 June 1958, bolstered the attractiveness of arbitration over litigation by giving parties a degree of certainty that an arbitral award would be enforced by all of the 149 State parties\(^{60}\) to the Convention with the ability to refuse to recognise or enforce awards confined to limited and narrowly circumscribed grounds.

There are two features common to both regimes. The first is that errors of law or of fact do not provide a basis for judicial intervention. The parties, having chosen arbitration, are for better or worse, generally confined to that mode of resolving their differences. Second, most of the grounds for intervention are concerned with establishing whether the dispute is or is not within the scope of the agreement between the parties since this is the root of the tribunal’s mandate and its jurisdiction; and secondly, with whether there has been any


patent or obvious unfairness in the process. Both the Model Law and New York Convention have brought about a substantial degree of harmonisation in the legal framework governing arbitration.61

26. But though an approach rooted in minimal and carefully circumscribed curial intervention is undoubtedly in place, it would be a mistake to conclude that this has displaced the role of the court. To the contrary, an appropriate degree of judicial scrutiny is in fact necessary to maintain the legitimacy and integrity of the arbitral process. Professor Jan Paulsson puts it thus:62

… arbitration unchecked inevitably means arbitration abused. … An arbitration-friendly venue is not the one where awards are totally inviolate; that rather indicates a degree of indifference that invites abuse. …

In a similar vein, Professor Sornarajah and I wrote in 2006 that63 “[t]he supply of a service depends on quality and this [in turn] depends on quality control” which, in the context of arbitration, is usually supplied by the courts. We said at that time that a “good and efficient supervisory mechanism over arbitration which permits the necessary leeway… [yet] ensures that there are no deviations from the juridical theory on which arbitration rests… is necessary” for the proper functioning of an arbitration system.64

27. Let me illustrate the point with an example. In 1985, the Belgian Legislature, by Article 1717(4) of the Judicial Code of Belgium, limited the right to challenge

61 ICCA Speech at para 6
63 Sornarajah and Menon at para 140
64 Sornarajah and Menon at para 140
arbitral awards to cases where one of the parties was a national or resident of Belgium, or a legal entity formed in Belgium or having a branch or some seat of operation there.\textsuperscript{65} It might have been expected that such a lassiez-faire approach to curial oversight of arbitration would enhance Belgium’s attractiveness as a venue for arbitration. In fact, it turned out that the mercantile community became concerned about the lack of any review process,\textsuperscript{66} so much so that the Judicial Code was eventually amended to allow for a degree of judicial review.\textsuperscript{67}

28. I suggest that in the final analysis, the question is no longer whether judicial intervention is appropriate; rather, it is calibrating the appropriate degree of judicial intervention that we should be discussing. Despite the harmonisation of arbitral instruments in the way of national laws which are enacted through the widespread adoption of the Model Law and the New York Convention, it is ultimately the courts that determine how the legislation will be interpreted and whether these instruments will be applied coherently and consistently across signatory states.\textsuperscript{68} Here, some differences have prevailed and I turn to examine the position in Singapore.

B. Singapore courts’ attitude towards arbitration

\textsuperscript{65} Hamid G Gharavi, \textit{The International Effectiveness of the Annulment of an Arbitral Award} (Kluwer Law International, 2002) at p 25
\textsuperscript{67} Abedian at pp 562–563
\textsuperscript{68} Paulsson at p 358
29. It has been said that the Singapore courts are heavily pro-arbitration and that parties to an arbitration agreement face a “near-Herculean” task\(^\text{69}\) when seeking to set aside an award or to persuade the courts to refuse to enforce an award. It is true that there is clear judicial support in Singapore for promoting arbitration as a key mode for the resolution of commercial disputes. But this response is unsurprising given the spirit of the Model Law and the New York Convention which Singapore has adopted as critical parts of its legislative framework governing international commercial arbitration. Thus, in *Tjong Very Sumito v Antig Investments*, the Singapore Court of Appeal emphasised that the courts should be “slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration” because the “whole thrust of the [International Arbitration Act]\(^\text{70}\) is geared towards minimising court involvement”.\(^\text{71}\)

30. But minimal curial intervention does not mean unquestioning and undiscerning deference to the decisions of arbitrators.\(^\text{72}\) The Singapore Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara*\(^\text{73}\) declared that while the spirit of the Model Law prescribes that courts should not, without good reason, interfere in the arbitral process, no State will permit a binding award to be given or enforced within its territory without being able to review the award, or at least afford the parties an opportunity to raise issues of due process or irregularities in the proceedings.

