Appeals in Arbitration: 'To Be or Not to Be'*

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Keywords: appeals, international commercial arbitration, Model Law, party autonomy, finality of awards, error correction, precedent, enforcement and recognition of awards, grounds for setting aside awards, arbitration legislation, supervisory role of courts in arbitration

1 INTRODUCTION

1. In February 2020, the Singapore Academy of Law ('**SAL**') published a comprehensive paper titled 'Report on the Right of Appeal against International Arbitration Awards on Questions of Law' ('**SAL Report**') in which SAL proposed legislative amendments in Singapore to enable parties the choice to 'opt in' to

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appeals on questions of law arising out of an international arbitration award. Currently, Singapore allows for appeals in domestic but not international arbitrations. Singapore has had great success with respect to international arbitration and is presently recognized as a very attractive international arbitration centre. In fact, the 2021 *International Arbitration Survey* recognized Singapore and London as the top two arbitral seats in the world.[1] The learned authors of the SAL Report recognized that the UK experience in allowing for appeals on questions of law for both domestic and international arbitration impacted London's popularity as an arbitral seat. This supported their position that Singapore should amend its International Arbitration Act ('**IAA**') to also allow for appeals on questions of law.[2]

2. On paper, the arguments in favour of allowing a limited right of appeal on questions of law seem attractive. The pursuit of excellence, including error-free awards, ought to be commended. Arbitral tribunals often determine matters of great significance. The stakes in international commercial arbitration can be very high. Why not provide parties with the option to have their awards subjected to judicial scrutiny in the form of appeals on a question of law? Is not party autonomy the cornerstone of arbitration? How can giving the parties this additional choice not strengthen that notion of party autonomy? Surely the UK experience demonstrates that allowing for such appeals ought to, at the very least, be seriously considered by other jurisdictions. Yet the prospect of appeals causes a level of discomfort for many within the broader arbitral community and users of arbitration. Why is this the case? What does practical experience teach us with respect to this matter?

3. This article examines the question of allowing for appeals on questions of law in international commercial arbitration. There are persuasive arguments for both perspectives. Most jurisdictions strictly adhere to a Model Law approach, and do not provide for appeals on questions of law at least with respect to international commercial arbitration. What are the lessons to be learned from the handful of jurisdictions that do allow for appeals? Further issues include whether an award that has been varied by a court is still an 'award' that can be enforced in the many nation-states who have ratified the New York Convention. Are there other ways of minimizing arbitral tribunal error and enhancing arbitral tribunal accountability? Can a body of arbitral precedent be established outside of court judgments? These are all important questions that confront international commercial arbitration.

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1 White & Case LLP & the School of International Arbitration, Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*.

2 *Ibid*.

4. Ultimately, after considering the various arguments and putting on my 'arbitrator hat' to give an opinion on the matter, I am of the view that the answer should be examined through the prism of 'party autonomy'. However, I am not convinced by the SAL Report that party autonomy is enhanced by giving the parties an option to have an appeal on questions of law. In my respectful view, such a position is simplistic. It is a 'false choice'. SAL's conceptualization of party autonomy does not properly distinguish the arbitral process, which is founded in the agreement of the parties, from a State-based curial or judicial process where judges derive their coercive powers from the State. At a superficial level it may seem that arbitrators and judges do similar things, and many arbitrators are even former judges. However, the two roles are very different. Arbitrators are appointed by the parties to serve the parties in resolving their disputes. Judges are appointed by and ultimately serve the State through the enforcement of the rule of law. They form part of the apparatus of government. It is entirely appropriate and essential that courts retain their supervisory jurisdiction over arbitral agreements and awards. However, unhelpful complications arise when one attempts to merge the two processes by allowing for judicial appeals in an otherwise private dispute resolution process. Weighing up the competing submissions, and considering the practical implications of allowing appeals, I am of the view that the Singapore Parliament (and that of other nation-states) would be better served, and would better serve the users of arbitration, by not allowing for appeals in international commercial arbitration and persisting with the Model Law model.

2 ARGUMENTS IN FAVOUR OF A LIMITED RIGHT OF APPEAL ON QUESTIONS OF LAW

5. The various arguments in favour of allowing for a limited right of appeal on questions of law are set out in summary form below. The learned authors of the SAL Report set out these arguments in a more comprehensive fashion.

