Singapore Academy of Law
Law Reform Committee

Consultation Paper on Certain Issues concerning Arbitration-Related Court Proceedings

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SAL SINGAPORE ACADEMY OF LAW

Members of the Law Reform Sub-Committee on Arbitration-Related Court Proceedings

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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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A. REFORMS BEING CONSIDERED

1 There are two reforms being considered by the Singapore Academy of Law's Law Reform Committee:

(a) whether 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 (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 issue***"); 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 issue***").

2 The considerations underpinning these potential reforms are set out in Sections B and C, below.

B. FIRST ISSUE – INDEMNITY COSTS TO BE ORDERED AS A MATTER OF COURSE IN UNSUCCESSFUL PROCEEDINGS TO SET ASIDE AN AWARD *OR* TO RESIST ENFORCEMENT

3 At present, the Court would usually award costs to the successful party in proceedings to set aside an award or to resist enforcement which fail (an "**unsuccessful challenge**") on a *standard basis*. An award of costs on a standard basis means that where there is any doubt as to whether the costs were reasonably incurred or were reasonable in amount, such doubt shall be resolved in favour of the *paying party* (which for present purposes, is the unsuccessful party in the unsuccessful challenge).[1] An award of costs on an *indemnity basis* means that where there is any doubt as to whether the costs were reasonably incurred or were reasonable in amount, such doubt shall be resolved in favour of the *receiving party* (which for present purposes, is the successful party in the unsuccessful challenge).[2]

4 As one would appreciate, these conceptual differences translate to an actual difference in the quantification of costs. In practice, as a rough and ready estimate, the quantum of costs awarded on an indemnity basis may be approximately 25 to 35% more than costs awarded on a standard basis.

5 By default, where the Court orders the unsuccessful party to pay the successful party costs of the proceedings without specifying whether such costs

1 Order 59, rule 27(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).
2 Order 59, rule 27(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

are to be on a standard basis or an indemnity basis, the position is that such costs are on a standard basis.[3]

6 The Court retains the discretion to decide whether to order costs on an indemnity basis.[4]

7 Hence, at present, the default position on the award of costs to the successful party in an unsuccessful challenge is an award of costs on a standard basis.

8 A survey of the positions in England and Wales, Australia, France, the USA (specifically New York), Hong Kong and Singapore reveals that Hong Kong is the exception: the Hong Kong courts would award costs on an indemnity basis by default to the successful party in an unsuccessful challenge.[5]

9 Nonetheless, the Hong Kong position merits further study. The genesis of that position can be traced to the Hong Kong Court of First Instance decision in *A v R (Arbitration: Enforcement)* ("*A v R*").[6] In that case, Reyes J observed that:[7]

> where a party unsuccessfully [makes a setting aside application or resists enforcement], he should in principle expect to have to pay costs on a higher basis […] because a party seeking to enforce an award should not have had to contend with such type of challenge.

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3 Order 59, rule 27(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

4 Order 59, rule 27(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

5 For the position in England and Wales, see *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879, *A v B* [2007] EWHC 54 (Comm), *Exfin Shipping (India) Ltd Mumbai v Tolani Shipping Co Ltd Mumbai* [2006] EWHC 1090 (Comm), and *Konkola Copper Mines v U&M Mining Zambia Ltd* [2014] EWHC 2374 (Comm), where the courts exceptionally award costs on an indemnity basis. For the Australian position, there is some uncertainty as there is no reported decision of the High Court on this matter but see generally *Sino Dragon Trading v Noble Resources* [2016] FCA 1169, *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303, and *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 829. For the position in France, although there is no concept of "indemnity basis" and "standard basis", for the position on analogous costs orders, see Articles 32, 599, 696 and 700 of the French Code of Civil Procedure and the decision in Civ, 1e, 23 February 1994, n° 92-12.309; Paris Court of Appeals, 6 May 2004, *Cart Carthago Films v. Sarl Babel Productions*, where, exceptionally, abusive challenges may lead to penalties. For the position in New York, although there is again no concept of "indemnity basis" and "standard basis", for the position on analogous costs orders, see 28 USC § 1927 which empowers the Courts to impose "sanctions" and depart from the American rule that each party is responsible for paying its own 'attorney's fees where a party has "multiplie[d] the proceedings in any case unreasonably and vexatiously […]". See also *DigiTelCom, Ltd v Tele2 Sverige AB* 2012 US Dist LEXIS 105896 (SDNY July 25, 2012), *Maryam Sayigh v Pier 59 Studios LP* 2015 US Dist LEXIS 27139 (SDNY Mar 5, 2015) *Universitas Education, LLC v Nova Group, Inc* 2013 US Dist LEXIS 142901 (SDNY May 21, 2013), *B L Harbert, International, LLC v Hercules Steel Co* 441 F 3d 905 (11th Cir, 2006), *Johnson Controls, Inc, v Edman Controls, Inc* 712 F 3d 1021 (7th Cir, 2013), and *DMA International, Inc, v Qwest Communications International, Inc,* 585 F 3d 1341 (10th Cir, 2009), where the power is viewed as being appropriate to be exercised in vexatious challenges of awards.