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70 International Arbitration Act (Cap 143A, 2002 Rev Ed)
71 Tjong Very Sumito and others v Antig Investments Pte Ltd [2009] 4 SLR(R) 732 at [29]
72 Sornarajah and Menon at para 143
73 CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] 4 SLR 305 at [26]
31. I submit that it is ultimately unhelpful to speak of a judicial policy towards arbitration as though there were a predilection either in favour or against the arbitral process. The judicial attitude towards any other dispute resolution process must be one that rests on appropriate intervention and oversight. Of course, what is appropriate is to be seen in the context of the fact that arbitration is a process that the parties have autonomously chosen for the resolution of their differences. More importantly, the very instruments that circumscribe the court’s ability contemplate that the court can and should intervene only in certain circumstances. But it then becomes a question of whether those circumstances avail. In this undertaking, the courts should neither be unduly exacting with a view to finding that the arbitral process should not be upheld. But nor should they be too ready to yield so as to refuse relief where the grievance is fairly made out. Rather, the task for the court is to bring a sensible commercial perspective to bear on the issues.

32. The Singapore courts must and will set aside awards or refuse enforcement of an award if a statutorily prescribed ground for doing so is established. It is as simple as that. These statutory exceptions often embody the circumstances in which the legitimacy of the arbitral award or process has been undermined or abused, and in these cases, curial intervention will not only be appropriate; I suggest that it will be necessary. I will illustrate this point with reference to some recent cases that have come before the Singapore courts.
33. First, our courts have emphasised that awards will be set aside for *meaningful breaches of natural justice*. In *L W Infrastructure v Lim Chin San Contractors*,\(^{74}\) we upheld the setting aside of an award where the arbitrator, after rendering his final award, made an additional award of pre-award interest on the request of one party, even though the other party had not responded to the request. The arbitrator claimed that he took the plaintiff’s failure to respond within three days of the defendant’s request as an indication that the plaintiff had no objections. We held that the notice requirement in Article 33(3) of the Model Law required that the plaintiff be afforded the opportunity to submit on the jurisdictional question of whether pre-award interest had been omitted from the final award in those circumstances where the rendering of an additional award was permissible to begin with as well as on the substantive question of whether the interest should have been awarded in any event.\(^{75}\) We clarified our earlier pronouncement in *Soh Beng Tee v Fairmount Development*\(^ {76}\) that an award would not be set aside for breach of natural justice if the same result could or would ultimately have been reached had the aggrieved party been afforded a proper opportunity to be heard. The appellant had argued in *LW Infrastructure* that intervention would only be permitted if the court was satisfied that a different outcome would certainly have ensued. We declined this submission.\(^{77}\) After all, how could we know what the arbitrator would have done had the appropriate arguments been canvassed? Rather, we held that the aggrieved party must show that as a result of the breach, the arbitrator was denied the

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\(^{74}\) *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*LW Infrastructure*")

\(^{75}\) *LW Infrastructure* at [58]

\(^{76}\) *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65]

\(^{77}\) *LW Infrastructure* at [51]
benefit of arguments or evidence that in our judgment had a real and not merely a fanciful chance of making a difference in his deliberations.\textsuperscript{78}

34. The courts have also affirmed that awards will not be allowed to stand where the tribunal altogether failed to consider the parties’ submissions or essential issues put to it. In \textit{Front Row Investment Holdings v Daimler South East Asia},\textsuperscript{79} the High Court set aside an award when an arbitrator mistakenly concluded that a party had abandoned two of the three misrepresentations that had been pleaded in its case and he accordingly ignored the evidence and the arguments relating to those two misrepresentations. The court concluded that the arbitrator had ignored a submission by a party, and that “[t]he failure to allow a party to address the tribunal on a key issue is the corollary to allowing the submissions but then ignoring it altogether whether deliberately or otherwise”.\textsuperscript{80} As the court said, “[i]n both cases, the mischief is precisely the same: a party is denied the opportunity to address its position to the judicial mind”.\textsuperscript{81}