2.1 Party autonomy

6. As noted above, the primary argument is that allowing for appeals on an 'opt in' basis enhances party choice and thereby party autonomy. Choice is inherently good.

7. Parties may have very good reasons to choose to have appeals from arbitral awards on questions of law. International commercial arbitration ought to provide the parties with this choice, including the opportunity to avail themselves of the extra protection that appeals afford. This is particularly so where matters are sizeable and the stakes are high.

8. There ought not be a 'one-size-fits-all' approach to international commercial arbitration. Just as arbitral institutions and arbitral tribunals (with the agreement of parties) proactively manage smaller matters in the interest of efficiency and cost-effectiveness by limiting parties' rights (such as the right to access documents or even the right to have a hearing), a tailored approach for mega-matters ought to be taken by providing the parties with additional rights, including the right of an appeal.

9. Further, party autonomy will always trump finality and considerations of costs and efficiency. The finality of an award is simply a direct consequence of party autonomy (and the initial choice that the parties made to choose arbitration). Party autonomy, therefore, is the ultimate source of the arbitrator's power and any initiative that enhances choice enhances autonomy and is to be embraced.

2.2 Attractiveness as a seat

10. A seat which gives the parties appeal options may be more attractive. As noted above, the United Kingdom allows for appeals in international commercial arbitration and London is (with Singapore) the most preferred seat in the world.

11. Lack of appeal rights has been cited as a reason why parties and their lawyers choose litigation over arbitration. When a 2015 survey asked what the three worst characteristics of international arbitration were, 17% of respondents mentioned 'lack of appeal mechanism on the merits'.[3]

12. Allowing for appeals would provide the parties with access to the judicial expertise of the Bench, to the mutual benefit of the parties. In many developed nations of the world, judges are revered as being preeminent lawyers of the highest intellectual, moral and ethical character. The arbitration world can only benefit by having judges more intimately involved in decision making.

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[3] Noam Zamir & Peretz Segal, *Appeal in International Arbitration: An Efficient and Affordable Arbitral Appeal Mechanism*, 35(1) Arb. Int'l 79, 86 (2019), citing Queen Mary School of International Arbitration and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* 8 (QMUL 2015).

2.3 Error correction – rightness

13. The primary function of any appeal is to enable errors to be corrected. Complex disputes are prone to human error either substantively or procedurally. The more 'high-value' the arbitration, the more costly any mistake. If it is accepted that even experienced judges must be subject to appeal and at times make appealable errors, there must be a strong reason not to provide some appeal mechanism for arbitral awards.[4]

2.4 Fairness

14. Too much finality may undermine the legitimacy of arbitration. To say that arbitration finalizes the conflict because a party who consciously consents to arbitration 'had only themselves to blame' ignores the cognitive dissonance of such consent.[5]

15. The appeal of finality may depend on the size and complexity of the case. That is, and as noted above, where the stakes are particularly high, the need to protect against the risk of an aberrant award by permitting an appeal outweighs the desire for speed and finality.[6] This has been described as a tension between the rival goals of finality and fairness.[7] And fairness must ultimately outweigh finality.

2.5 Accountability of arbitrators – public confidence

16. Error correction provides stronger accountability of the arbitral tribunal to the parties. Having arbitrators accountable for their decisions and reasoning in a public way (like trial judges are) will ensure that the powers of arbitrators are necessarily checked in a measured and appropriate way. This may lead to more public confidence in international commercial arbitration.

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4 Zamir & Segal, *supra* n. 3, at 83, citing *Summary Record of Proceedings, Geneva Consultative Meetings of Legal Experts, February 17–122, 1964*, History of the ICSID Convention, vol II-1 427 (ICSID 2009).

5 Zamir & Segal, *supra* n. 3, at 84.

6 Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 30(5) J. Int'l Arb. 531, 534 (2013), citing *AT&T Mobility LLC v. Concepcion* 131 S Ct 1740 (2011); D. Wallace, *Control by the Courts: A Plea for More, Not Less*, 6(1) Arb. Int'l 253, 258 (1990).

7 Platt, *supra* n. 6, at 534, citing W Park, *Why Courts Review Arbitral Awards*, 16(1) Int'l Arb. Report 596 (2001) and H. Abedian, *Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review*, 28(1) J. Int'l Arb. 553, 589 (2011).

