USE OF COSTS ON INDEMNITY BASIS TO COMBAT DILATORY TACTICS IN ARBITRATION- ADVOCATING THE HONG KONG APPROACH

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ABSTRACT

Arbitral terrorism has become a subject of international concern. Dilatory tactics are the most common methods employed in derailment of arbitral process. Hong Kong's revolutionary stand in using costs on indemnity basis as a deterrent tool has broken ground in arbitration wherein notwithstanding the merit in the application, unsuccessful attempts and appeals at setting aside an award are being sanctioned by courts with indemnity costs. Even ICSID and ICC have penalized parties, winners and losers alike, for disorderly conduct in delaying arbitral proceedings. In the backdrop of the Hong Kong approach, echoed in the recent decision of Pacific China Holdings v. Grand Pacific Holdings, the article explicates the utility of the pre-award approach followed by arbitral institutions and national courts, and the conservative post-award approach followed by Australia, Malaysia, Singapore, England, and United States in discouraging dilatory tactics in arbitration. The conservative approach imposes indemnity costs as an exception unlike the Hong Kong approach where indemnity costs are imposed as a general rule. The conservative approach varies within the countries that follow it. Australia vociferously follows the conservative approach where it has explicitly rejected the Hong Kong approach. While America's stand is closer to Hong Kong's in spirit, United Kingdom, Malaysia and Singapore have not employed any conspicuous tangible practice of using indemnity costs in proceedings arising out of arbitration. The article analyses the jurisprudence available to extrapolate the effectiveness of the Hong Kong approach in combating dilatory maneuvers in arbitration.

I. Introduction

Guerrilla tactics of delaying and dilating enforcement of an arbitral award by resorting to appeals and injunctions have plagued the arbitration mechanism across countries and institutions and this become an international phenomenon.[1]

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[1] *See* Michael Hwang, *Why is there Still Resistance to Arbitration in Asia*, *in* Global Reflections On International Law, Commerce And Dispute Resolution: Liber Amicororum In Honour Of Robert Briner 401-405 (2005); Stephan Wilske*, Crisis? What Crisis?: The*

Indemnity costs and sanctions are emerging as effective tools to thwart unjustified protracted attempts at capsizing arbitral process or vacating arbitral awards.

> *When a party who loses an arbitration award, assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken.*
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> -10th Circuit Court in *Lewis* v. *Circuit City Stores, Inc.*[2]

The Hong Kong Court of Appeal gave a separate decision on costs in *Pacific China Holdings Ltd* v. *Grand Pacific Holdings*[3] which was upheld by the Final Court of Appeal in 2013, that confirmed the revolutionary position taken by the country in using indemnity costs as a tool to bolster its support for the finality of arbitral process by using it to sanction appeals against arbitral awards.

This paper focuses on the use of costs on an indemnity basis by Hong Kong as a measure of deterrence against undermining of the arbitral awards by disgruntled claimants. After a thorough exposition on the principles that govern indemnity costs in Australia, United Kingdom and United States, this paper will elucidate on the practicability of such a measure and make an assessment on the distinction between the Hong Kong approach of 'indemnity costs as a rule' and the Conservative approach of 'indemnity costs as an exception'. By evaluating the cross jurisdictional matrix of jurisprudence available, this write-up will advocate the use of indemnity costs as an effective measure to curb dilatory manoeuvres in the form of court intervention.

II. The Problem of Dilatory Tactics

Arbitration, marketed as an effective and expeditious form of alternate dispute resolution mechanism, has devolved into becoming merely the first step to litigation. There are various reasons that have contributed to this downfall

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Development of International Arbitration in Tougher Times, 2.2 Contemp. Asia Arb. J. 187-216 (2009).

[2] Lewis v. Circuit City Stores, Inc., 500 F.3d 1140, 1153 (10th Cir.2007) [Hereinafter 'Circuit City case'].

[3] Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd., [2012] H.K.C. 971 (C.A.) [hereinafter 'Grand Pacific'].

ranging from zealous judicial intervention to lapses in arbitral integrity. One of the most common tools for undermining arbitration has been the use of dilatory tactics by attorneys and counsels, wherein parties involve courts in the arbitral proceedings leading to a delay in conclusion of the dispute.

Dilatory manoeuvres are just one of the methods employed in *Guerilla tactics* or *arbitral terrorism*. The article, credited with coining the term 'arbitration guerrillas or terrorists', by Michael Hwang, used the term to describe respondents who have a bad case and yet decide to plead for court intervention.[4] They range from completely illegal and inappropriate acts, such as witness tampering and intimidation of arbitrators, to unwarranted applications for court intervention in the form of injunctions.[5] Belated jurisdictional objections, challenges to the impartiality of arbitrator, applications for interim injunctions, institution of parallel proceedings and persistent appeals against awards undermine the finality and integrity of an award.

The diversity of tactics that are used to get a 'second bite at the apple' ranges from challenges to the authority of the Tribunal, requests for the replacement of arbitrators, resignations of party-nominated arbitrators, efforts to break-down communications between members of the arbitral tribunal and resort to national courts.[6] The problem of obstructive moves aimed at frustrating the arbitral procedure is no longer in its nascent stage as is evident by a move to reinforce the arsenal of arms against guerrilla tactics. This can be seen in the 2012 Rules of Arbitration of the International Chamber of Commerce which encourage an

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[4] *See* Michael Hwang, *Supra note* 1, (defining arbitration terrorists or guerrillas as 'Respondents who are not interested in playing the game by the Rules, usually because they have a bad case. They will try and exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so it becomes abortive or ineffective)'. Stephan Wilske credits Michael Hwang for the first use of the term 'arbitration guerrillas'; Stephan Wilske, *Arbitration Guerillas at the Gate: Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough*, AUSTRIAN Y.B. ON INT'L ARB. 315, 323–324 (Klausegger et al. eds., 2011).