35. In a more recent decision, \textit{TMM Division Maritime v Pacific Richfield Marine}\textsuperscript{82} the High Court discussed at some length possible sub-rules or subsidiary duties falling within the ambit of the rules of natural justice. The court held that the tribunal had the duty not to look beyond the parties’ submissions; the duty to deal with the essential issues; the duty to attempt to consider and comprehend

\textsuperscript{78} LW Infrastructure at [54]
\textsuperscript{79} \textit{Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd} [2010] SGHC 80 (“\textit{Front Row}”)
\textsuperscript{80} \textit{Front Row} at [35]
\textsuperscript{81} \textit{Front Row} at [35]
\textsuperscript{82} \textit{TMM Division Maritime SA de CV v Pacific Richfield Marine Pte Ltd} [2013] SGHC 186 (“\textit{TMM}”)
the submissions; and the duty to give reasons. But the court emphasised that this did not entail imposing unrealistic and exacting standards on arbitrators. The challenge in TMM Division Maritime was unsuccessful on the facts. But in another case, BLB v BLC, the High Court remitted a counterclaim to arbitration, finding that the tribunal had failed to consider the merits of that claim which was an essential issue for determination. The tribunal had wrongly assumed that the counterclaim was for relief sought pursuant to other pleaded complaints which it had dealt with, and so had failed to consider the distinct head of claim in question.

36. In the second category are those cases where the Singapore courts will review the jurisdiction of the tribunal and in particular whether the tribunal exceeded its jurisdiction in issuing the award. The Court of Appeal said in CRW Joint Operation that Article 34(2)(a)(iii) of the Model Law applies “where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it”. A two-step enquiry will be taken. First, the court will determine what matters were within the scope of the submission to the arbitral tribunal, and second, whether the arbitral award involved such matters or “a new difference … outside the scope of the submission to arbitration”. In CRW Joint Operation, we held that the arbitral tribunal exceeded its jurisdiction in rendering a determination by a dispute

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83 BLB and another v BLC and others [2013] SGHC 196 (“BLB”) at [74] citing TMM at [63]–[106]
84 BLB
85 BLB at [64], [74], [75], [85] and [86]
86 CRW Joint Operation at [31]
87 CRW Joint Operation at [30]
adjudication board final without assessing the merits of the respondent’s defence and of the adjudicator’s decision.\textsuperscript{88}

37. Last week, we delivered our decision in \textit{International Research Corp v Lufthansa Systems},\textsuperscript{89} and we found that the arbitral tribunal did not have jurisdiction over the appellant and its dispute with the respondent, contrary to the ruling of the tribunal and, indeed, contrary to the ruling of the High Court. The first respondent entered into a Cooperation Agreement with an entity known as Datamat to supply a component of an electronic data protection system that Datamat had contracted to provide to Thai Airways. The appellant also entered into an agreement with Datamat to supply various other products and services in relation to Datamat’s contract with Thai Airways. Datamat assigned its right to receive payments from Thai Airways to Siam Commercial Bank and opened an account with the Bank for this purpose. Payments due to the appellant would be deducted from the bank account, and the appellant was to pay the respondent for the services and products that it provided to Datamat from monies in this account. Perhaps not surprisingly, given these arrangements, Datamat subsequently ran into financial difficulties. The appellant, the respondent and Datamat entered into a series of two Supplemental Agreements, stated to be “annexed to and made part of” the Cooperation Agreement, and the Supplemental Agreements provided that the appellant would manage proceeds due to Datamat from Thai Airways and use that to pay the respondent for works and services that it rendered to Datamat.