2.6 Efficiency

17. An appeal mechanism may improve an award's execution. A dissatisfied party who lost on an appeal may be less inclined to spend additional time and resources resisting enforcement or setting aside the award before domestic courts.[8]

2.7 Development of commercial law

18. Appeals on questions of law enable commercial law (or mercantile law) to be evaluated and modernized.[9] That is, appeals provide courts with more options to provide reasoned judgments on points of commercial law. Appeals, which are public, why public scrutiny and not being hidden is a good thing/advances the law (fundamental principles of natural justice).

2.8 Development of precedent

19. Appeal decisions will give rise to a further body of precedent which helps in respect to the certainty of the rule of law. Allowing appeals enables courts to develop rules and norms around complex commercial matters of public importance. The use of precedent ensures consistency, which is essential for arbitration to possess legitimacy.

2.9 Right honourable lord mustill report

20. Prior to the United Kingdom adopting its *Arbitration Act 1996*, Lord Mustill produced a paper that may have been highly influential in Parliament's decision to allow for appeals. One of the core arguments he made was that the Model Law (that does not allow for appeals to courts) is probably more suitable for adoption by States with an undeveloped arbitration regime and set-up.[10] The contention follows that courts should be involved more in international commercial arbitration in nations that have a strong and developed legal tradition, such as the United Kingdom.

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8 Zamir & Segal, *supra* n. 3, at 85.

9 H. R. Dundas, *Arbitration and the English Courts: Progress and Regress*, 72(1) Arb. 104 (2006).

10 Department of Trade and Industry (UK), *A New Arbitration Act? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law on International Commercial Arbitration* (Chair: the Rt Hon Lord Justice Mustill) (London: HMSO 1989) ('Mustill Report'), also published in [1989] 4 Arb Materials 5.

3 ARGUMENTS AGAINST RIGHT OF APPEAL ON QUESTIONS OF LAW

21. The question as to whether to allow appeals on a question of law is not new. It has existed for decades and has essentially been rejected by the majority of nation-states who have implemented the Model Law in its 'pure' form. A summary of the arguments against allowing for a right of appeal on a question of law is set out below.

3.1 Model law, new york convention and international trends

22. Too much curial intervention is simply out of line with the Model Law, the New York Convention and international trends. The New York Convention crystallized the modern consensus that international commercial arbitration should not be subject to the court's appeal process. It provides an exhaustive list of grounds for refusal of recognition and enforcement of foreign arbitral awards which have been construed narrowly by national courts.[11] This list mainly pertains to procedural fairness and consent of the parties and does not include error of law or fact.[12]

23. The Model Law provides for a sound and internationally accepted framework for international commercial arbitrations. It represents best practice and a harmonization of the various diverse legal cultures of the nation-states who have achieved a remarkable feat in the creation, adoption and implementation of the New York Convention. Any move away from that consensus may fracture this co-operation of nation states. And such global co-operation has helped to ensure that international commercial transactions are governed and enforced by a system that may be coined as an 'international commercial rule of law'. Anything which has at its centre an independent and impartial rules-based system must be preferred to a system without such rules, where might and power prevail. The Model Law is, in many senses, a global compromise which also appeals to businesspeople and lawyers, including those from Continental Europe, China, Indonesia, Japan and Vietnam who may be unfamiliar with Lord Mustill's concept of developed English law and arbitration.

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[11] The 5 May 2021 decision of the Supreme Court of Western Australia in *Venetian Nominees Pty Ltd v. Weatherford Australia Pty Ltd [2021] WASC 137* demonstrates that courts will construe these grounds narrowly and in the words of Martin J 'losing does not equate to procedural unfairness'.

[12] Zamir & Segal, *supra* n. 3, at 81.

24. Since 1958, global commerce and those who do business across borders have greatly benefitted from the New York Convention. Those benefits have been recognized and embraced by the users of international commercial arbitration.