6 [2009] 3 HKLRD 389.

7 *Id* at [68].

10 The rationale stated by Reyes J is that:[8]

> […] if the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidising the losing party's abortive attempt to frustrate enforcement of a valid award. The winning party would only be able to recover about two-thirds of its costs of the challenge and would be out of pocket as to one-third. This despite the winning party already having successfully gone through an arbitration and obtained an award in its favour. The losing party, in contrast, would not be bearing the full consequences of its abortive application […] Such a state of affairs would only encourage the bringing of unmeritorious challenges to an award. It would turn what should be an exceptional and high-risk strategy into something which was potentially "worth a go". That cannot be conducive to [civil justice reform] and its underlying objectives.

11 The observations of Reyes J in *A v R,* and the notion that indemnity costs should be the starting point, were subsequently endorsed in other decisions, including decisions of the Hong Kong Court of Appeal.[9] The ostensible basis of the approach taken in the *A v R* line of cases rests on the Hong Kong Rules of Court which empower the court to award costs on an indemnity basis.[10] As noted above, the Singapore courts are similarly empowered.

12 Already, in Singapore, indemnity costs are ordered as a matter of course in cases where a party, in breach of an arbitration agreement, has initiated court proceedings resulting in such proceedings eventually being stayed in favour of arbitration. The Singapore Court of Appeal in *Tjong Very Sumito v Antig Investments Pte Ltd*[11] has endorsed the views of the High Court in the same case in *Tjong Very Sumito v Antig Investments Pte Ltd*[12] where Justice Choo Han Teck had observed that:[13]

> In my judgment, provided that it can be established by a successful application for a stay or an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause that the breach has caused the innocent party reasonably to incur legal costs, *those costs should normally be recoverable on an indemnity basis* […] 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. In the ordinary way *it can therefore normally be characterised as so serious a departure from 'the norm' as to require judicial discouragement by more stringent means than an order for costs on the standard basis*. However, although an order for indemnity costs will

8 *Id* at [71].
9 See *Gao Haiyan v Keeneye Holdings Ltd* [2012] HKCA 43, *Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings Ltd* [2012] HKCA 332, and *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* [2016] 1 HKC 149.
10 See *Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings Ltd* [2012] HKCA 332 at [15]–[16].
11 [2009] SLR(R) 861.
12 [2008] SGHC 202.
13 *Id* at [11].

> usually be appropriate in such cases, there may be exceptional cases where such an order should not be made. […] [Emphasis added.]

13 Accordingly, the Law Reform Committee is giving serious consideration to proposing a reform of the legal position so that indemnity costs are awarded as a matter of course to the successful party in an unsuccessful challenge. In addition to the reasons articulated in the Hong Kong jurisprudence considered above, it may be said that such reforms are desirable given that:

(a) the successful party has already prevailed in arbitral proceedings and should not be put to bear substantial costs out-of-pocket in an unsuccessful challenge which would be the case if the successful party is only able to recover costs on a standard basis;

(b) the award of indemnity costs as a matter of course in an unsuccessful challenge would add to deter parties from mounting unmeritorious challenges to enforcement of an award or to set aside an award, which in turn saves time and costs for all parties as well as saving judicial time from dealing with such unmeritorious challenges; and

(c) recognising that in international arbitration, the assessment of the quantum of costs payable under a final award by the unsuccessful party to the successful party is generally closer to that under an indemnity basis.

C. SECOND ISSUE – HIGH COURT JUDGE TO HEAR FIRST INSTANCE PROCEEDINGS ON RESISTING ENFORCEMENT OF ARBITRAL AWARD

14 As part of the existing case management policy of the Supreme Court Registry, applications to set aside an award are heard at first instance before a High Court Judge ("**setting-aside proceedings**"). In contrast, proceedings which involve resisting enforcement of an award ("**contested enforcement proceedings**") are heard at first instance before an Assistant Registrar of the Supreme Court. In practical terms, this means that there is *one* round of appeal (from High Court Judge to the Court of Appeal) for setting-aside proceedings and *two* rounds of appeal (from Assistant Registrar to High Court Judge, and from High Court Judge to the Court of Appeal) for contested enforcement proceedings.

15 It is, however, preferable to streamline both processes so that there is only *one* round of appeal for both setting-aside proceedings and contested enforcement proceedings, given that the substantive bases for setting-aside and for resisting enforcement dovetail. Already, where a challenge to an award leads to two sets of parallel proceedings, the setting-aside proceedings (taken out on the motion of the party seeking to set aside the award) and contested enforcement proceedings (taken out by the same party in response to an application to enforce the award) are both fixed before the same High Court Judge at first instance.

14 The streamlining of both processes so that there is only one round of appeal would save time and costs.

16 This reform may potentially be in the form of a change of case management policy within the Supreme Court Registry.

D. FEEDBACK SOUGHT

17 Feedback is accordingly sought on whether the reforms set out above would be welcomed by the arbitration community and by users of arbitration processes in Singapore.