\textsuperscript{88} \textit{CRW Joint Operation} at [82]  
\textsuperscript{89} \textit{IRC} at [6]
38. The Cooperation Agreement contained a multi-tiered dispute resolution mechanism. A dispute over payment arose between the appellant and the respondent, and the respondent filed a notice of arbitration. The appellant objected to the jurisdiction of any arbitral tribunal to hear the dispute, and one of the grounds it raised was that it was not bound by the dispute resolution mechanism in the Cooperation Agreement. The dispute resolution mechanism involved Datamat and not the respondent. The arbitral tribunal ruled that it had jurisdiction and the High Court agreed. We found, however, that the parties had not intended that the dispute resolution mechanism contained in the Cooperation Agreement was to be incorporated as part of the Supplemental Agreements, and the appellant was accordingly not bound by that mechanism.\(^{90}\)

39. Let me elaborate on this. On the one hand, we rejected the continued application of the “strict rule” from English jurisprudence which requires that where an arbitration clause found in another agreement is to be treated as having been incorporated into the agreement which is the subject of the dispute, there must explicit reference to the arbitration clause itself.\(^{91}\) We concluded that it was ultimately a question of construing the contract to determine whether the parties intended to incorporate the arbitration clause alongside the other terms and there was no need to include such explicit terms. On the other hand, in construing the agreements, we found that the parties did not intend to import the dispute resolution clause in the Cooperation Agreement into the Supplemental Agreements. These had not been entered into with a

\(^{90}\) IRC at [53]  
\(^{91}\) IRC at [34]
view to the appellant guaranteeing any obligation under the Cooperation Agreement; the appellant's only substantive obligation under the Supplemental Agreements was to act as a payment agent. The appellant, we held, would not have expected to get involved in an arbitration concerning disputes as to whether the obligations under the Cooperation Agreement had or had not been performed. Moreover, under the terms of the Supplemental Agreements, all other obligations under the Cooperation Agreement had been expressly excluded. Finally, we were bolstered in our conclusion by the language and form of the dispute resolution mechanism.

40. A particularly interesting but difficult question that has arisen before the Singapore courts is whether a party which has not challenged an award on jurisdictional grounds before the seat or supervisory court can nonetheless raise such a ground to resist enforcement or recognition of the award before the enforcing court. One reading of our High Court decision in Aloe Vera of America v Asianic Food, is that it is the supervisory court, rather than the enforcing court, that is the appropriate one to review the tribunal's determination of its own jurisdiction. While the court acknowledged that a party could seek to challenge a foreign award both before the supervisory court and the enforcing court, it held that it was not necessary or logical to assume that the grounds for both types of applications would be identical. The court also said that a failure to raise the point before the supervisory court could

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92 IRC at [38]
93 IRC at [48]
94 IRC at [42]
95 IRC at [50]–[51]
96 Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another [2006] 3 SLR(R) 174 ("Aloe Vera") at [48]
97 Aloe Vera at [55]
amount to an estoppel or suggest a want of *bona fides* if the point was taken up at the enforcement stage.\(^9\)

41. If this reading is adopted, the approach in *Aloe Vera* may be seen to stand in contrast to the decisions of the Court of Appeal and the Supreme Court of the United Kingdom in *Dallah Real Estate & Tourism v Ministry of Religious Affairs of the Government of Pakistan*\(^9\) where the court was prepared to enter into a rehearing as to the validity of the arbitration agreement, without limiting itself to reviewing the arbitral tribunal’s decision for correctness.\(^1\) Both the English Court of Appeal and the Supreme Court rejected the argument that the failure to challenge the award on jurisdictional grounds before the curial court could give rise to an issue estoppel.\(^10\) Lord Justice Moore-Bick in the Court of Appeal held that a party which had not submitted to the arbitrator’s jurisdiction is entitled to a full *de novo* judicial determination on the issue of jurisdiction before the English court at the enforcement stage, irrespective of whether the award was a domestic international award or foreign award.\(^10\)

42. In the Supreme Court, Lord Mance thought that the tribunal’s determination of its jurisdiction might be helpful but it was certainly not determinative; nor would it be given great or insurmountable deference, and he said:\(^10\)

\[\ldots\] The tribunal’s own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to

\(^9\) *Aloe Vera* at [56]
\(^1\) ICCA speech at para 55
\(^1\) [2009] EWCA Civ 755 at [55]–[56]; *Dallah* at [23]
\(^1\) [2009] EWCA Civ 755 at [55]
\(^1\) *Dallah* at [30]
the Government at all. … The scheme of the New York Convention… may give limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in article V(I)… But that is as far as it goes in law. Dallah starts with advantage of service, it does not also start 15 or 30 love up.