3.2 User preference

25. A seat which has a culture of limited curial intervention may be a more attractive seat for users of international commercial arbitration. This philosophy sat behind Singapore's drive over the last few decades to become an international hub for arbitration. Singapore, as noted above, is now (with London) the most preferred seat globally.[13] Caution must be exercised when viewing the situation in London. First, I am aware through conversations with prominent members of the arbitral community that it is common for businesspeople and lawyers to draft their arbitration agreements to exclude appeals. Secondly, the appeal rights in the UK are limited to those contracts which are governed by UK law. Many international commercial arbitrations that are seated in London are governed by laws other than UK laws. So, there may be no direct link to London's great popularity as an international arbitration seat and to that part of the *Arbitration Act 1996* which enables limited appeals in limited circumstances.

26. Ultimately, the majority of these users do not want appeals. In 2015, a Queen Mary University survey revealed that 77% of respondents did not favour the inclusion of an appeal mechanism in commercial arbitration. Further, 61% were against it in investment treaty arbitration.[14] In Bryan Cave Leighton Paisner's (BCLP's) 2020 annual arbitration survey, the vast majority of respondents (over 70%) were against allowing appeals to national courts.[15]

3.3 Finality of award

27. A strong practical argument against appeals is that by their nature they undermine the finality of arbitral awards, which may lead to increased cost and delay in resolving disputes. International commercial arbitration, as its name suggests, is confined to commercial disputes only. Unlike in criminal law, family law or other areas where the State may have an important interest, businesspeople generally prefer practical, fair, sensible and final resolutions of disputes to enable

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[13] White & Case LLP & the School of International Arbitration, Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*.

[14] Queen Mary School of International Arbitration and White & Case, *supra* n. 3.

[15] Bryan Cave Leighton Paisner, *Annual Arbitration Survey 2020: A Right of Appeal in International Arbitration. A Second Bite of the Cherry: Sweet or Sour?*

them to 'get back to business'. Disputes that drag on through the years and potentially decades are simply 'not good for business'. The concept of 'finality of award' has a strong, sensible, pragmatic and commercial base to it. Further, the commercial safeguard is that the parties have the choice in respect to who is appointed to the arbitral tribunal. If they want very experienced and eminent lawyers, then that choice is theirs to make.

28. Finality is meant to increase legal certainty of international commerce and to ensure compliance with the arbitral award.[16] This in turn gives businesses the confidence to operate across national borders to the benefit of local economies and the broader global economy.

3.4 Cost and efficiency

29. Finality is meant to enhance the efficiency of the arbitral system by narrowing the temporal span of the arbitral process.[17] The old adage that 'time is money' rings particularly true of adversarial dispute resolution processes. Generally, the best thing that a dispute resolver can do to assist the parties to reduce cost is to reduce the time that is taken to resolve the matter. Prolonging proceedings is costly both in legal fees and in delaying enforcement of the award.[18] There have been suggestions to limit the time for drafting the appeal award, as well as a page limit for the written submissions. These may alleviate some efficiency concerns. But generally, appeals introduce a whole new layer to the dispute resolution process which inevitably results in more time (and cost) to achieve final resolution. Long-running disputes distract businesses and business managers from their core work.

3.5 Privacy and confidentiality

30. Arbitration is designed to be more private and confidential than litigation, which in most nation-states takes place in a public forum and is on the public record. Like mediation, in this sense it is predominantly concerned with resolving specific disputes between parties. It often provides a more discrete and tailored service to businesspeople than what judges can offer. The parties have direct and confidential access to their arbitral tribunal which is often not the case for litigation. Arbitration also caters for situations in which the parties simply cannot reach

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16 Zamir & Segal, *supra* n. 3, at 81, citing Ivan Milotić, *Exclusion of Appeals Against Arbitration in Roman Law*, 20 Croatian Arb. Y.B. 241 (2013).

17 *Ibid*.

18 Zamir & Segal, n. 3, at 84, citing Irene M Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 J. Int'l L. & Pol. 1109, 1164 (2012).

their own agreements to resolve the substantive matters in dispute (e.g., mediation has been tried but failed), but jointly agree to put their dispute in the hands of someone that they trust to resolve it for them.

