Red Light, Green Light: The Inter-operability of National Courts in Arbitration-Related Litigation[1]

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1. What is a Singaporean lawyer doing as an author of what some might regard as a quintessentially English book on arbitration law?

2. Part of the answer lies in the observation made by Mr Justice David Foxton that courts around the world, including the English courts, are increasingly looking to each other for inspiration. This was in fact a trend that Prof Goh Yihan and I identified almost 10 years ago in our publication *Singapore Law: 50 Years in the Making* (Academy Publishing, 2015).

3. But it goes beyond the mere intellectual curiosity of internationally-minded judges.

4. The reality is that the "international" in international arbitration today is not simply definitional. That there is one foreign party, or a foreign law is chosen, and so on.

5. It reflects the international nature of the *practice*, driven by the global operations of parties, and hence the multiplicity of jurisdictions in which arbitration-related litigation occurs even within a single dispute.

6. This calls into question, to use computer lingo, the *inter-operability* of national courts. How do they speak to each other? How should they?

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[1] This speech was delivered at the launch of *Mustill & Boyd: Commercial and Investor State Arbitration* (LexisNexis, 3rd ed, 2024) in Singapore at a seminar titled "The Internationalisation of International Arbitration" organised by the Singapore Academy of Law.

[2] I am grateful for the assistance of Tan Jun Hong in the preparation of this speech. All errors remain mine.

7. A fairly common situation that arises nowadays involves a party to an arbitration agreement running to the courts of its home jurisdiction to commence litigation in breach of an arbitration agreement.

8. The other party turns to the court at the seat of arbitration, or another court that is empowered to support a foreign arbitration, to seek an antisuit injunction, possibly coupled with an anti-recognition or anti-enforcement injunction to pre-empt the enforceability of a possible judgment obtained in breach of the arbitration agreement.

9. In some cases, this might be sufficient to stop the recalcitrant party. In many cases, it would not be. A judgment is then obtained in breach of the arbitration agreement and is sought to be enforced in a third country where there are assets.

10. If the rogue judgment were sought to be enforced in England, section 32 of the Civil Jurisdiction and Judgments Act would provide an answer to the enforcement of such a judgment.

11. The answer is more complicated in countries such as Singapore, which does not have an equivalent.

12. If the rogue judgment happened to originate from one of the countries covered by the Reciprocal Enforcement of Foreign Judgments Act ("REFJA"), there is in fact an answer given by section 5(4)(b) of the Act.

13. In short, the Act treats a court as not having the requisite jurisdiction if "the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court."

14. Though it has yet to be tested, there is no reason why the reference to "an agreement under which the dispute in question was to be settled" should not include an arbitration agreement.

15. If the rogue judgment comes from outside a court that is not covered by the REFJA, the position is not clear.

16. It may be thought, intuitively anyway, that such a rogue judgment should not be enforced as a matter of public policy. But hardly any authority exists – other than a short article I wrote years ago.

17. To the contrary, Lord Justice Moore-Bick in *The Wadi Sudr* [2010] 1 Lloyd's Rep 193 had expressed the view, although obiter, that a breach of an arbitration agreement alone would not be sufficient to offend English public policy for the purposes of whether to enforce a foreign judgment, particularly if it were a decision taken by the foreign court in good faith.

18. Could Singapore's public policy be any different?

19. It is not controversial that Singapore is 'arbitration-friendly'. In this regard:

    a. The International Arbitration Act gives force to the UNCITRAL Model Law on International Commercial Arbitration 1985, which obliges the court to enforce an arbitration agreement (see, inter alia, Arts. 5 and 8) as well as the New York Convention 1958 which also imposes an obligation on the courts of contracting states to recognise and enforce an arbitration agreement (Art II).

    b. In enacting these instruments as part of Singapore law, Parliament endorsed the "full liberty" of parties to "choose laws and arbitrators to resolve their disputes with minimal intervention from domestic courts": see, *Singapore Parliamentary Debates, Official Report* (31 October 1994) vol 63 at cols 624−629 (Associate Professor Ho Peng Kee, Parliamentary Secretary to the Minister for Law).

    c. There is a long-stated judicial policy of the Singapore courts has also been to respect the choice of parties as to the method of dispute resolution.

d. In *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244, the court explicitly held that "*it is part of Singapore's public policy to promote or favour international arbitration*" and thus the court should give effect to the parties' contractual choice as to the manner of dispute resolution unless the parties' choice offended Singapore law. This extended to enforcing the contractual bargain of parties to arbitrate their disputes (at [54]).