43. Lord Collins agreed, emphasising that while a tribunal in an international commercial arbitration has the power to consider its own jurisdiction, it does not follow that this is an exclusive power to determine the question. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal’s ruling on jurisdiction. Still less did it mean that when the award came to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal. Lord Collins also said that while the New York Convention had a “pro-enforcement policy” for the recognition and enforcement of arbitral awards, there was nothing in the Convention that required primacy to be accorded to the courts of the arbitral seat, in the sense that the supervisory court should be the only court entitled to carry out a re-hearing of the issue of the existence of a valid arbitration agreement.

44. This might be among the issues that are to be decided by our Court of Appeal in PT First Media TBK v Astro Nusantara International in which a key issue was whether the appellant which had not applied to set aside a domestic international award before the seat court on jurisdictional grounds under Article 16 of the Model Law nonetheless remained entitled to raise the issue before the same courts to resist enforcement of the award. The dispute arose out of a

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104 Dallah at [84]
105 Dallah at [101]–[103]
106 PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others, Civil Appeals No 150 and 151 of 2012
failed joint venture between companies within the Astro group and companies in the Lippo group, an Indonesian conglomerate, to provide multimedia and television services in Indonesia. The first to fifth respondents, which were from the Astro Group, and companies from the Lippo Group entered into a Subscription and Shareholders’ Agreement or SSA for short. It was undisputed that the sixth to eight respondents, also from the Astro Group, were not parties to this Agreement. In anticipation of the closing of the deal, the sixth to eighth respondents provided supporting services and funding to the joint venture. However, it subsequently became clear that the joint venture would not close. Nonetheless, the sixth to eighth respondents continued to provide services and funding. A dispute arose over the provision of these services and funding and one of the Lippo Group companies commenced proceedings in Indonesia against the sixth to eighth respondents. The Astro companies commenced arbitration against the Lippo companies, taking the position that this was in breach of the arbitration agreement in the SSA. The Lippo companies argued that the sixth to eighth respondents were not party to the SSA and that the tribunal did not have the jurisdiction to join them to the arbitration. The tribunal disagreed and found that it had jurisdiction over the dispute and exercised its power to join these respondents to the arbitration.

45. The Lippo companies did not appeal the tribunal’s decision to the court as they were entitled to under Article 16(3) of the Model Law and proceeded to defend the substantive issues in the arbitration albeit that they stated in their defence that this was being done without prejudice to their position that the tribunal lacked jurisdiction to hear the dispute. When the two Astro companies sought to
enforce the arbitral awards in their favour in Singapore, the High Court held that PT First Media, the only Lippo company to challenge the enforcement of the award in Singapore, was precluded from doing so on these jurisdictional objections given that it had not challenged the awards under Article 16(3) within the prescribed time. What happened after we shall have to wait and see because this has been argued before the Court of Appeal and I cannot say any more.

46. The third and final ground that I will touch on in today’s speech is the public policy exception. The Singapore courts recognise that an award which conflicts with the public policy of the State, or one which is induced or affected by fraud or corruption can be set aside. However, it should be noted that the occasion to do so has not yet arisen in Singapore. The prevailing judicial view has been that the public policy ground should be construed very narrowly, and it has been limited to the “elements of a State’s own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected”. In PT Asuransi Jasa Indonesia (Persero) v Dexia Bank, we held that the public policy ground should “only operate in instances where the upholding of an arbitral award would ‘shock the conscience’… or [be] ‘clearly injurious to the public good or... wholly offensive to the ordinary

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107 IAA, First Schedule; Art 34(2)(b)(ii) of the Model Law
108 S 24(a) of the IAA
110 Hebei Import & Export Corporation v Polytek Engineering Co Ltd [1999] HKCFA 40 at [29]
111 PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR 597 at [59]
reasonable and fully informed member of the public’ … or where it violates the forum’s most basic notions of morality and justice”.