31. The starting point for arbitration-related court proceedings is that they are public. In the absence of exceptional circumstances, the presumption of open justice will require disclosure of the identity of the parties and at least some degree of disclosure of the contents of the award, even if the arbitration agreement contains an explicit confidentiality clause.[19]

32. Arbitration does not exist in a vacuum and courts retain the essential supervisory role, including in respect to enforcement and recognition. Consequently, it can never offer the parties a 100% guarantee of privacy and confidentiality, though the more sensitive aspects of the process, such as cross-examination of witnesses, do take place in private. It is implicit (and sometimes explicit) that strangers to an arbitration, including representatives from the media, are excluded from the hearing.

3.6 Appeals undermine the service element of arbitration

33. Ultimately, arbitrators are paid directly by the parties and accordingly (unlike judges) are service providers. Part of their service role is to be available and assist the parties in every aspect of the arbitral process through to the delivery of the final award. Arbitrators (unlike judges) run private professional practices. An astute and successful arbitrator seeks a reputation of providing a high-quality service, both in terms of the substantive decision-making and reasoning processes and also procedural fairness and case-management skill. Judges generally take an oath of office to the nation-state or jurisdiction that appoints them. The notion of providing a 'service' to the parties is (rightly) anathema to them. While many judges do provide great service to those who appear before them, they have higher obligations and duties, including to the rule of law and to the very high office that they serve. The introduction of appeals introduces into the arbitral process this new actor who may (in some circumstances quite appropriately) have no real interest in serving the commercial interests and procedural needs of the parties who appear before her or him. Parties do not have the same access to a judge in the same way that they have access to their arbitral tribunal.

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[19] David Williams QC, *Arbitration Appeals*, 2(1) N.Z. L. J. 75 (2005), citing *Television New Zealand Ltd v. Langley Productions Ltd* [2000] 2 NZLR 250.

3.7 Appeals undermine party autonomy

34. Ultimately, the arbitral tribunal is chosen by the parties, whereas the parties will rarely, if ever, be able to choose the judge who hears the appeal. A judge is nominated by the State. In arbitration, disputants appoint the tribunal (directly or by a chosen arbitration institution) after they have inquired whether the arbitrator is trustworthy, honest and knowledgeable to decide the particular dispute. The parties have true ownership of the process because they have determined all the parameters.[20]

35. The judicial process is very different from the arbitral process. Judges derive their powers from the coercive powers of the State as opposed to arbitrators who derive their powers from the agreement of the parties.

36. The very concept of an appeal connotes the existence of judicial hierarchy, with a stranger to the arbitration being elevated to a position where she or he ultimately decides the matter. That person, who plays that ultimate and final role, was, quite simply, not chosen by the parties. For example, the parties may have a dispute involving an infrastructure project and may have agreed to an arbitral tribunal that has decades of relevant construction law or technical experience. But if their dispute is ultimately decided on appeal, this may mean that a judge with limited construction experience ultimately decides. The parties' choice to have construction experts decide the dispute has been undermined. There is no true party autonomy.

37. In international commercial arbitration, party autonomy is especially important because parties come from different jurisdictions and often lack familiarity or trust in the other's legal system.[21] To continue with the hypothetical infrastructure project example noted above, the claimant may be a Japanese contractor and the respondent may be a State-owned English power plant. The parties may have agreed to place their trust in an arbitral tribunal with experienced construction lawyers from three independent nations (say, China, Vietnam and Australia). If the parties' dispute is ultimately decided by, say, an English judge or a Japanese judge (regardless of how eminent she or he is), that process is likely to undermine the trust and familiarity that the parties enjoy with a global and impartial dispute resolution system.

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[20] Zamir & Segal, *supra* n. 3, at 83.

[21] *Ibid.,* at 84, citing Thomas Dietz, *Does International Commercial Arbitration Provide Efficient Contract Enforcement Institutions for International Trade?*, in *International Arbitration and Global Governance: Contending Theories and Evidence* 178 (Walter Mattli & Thomas Dietz eds, OUP 2014).

4 WHAT ARE OTHER SEATS DOING?

38. While most seats do not allow for appeals, there are some who do. I briefly list some of those who do allow for appeals on the question of law to varying degrees below.

4.1 Singapore International Commercial Court (SICC)

39. The SICC provides the parties with opt-out appeal mechanisms.

4.2 Singapore

40. As noted above, Singapore has allowed for appeals for domestic arbitration but not international arbitration. The role of appeals for international commercial arbitrations is presently being reviewed by the Ministry of Law.