20. But if public policy is not the answer, would the Singapore courts analogise the statutory defence available under the REFJA in the development of the common law – by holding that such a judgment had been obtained from a court lacking the requisite jurisdiction?

21. It does seem odd that a party's position should be worse if such a judgment were obtained from a court of a country that is not even a part of the reciprocal enforcement regime.

22. In the Chief Justice's speech, "Transnational Relitigation and the Doctrine of Transnational Issue Estoppel", delivered at the *8th Judicial Seminar on Commercial Litigation* (14 March 2024), he argued, echoing his judgment in *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10, that it was incumbent on the courts to develop the common law of Singapore, as far as permissible, in a way that advances Singapore's international law obligations, and that the common law should, as far as possible, be developed in a way which coheres with relevant legislation. See also, *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102.

23. There might be some prospect of developing our common law in what I would argue to be the correct direction.

24. Would a party that has obtained an antisuit or anti-recognition or anti-enforcement injunction be in a better position if they enforced such an injunction in Singapore prior to an application by the recalcitrant party to enforce the rogue judgment?

25. That possibility arises because of the recently expanded jurisdiction of the REFJA to cover non-money, interlocutory judgments. And again, although untested, there seems to be no reason in principle why that cannot include antisuit injunctions and the like.

26. One reason that enforcing the injunction in Singapore might strengthen the hand of the party seeking to enforce the arbitration agreement is that by 'domesticating' the injunction, the further actions of the recalcitrant party could be regarded as being in contempt of court.

27. In *Gonzalo Gil White v Oro Negro Drilling Pte Ltd.* [2024] SGCA 9, the Singapore Court of Appeal recognised that it would be against public policy to recognise or enforce a foreign judgment on the application of a party who (1) had notice of an antisuit injunction from the court of the forum, (2) proceeds to carry on with the foreign proceedings and (3) subsequently procures judgment from the foreign court.

28. The court explained that this reflects the broader principle that this would be against the fundamental public policy of the forum because of the abuse of process which would result from the contempt of an order of the court of the forum.

29. The court also cited with approval an earlier High Court decision in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088, which had held that "it would be manifestly against public policy to give recognition to the foreign judgment at the behest of the defendants who have procured it in breach of an order emanating from this court".

30. In fact, following English authority, the Singapore courts have a discretion to refuse to hear a party in contempt. This principle has been confirmed in the context of a party acting in breach of an antisuit injunction issued by the forum court (see, *Pertamina International Marketing & Distribution Pte Ltd v P-H-O-E-N-I-X Petroleum Philippines, Inc (a.k.a. Phoenix Petroleum Philippines, Inc)* [2024] SGHC(I) 13).

31. A further reason would be that the enforcement of such an injunction in Singapore could then give rise to an estoppel against the rogue judgment obtained and sought to

be enforced subsequently. It is trite that a subsequent foreign judgment should not be enforced if it conflicts with a prior local judgment.

32. What if the injunction was not obtained from a jurisdiction covered by the REFJA?

33. Enforcement would not be an option. But it could possibly be recognised. Indeed, it has been said in other contexts that it is possible that issue estoppel can in principle arise in respect of foreign decisions on interlocutory matters (see, *Lakshmi Anil Salgocar v Jhaveri Darsan Jitendra and Anor* [2019] 2 SLR 372).

34. While there may or may not be straightforward answers to these issues, they illustrate a very different world in which the previous edition of M&B was written and the current realities.

    a. In 1989, when the previous edition was published, there had not yet been the decision in *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96 that there should be "no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them."

    b. It was also before Singapore's High Court decision in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088, that where there is an arbitration agreement, "it has a duty to uphold that agreement and prevent any breach of it": at [91].

35. Those principles, now treated as established and uncontroversial, are being tested in an increasingly interconnected world where each jurisdiction is potentially part of an international squid game to see which party survives.

36. It is possibly in recognition of this reality that explains two of Singapore's recent legislative amendments:

a. First, that rules on service out of jurisdiction are a lot less categorical than under the old Order 11 and has shifted to the wider formulation as to whether the Court has the jurisdiction or is the appropriate court to hear the action.

b. Second, that the Singapore courts may now grant so-called freestanding injunctions in support of foreign proceedings – in line with countries such as the UK.

37. The multi-jurisdictional nature of the law, procedure and practice of international arbitration, is well-represented in the third edition. Where we are headed is a more developed jurisprudence and understanding of how national courts "red light and green light" each other's judgments on arbitration-related matters, which the 4th edition of M&B will undoubtedly have more to say on.