47. Arbitral awards which involve public policy or public interest considerations present great difficulties to the courts. A balance has to be struck between upholding the finality of awards on the one hand and protecting the public policy of the State on the other.\textsuperscript{112}

48. The recent case of \textit{AJU v AJT} is one where public policy was found to have been implicated at first instance, though it was later reversed on appeal. The case has attracted much comment, with at least one suggestion that following this case, a tribunal’s factual determination as to whether an underlying contract is illegal for being in contravention of the public policy of another State might not be reviewable in Singapore.\textsuperscript{113} The arbitral tribunal was presented with an agreement under which one party was to withdraw its complaint to the Thai police. The aim was to request discontinuance of criminal investigations in Thailand on charges of fraud and forgery. This was agreed in the context of an overall settlement of the dispute. It was undisputed that fraud was a compoundable offence under Thai law, whereas forgery was not. The question was whether the agreement was illegal or void as being contrary to the public policy of Thailand. The tribunal found that the agreement was not illegal because the Thai Police retained their right to continue with investigations into

\textsuperscript{112} \textit{Corvetina Technology Ltd v Clough Engineering Ltd [2004] NSWSC 700 at [18]}

\textsuperscript{113} Nicholas Poon, “Striking a balance between public policy and arbitration policy in international commercial arbitration” [2012] SJLS 185 at p 187
the forgery, if they so wished, even though the complaint had been withdrawn.114

49. The Singapore High Court set aside the award, holding that the tribunal's determination of whether the agreement was illegal was not conclusive or binding on the court.115 In an appropriate case the court thought it could examine the facts and decide the illegality issue afresh; and in so doing, it found that the agreement had been intended to stifle the prosecution of the offences in Thailand and this was thought to be a breach of international comity. The High Court favoured the approach of Lord Justice Waller in Soleimany v Soleimany who observed that an enforcing court could make a preliminary inquiry into the tribunal's determination that an agreement was not illegal if there was *prima facie* evidence that the award was based on an illegal contract.116 And Lord Justice Waller suggested that if the court was satisfied on the basis of that preliminary inquiry that full faith and credit should not be given to the award, it could then embark on a more elaborate inquiry of the issue of illegality.

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114 AJU v AJT [2011] 4 SLR 739 ("AJU v AJT") at [15]
116 Soleimany v Soleimany [1999] QB 785 at 800: "... Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? ... We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality."
50. This contrasts with the approach of Justice Colman in *Westacre Investments Inc v Jugoimport-SPDR Holding*\textsuperscript{117} and of the majority of the Court of Appeal in *Westacre*. Justice Colman considered that if the tribunal had the jurisdiction to determine the question of illegality, and if facts not placed before the tribunal were subsequently relied upon to challenge the enforcement of the award, the enforcing court had to consider whether the public policy against enforcing illegal contracts in the enforcement jurisdiction outweighed the countervailing policy of upholding the finality of awards. The majority of the Court of Appeal in *Westacre*\textsuperscript{118} expressed doubts about *Soleimany* but found that even if Lord Justice Waller’s observations in *Soleimany* were applied in *Westacre*, the award should stand.

51. The Singapore Court of Appeal in *AJU v AJT* preferred the approach in *Westacre*, and also disagreed with the view in *Rockeby Biomed v Alpha Advisory*\textsuperscript{119} that a court can examine the facts afresh in determining whether the tribunal had come to an erroneous conclusion on issues of illegality.\textsuperscript{120} The Court of Appeal acknowledged that while it could not abrogate its judicial power to the tribunal to decide what the public policy of Singapore was, and in turn whether an agreement was illegal or against public policy of Singapore, it was not entitled to reopen the findings of the tribunal in every case. In *AJU v AJT*, the tribunal had not ignored palpable or indisputable illegality.\textsuperscript{121} The court further held that what is the public policy of Singapore is a question of law and the court’s ability to set aside an award as being contrary to public policy is

\textsuperscript{117} *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740

\textsuperscript{118} *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] 1 QB 288

\textsuperscript{119} *Rockeby Biomed Ltd v Alpha Advisory Pte Ltd* [2011] SGHC 155

\textsuperscript{120} *AJU v AJT* at [71]

\textsuperscript{121} *AJU v AJT* at [63]–[64]
confined to situations where this question of law was implicated. The objection was not available to review or set aside findings of fact that had been made by the tribunal.  