4.3 Section 69 Arbitration Act 1996 (United Kingdom) ('UK Act')

41. The UK Act recognizes a right of appeal against international commercial arbitration awards on questions of law. The appeal right is available to the parties on an 'opt-out' basis. That is, should the parties decide that they do not want appeals, they need to agree to an express clause being inserted in their contract with sufficiently clear wording.[22] The hurdle in the UK Act for a successful appeal is 'over and above the court being satisfied that the tribunal was *obviously* wrong in law … there will have to be something else which makes it just and proper for the court to substitute its own decision for that of the tribunal'.[23] This is intended to make successful applications for leave to appeal from an arbitration award very rare.[24]

4.4 New Zealand

42. New Zealand allows for appeals on an 'opt-in' basis for international commercial arbitration and on an 'opt-out' basis for domestic arbitration.[25]

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22 Platt, *supra* n. 6, at 537.
23 *Arbitration Act 1996* (England and Wales) s. 69(3)(d).
24 Lord Saville, *The Arbitration Act 1996*, Lloyd's Mar. & Commercial Q. 502 (1997).
25 *Arbitration Act 1996* (NZ) Sch. 2 cl 5.

4.5 Hong Kong

43. The right to 'opt in' to appeal arbitral awards on questions of law is only available for parties to domestic arbitration.

4.6 Australia

44. Section 34A *Commercial Arbitration Acts* of each Australian state and territory ('**CAA**') allows an appeal on a question of law if the parties agree to such an appeal and the court grants leave. The decision of the arbitral tribunal must be 'obviously wrong' or the question must be one of 'general public importance' and the arbitral decision is open to 'serious doubt'.

45. There is no appeal right conferred by the *International Arbitration Act 1974* (Cth). In *TCL Air Conditioner (Zhongsan) Co Ltd v Judges of the Federal Court of Australia*, the High Court upheld the constitutional validity of amendments in 2010 enacting the United Nations Commission on International Trade Law ('**UNCITRAL**') Model Law into the IAA, affirming Australia's adherence to the principles of party autonomy and the finality of awards in international commercial arbitration.[26]

4.7 United States of America – Doctrine of Manifest Disregard of the Law

46. There is a common law ground for vacating an arbitration award, recognized by the Supreme Court of the United States, in exceptional circumstances where the award shows a manifest disregard of the law. This doctrine has a very high threshold that needs to be satisfied, given the public policy of finality of an arbitration award and the doctrine of *functus officio*.[27]

5 FURTHER ISSUES TO CONSIDER

47. Introducing appeals on the question of law in arbitrations may give rise to additional issues that legislators, judges, parties and parties' advisors need to be mindful of. Some of these further issues are summarized below.

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[26] *TCL Air Conditioner (Zhongshan) Co Ltd v. Judges of the Federal Court of Australia* (2013) 251 CLR 533 45–54, 81–99.

[27] Tan Liang Ying & Christine Sim, *Appeals on Questions of Law in International Arbitration – A Comparative Perspective from New York*, SAL Prac 18 15–21 (2020).

5.1 Enforcement of an award varied by court

48. Where an arbitral award is varied or amended by an appeal court, the question arises as to whether that varied award still constitutes an 'arbitral award' that is covered by the New York Convention and enforced in the normal way across the multitude of jurisdictions that recognize arbitral awards.

49. In Singapore, section 51(2) *Arbitration Act* (which applies to domestic awards) provides that where an award is varied by court, the variation shall have effect as part of the arbitral tribunal's award. That solution may be satisfactory for domestic arbitrations but does not assist an award creditor in an international arbitration which may have no other choice but to seek enforcement in jurisdictions beyond the arbitral seat (or more importantly jurisdictions that do not have the legislative equivalent of section 51(2) *Arbitration Act*).

5.2 Leave of court

50. In those jurisdictions that allow for appeals, they are generally not allowed on an 'as right' basis. There is a recognition in some jurisdictions (e.g., domestic arbitration in Australia) that the court acts as a gatekeeper in determining whether to grant leave. The discretion to grant leave may depend upon a range of factors, including the strength of the challenge, amount of money involved, the importance of the dispute, how the question arose (i.e., incidentally or at the heart of the arbitration), delay involved, qualifications of the arbitrators, and so on. Accordingly, the additional thresholds for the court to consider with respect to whether it entertains an appeal must be determined. The test for leave is expressed in different ways in different jurisdictions, meaning that it may be unlikely that any harmonious or 'best practice' global approach emerges on this issue. This may undermine legal certainty for those businesses that operate across international borders.