52. *AJU v AJT* might appear to suggest a high-water mark of non-intervention with a tribunal’s findings on public policy and illegality but, in my view, the decision is entirely defensible. The central question in that case was whether the parties had reached a binding agreement under Thai law. That was the question that the tribunal had to decide and the tribunal found that there was a binding agreement under Thai law, and there was no agreement that the appellant would be *required* to withdraw the forgery charges if only because it would have been impossible to do so under Thai law. There was no basis for the Singapore court as the curial court to review that decision and if it had tried to do so, it would have been sitting as an appellate court. The decision of the tribunal turned not on a misappreciation of the contours of public policy *vis-à-vis* stifling prosecutions but on its view that the Concluding Agreement did not require illegal conduct on the part of the parties.  

The only question the Singapore court could legitimately have considered was whether upholding the award would have violated the public policy of Singapore but this was never engaged on the facts.

53. Although there is nothing to suggest that the tribunal’s conclusion on the question of illegality was wrong in *AJU v AJT*, a related question which arises is

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122 *AJU v AJT* at [67]–[69]
whether the outcome would have been different had the tribunal been plainly wrong. The High Court of New Zealand in *Downer-Hill Joint Venture v Government of Fiji*¹²⁴ has held that a “serious [but] fundamental error of law or fact could result in an award being contrary to the public policy of New Zealand” where, for example, the tribunal made erroneous factual findings not based on any logical probative evidence.¹²⁵ And in the Canadian decision of *Navigation Sonamar v Algoma Steamships*,¹²⁶ it was suggested that a patently unreasonable error in an award could lead to the setting aside of that award for excess of jurisdiction or on grounds of public policy.¹²⁷

54. This echoes a case that many of us will be familiar with – *Oil & Natural Gas Corporation v Saw Pipes*.¹²⁸ In that case, the Indian Supreme Court took an even more extensive reading of the public policy exception by holding that an award that is “patently illegal” for contravening statutory provisions under Indian law would be set aside as it was thought to be contrary to public policy to uphold the award in such circumstances. *ONGC* was later applied in *Phulchand Exports v Patriot*.¹²⁹ However, the Supreme Court in a more recent decision,

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¹²⁴ [2005] 1 NZLR 554
¹²⁵ Headnotes of *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554: A serious and fundamental error of law or fact could result in an award being contrary to the public policy of New Zealand because breaches of natural justice had occurred in connection with the making of the award. However, such a threshold was high and mere mistake would not suffice. In order to set aside an award for erroneous factual findings it had to be shown that the factual finding complained of was not based on any logically probative evidence. It had also to be shown that even if such a breach of natural justice had occurred the award was contrary to public policy. This required it to be shown that a substantial miscarriage of justice would result if the award stood because the impugned finding was fundamental to the reasoning or outcome of the award. Such a breach of public policy would be obvious...
¹²⁶ *Navigation Sonamar Inc v Algoma Steamships Ltd*, Judgment from Quebec delivered on 16 April 1987 by Charles Gonthiers J reported at [1987] RJQ 1346
¹²⁹ *Phulchand Exports Limited v O O O Patriot* (2011) 10 SCC 300 at [12]–[13]
Shri Lal Mahal v Progetto Grano,\textsuperscript{130} has ruled that the public policy exception to the enforcement of a foreign arbitral award must be given a narrow meaning, and enforcement could only be opposed on grounds of public policy where it was contrary to the fundamental policy of Indian law, the interests of India or justice and morality, and overruled Phulchand’s endorsement of the patent illegality ground.\textsuperscript{131} Notably in our decision in PT Asuransi,\textsuperscript{132} which I have referred to, we declined to apply ONGC on the ground that the International Arbitration Act would be internally inconsistent if the public policy exception was to enlarge the scope of curial intervention to set aside errors of law or fact. The effect of a holding as that in ONGC v Saw Pipes was to allow for appeals on errors of law.

55. Decisions concerning the public policy ground are highly fact-sensitive and complex and it may be that future cases will test the boundaries. However, for the foreseeable future, it seems that successful challenges of awards on the grounds of public policy will likely remain few and far between. The courts are rightly wary of attempts to re-open the merits of arbitral awards under the guise of the public policy exception.

IV. CONCLUSION

56. Let me close. I have illustrated that courts can and will intervene in arbitration when and to the extent it is appropriate to do so. Some might lament this in the name of party autonomy. But this misses the point. Party autonomy has its

\textsuperscript{130} Shri Lal Mahal Ltd v Progetto Grano, Spa, Civil Appeal No 5085 of 2013
\textsuperscript{131} Civil Appeal No 5085 of 2013 at [28]
\textsuperscript{132} [2007] 1 SLR 597 at [57]
limits especially if there are real grounds to think that the parties have not in fact agreed to be bound; or if the process has not been fairly conducted. Where the courts intervene in such circumstances, they actually serve arbitration by conferring legitimacy upon it. Plainly, the record of the Singapore courts demonstrates that such interventions are far from commonplace. But it misses the point to suggest that one must have the force of Hercules in order to succeed. Others might say we do not intervene enough. This equally misses the mark. Ultimately, this does not lend itself to numerical or quantitative assessment. The question in each case is whether the limited grounds for intervention exist on the facts.

57. I suggest that the real challenge facing arbitration in the next few decades in Singapore and perhaps beyond is less likely to arise from any negative judicial perceptions, than from any failure of the arbitration community to respond to some of the potential pitfalls facing arbitration in this century.

58. The rise of institutional arbitration has resulted in the arbitral process becoming more complex and transformed by what has been termed "judicialisation". Expedition, informality and efficiency, all attributes traditionally associated with arbitration, have been sacrificed. A 2008 survey found that 50% of the corporations surveyed ranked costs as the most important disadvantage of international arbitration.\(^\text{133}\) High costs and the length of time taken to resolve disputes were cited as the two primary drawbacks of arbitration in a 2013

survey amongst a hundred corporate counsel from across different industry sectors.\textsuperscript{134} The fear is that arbitration may morph into a creature no longer responsive or suited to the needs of the mercantile community from which it sprang.\textsuperscript{135}

59. Another growing concern is the threat of moral hazard in the arbitration process. Arbitrators have wrested for themselves the power to grant final and authoritative ruling on disputes, but the mechanisms to ensure accountability may not be as robust as they ought to be. The typical conditions that assure impartiality in the judicial sphere are lacking in arbitration.\textsuperscript{136} Arbitrators are often drawn from the same ranks of legal professionals as counsel and this creates its own set of issues.\textsuperscript{137} And the conflict of interest problem may be exacerbated with the growing incidence of third-party funding and participation of vulture funds,\textsuperscript{138} which I had spoken about in Penang.\textsuperscript{139}

60. A lack of commonly accepted ethical standards threatens to undermine the fairness and integrity of international arbitration, and could threaten the attractiveness of arbitration itself in a setting of the pool of arbitration practitioners growing at exponential rates.\textsuperscript{140} Curial intervention is of limited reach in such circumstances because it is an \textit{ex post facto} machinery and,
especially under the Model Law and the New York Convention, often limited to egregious instances of misconduct.141

61. Arbitration must respond to these challenges, or risk the prospect of deepening dissatisfaction on the part of its users and a growing disconnect with them.142 In fact, there are modest signs suggesting a return to adjudicatory processes in the courts for the very reasons that the mercantile community found the judicial process unattractive in the first place: high costs, delays and the complexity of procedural rules. And as we have seen in Malaysia and in Singapore, it is often cheaper and faster to obtain resolution of disputes in the courts.

62. A 2011 survey of the Fortune 1,000 companies indicated a significant drop in the use of arbitration in commercial, employment and construction disputes, and increased usage and preference for mediation to resolve commercial disputes as compared to that in 1997.143 The results also appeared to indicate that more businesses were prepared to litigate rather than to arbitrate, at least for US domestic disputes, where mediation had failed.144 The leading concerns with arbitration cited by the respondents included the lack of an avenue for appeal, the concern that arbitrators were not confined to legal rules, and the

141 ICCA speech at para 44
142 ICCA speech at para 47–50
143 Thomas J Stipanowich and J Ryan Lamare, “Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations” (“Stipanowich and Lamare”) at pp 3 and 36
144 Stipanowich and Lamare at p 36
high costs of the process.\textsuperscript{145} It was suggested that arbitration may have reached its “tipping point”, at least in the US.\textsuperscript{146}

63. The challenge in this age for the arbitration community is to respond and chart its future course so as to ensure that it continues to be a sustainable, legitimate and attractive process that can partner the courts in the task of resolving disputes in the decades to come.

\textsuperscript{145} Stipanowich and Lamare at p 37
\textsuperscript{146} Stipanowich and Lamare at p 36