5.3 What is a question of law?

51. The practice of the law can be more complex than an academic study of it. On occasions it may simply be very difficult for practitioners to neatly separate questions of law from questions of fact. Some jurisdictions recognize that a perverse finding of fact or one based on no evidence may be regarded as an error of law. In opening the Pandora's box and allowing questions of law to be determined on appeal, one must also ask: what about questions of combined fact and law? This generally refers to the exercise of applying the relevant legal test to

the relevant facts. A mixed question of fact and law is fundamentally a question of application. Separating a question of law from its application can be difficult and can be manipulated by a skilled advocate in an attempt to have factual findings overturned.

5.4 Courts deciding questions of foreign law

52. There is something quite strange about the possibility of a national court deciding questions of law of another nation state. The United Kingdom, as noted above, has a solution for this problem. Section 82 of the UK Act defines a question of law as a 'question of law of England and Wales' or 'Northern Ireland'. Excluding questions of foreign law in the UK Act is significant, as many (perhaps most) international commercial arbitrations seated in London are governed by foreign laws. That is, while the procedural law is UK law, the substantive law applying to the contract often is some other law (e.g., French or Chinese law). The English courts have recognized that they perhaps have no business in deciding what is, or what is not, Chinese or French law. The result is that the appeal option in the UK in respect of international commercial arbitration is quite limited (and appropriately so).

53. In New Zealand, the legislature has not been so reserved, and a 'question of law' is not defined. The approach generally taken by New Zealand courts is to regard the determination of foreign law to be a question of fact based on expert evidence. There is nothing novel about an arbitral tribunal deciding questions of substantive law as a matter of fact based on expert evidence. It is, however, somewhat more delicate for a court of one nation to opine and give judgment on the laws of another nation.

54. As an aside, it is noted that Singapore has the benefit of the SICC which is comprised of eminent judges from foreign jurisdictions who may assist in resolving questions of foreign law by themselves determining the law, rather than dealing with it as a question of fact.

5.5 Internal appeals

55. Some commercial arbitration rules (e.g., Arbitrators and Mediators Institute of New Zealand ('**AMINZ**') permit an arbitral appeal to a separate appeal tribunal comprised of arbitrators who are retired judges. This may be attractive to parties who wish to have the ability to seek appellate review but wish for this to take place in an 'in-house' environment and a confidential setting (away from public court).

Criticism has been made of the AMINZ approach. It has been noted that appointing only retired judges undermines party autonomy and excludes other eminent and perhaps more appropriate commercial lawyers or arbitrators from other fields such as those with accounting and finance expertise. A possible solution would be for the parties to agree on the necessary qualifications, and in the absence of agreement the President or Council of AMINZ could be given discretion to appoint appeal panel members with relevant experience and qualifications.[28]

5.6 Internal error correction

56. Some arbitral bodies (e.g., International Chamber of Commerce ('**ICC**') have an internal process for error correction whereby awards are reviewed and scrutinized by the ICC International Court of Arbitration before they are delivered to the parties. This may assist in the quest for perfection without the complications of introducing the parties to State-based courts to undertake that error correction role. Importantly, in systems of internal error correction, the ultimate decision as to whether or not to amend an award rests (as it should) with the arbitral tribunal.

5.7 Publishing of arbitrators' awards

57. Some arbitral bodies (e.g., ICC) publish arbitral awards with the consent of the parties. To preserve party autonomy this is often done on an opt-out basis. This assists with the question of arbitrator accountability and the development of a body of precedent. Again, such an approach may be preferred to the complexities that arise by having precedent captured only through the domain of national courts.

5.8 Who will hear the appeals?

58. The question also arises as to which judges are best placed to hear the appeals. Should the appeal go to the relevant court at first instance or to the appeal court? In Australia, where there is a federal system, should the appeal go to the Federal Court or to both the Federal Court and the relevant Supreme Courts? Should specialist arbitration judges be developed and used for such appeals? And how many levels of appeal should be had? Should an appeal from an arbitral tribunal go to one judge, three judges or more? If the appeal goes to one judge are there legitimacy issues to consider where the award was produced by an arbitral tribunal

[28] Williams, *supra* n. 19, at 76.

of three? How can there be international consistency in the application of such appeals?

5.9 Appeal rights are different to rights to set aside an award

59. This whole article has been premised on the notion that an appeal to a national court on a question of law is a very different concept to the limited rights under the Model Law for an arbitral award to be set aside or refused enforcement. These grounds to set aside (which find their origin in the New York Convention) do not cover error of law or fact but deal with situations where there was no power to issue the award in the first place or there has been a denial of natural justice. The grounds are narrow, provide a level of protection to the parties, and offer comfort for the supervising court, and are unlikely to be successfully relied upon on a frequent basis.

6 MY OPINION AND REASONS FOR IT

60. In my view, courts have a very important role to play in the world of arbitration. Without the supervisory role that takes place in its most critical and practical sense with applications to enforce or set aside awards, arbitration would be a 'toothless tiger' and have no global currency.

61. The learned authors of the SAL Report raise many important issues. In my view those issues, and the various arguments in favour of appeals in arbitration, can be addressed in other ways. For example, error correction and the quest for perfection can be addressed through a thorough internal review mechanism prior to awards being released together with the appointment of highly distinguished and skilled arbitrators. Fairness can be addressed by the parties choosing a tribunal (usually of 3 people) whereby each member has a track record of technical excellence, honesty and integrity. As an aside, it is noted that there are many examples of appeal judges being overturned by further appeals. There is never any guarantee of perfection in any legal system comprised of human beings. The accountability of arbitrators can be enhanced by having their awards made publicly available (unless the parties opt out of that). Similarly, the development of a body of precedent (and potentially a body of substantive commercial 'law') can be developed by publishing awards.

62. Ultimately, it is my view that it is unwise for Singapore, or other jurisdictions, to enable appeals against arbitral awards on questions of law with respect to international commercial arbitration. The fundamental reason for this conclusion lies in *party autonomy*. The most important decision that parties make in an

arbitration is the identity of *their* arbitral tribunal. Where appeals on questions of law are allowed, this most fundamental choice is taken away from them (albeit potentially through the 'opt-in' choice that parties may make to allow for an appeal). Some arbitrations look very much like court litigation, often due to choices that parties and their advisors make. However, they are very different products and processes which do not comfortably sit together (except in the supervisory role sense that a national court retains). Arbitrators are essentially service providers. Their primary duty lies to the parties who appoint them. They simply exist to help parties resolve their disputes. Judges have a different primary duty. They take an oath of office and serve their jurisdictions through the enforcement of rule of law and in many jurisdictions the development of that law. A rule of law presided over by courts is obviously essential for any free and civilized society.

63. There are many States that do not have developed legal systems. In some countries judges are not free from corruption or are not able to enforce the law free from State intervention. If such countries follow the lead of more developed countries to allow appeals then the whole fabric of international commercial arbitration may be undermined. Mistrust of national legal systems combined with the need for international commerce to operate under an independent and rules-based system has been part of the reason why the New York Convention and international commercial arbitration have been so successful.

64. Judges, arbitrators, mediators, negotiators (and the list goes on) all co-exist and complement each other in the broader dispute resolution world. A legal system would simply break down if courts were required to resolve every dispute that arises between its citizens. Mediation has provided courts and parties with a great service in resolving countless disputes in ways that are mutually satisfactory to the parties. In this sense, arbitration is similar, except that the parties have simply 'agreed to disagree' and place their confidence and trust in someone acceptable to them to break the deadlock. Similarly, mediators and arbitrators receive great benefit from courts. In this respect, the concept of negotiations or arbitrations taking place in 'the shadow of the law' is particularly apt. Courts and judges provide a context and framework within which mediators and arbitrators operate. Merging arbitration with litigation (which in my opinion is the outcome of allowing appeals on the question of law) may be superficially attractive, but ultimately it is unwise. At best, the notion confuses two very different processes. It is a false choice. At worst, the concept potentially diminishes the role of a judge to simply a dispute resolver and undermines the role of arbitrators, potentially preventing them from completing the service that the parties hired them to do.