[5] Gunther Horvath, *Subtle Ways to Address Guerilla Tactics*, Speaking Notes of presentation given at the CILS Conference, Vienna, Austria (May 24. – 27, 2012) *available at* http://www.arbitration-austria.at/dokumente/Horvath.pdf.

[6] S. Greenberg, *Tackling Guerrilla Challenges Against Arbitrators: Institutional Perspective*, Transnat'l Disp. Mgmt. 7 (2010).

active approach of case management to combat undue delays and excessive costs by obliging parties and arbitrators to conduct arbitrations efficiently.[7]

However, approaching a court against the continuance of an arbitral process or enforcement of the award passed by the tribunal falls in a twilight zone when viewed through the kaleidoscope of guerrilla tactics. Conduct of appeals in domestic courts on account of dissatisfaction with an arbitral award, identified by some attorneys as guerrilla tactics, would be defended by others as a legitimate strategy, or even as part of an attorney's obligation to diligently represent the client's interest. To their European counterparts, the American's approach in the form of interjecting excessive objections, bullying witnesses on cross-examination, concocting creative interpretations of legal rules and strategically jockeying for procedural advantages in arbitration is disruptive and counterproductive. While it is no surprise that American attorneys have been characterized as 'ungentlemanly',[8] the moot question is when does such conduct transform into a guerrilla tactic? Further, every move aimed at pleading for court intervention cannot be regarded as an escapade of a crestfallen party to the arbitration agreement as some might involve grave grievances which need to be redressed.[9] Thus, constructing an unassailable arbitration structure absolutely free from the scope of judicial encroachment is not possible.

Despite the recent pro-arbitration approach taken by the judiciaries of many countries, dilatory tactics have not been curbed as they are masked with the veil of grievance catapulted from the rock of justice, equity and good conscience. It therefore becomes an inescapable duty of the Court to take cognizance of such prayers and this effectively derails the arbitral process. The problem is further aggravated as the international arbitration system does not possess its own

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[7] Victoria Orlowski, *Chapter 2, §2.02: The Perspective of Arbitral Institutions: Upping the Arsenal – Using the ICC Rules to Counteract Guerilla Tactics, in* Guerrilla Tactics In International Arbitration (Günther J. Horvath & Stephan Wilske eds. 2013).

[8] Santiago A.Cueto, *Guerilla Tactics in International Arbitration. The New Normal in 2014?*, INT'L ARB. PRINCIPLES (Dec. 29, 2013), *available at* http://internationalarbitrators.com/guerilla-tactics-in-international-arbitration-the-new-normal-in-2014/ (last visited Jan. 30, 2014).

[9] *See* Rama Chandran v. The Industrial Court of Malaysia & Anr., [1997] 1 M.L.J. 145 (Malay.); M/s Mohan Construction Co. v. DDA, 73 (1998) D.L.T. 12 (India); Burlage v. Superior Court, 178 Cal. App.4th 524 (CA 2009) [awards vacated due to misconduct on part of arbitrator].

transparent Code of Ethics. The current absence of ethical regulations to curb such dilatory tactics poses a potential crisis which has been pointed out by leading arbitrators as a considerable threat to the future integrity and legitimacy of international arbitration.[10]

III. Costs

Costs include all those expenses of litigation which one party is directed by the Court to pay to the other at the conclusion of a suit or dispute between them.[11] They must be distinguished from 'fees' which have to be paid by a litigant to the officers of the court.[12] Costs exist to ensure that not all victories are pyrrhic and won at excessive cost, and to deter litigants who are guilty of some misconduct or unwelcome demeanour.[13]

The monetary burden of a long-drawn out litigation battle placed on the contesting parties is rather sizeable in measure. Arbitration, like litigation, also requires the resolution of the question on costs as 'the costs of international commercial arbitrations are regularly substantial, not only in absolute terms but also compared to the amount in dispute'.[14] There exists no general discernible

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[10] *See* Charles N. Brower & Stephan W. Schill, *Regulating Counsel Conduct before International Arbitral Tribunals, in* Making Transnational Law Work In The Global Economy: Essays In Honour Of Detlev Vagts 491-492 (Peter H. F. Bekker et al. eds. 2010) ('At issue may ultimately be the legitimacy of the international arbitral system as a whole, in particular inasmuch as … [uniform legal ethics for counsel] operate not only retrospectively…, but also prospectively as a mechanism of global governance.'); Doak Bishop, Address at the ICCA Congress (26 May 2010) ('Although there have been no catastrophes to this point, the International Arbitration system is at least subject to reasonable criticism without its own transparent Code of Ethics, and we need to ensure the future integrity and legitimacy of the system.'); *See also* Carolyn B. Lammet et al., *Has the Time Come for an ICSID Code of Ethics for Counsel?, in* 2009-2010 Y.B. On Int'l Investment L. & Pol'y (Karl Sauvant ed., 2010) (answering the titular question in the positive); Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration,* 3 DISP. RESOL. INT'L 83, 78-94 (2009) (answering the titular question in the negative).

[11] Arthur L. Goodhart, *Costs*, 38 THE YALE L. J. 849-878 (1929).

[12] *See* Bouvier's Law Dictionary 239 (1926).

[13] McCullough Estate v. Ayer, (1998) A.B.C.A. 38 (Can. C.A.).

[14] W. Lawrence Craig, William W. Park & Jan Paulsson, INTERNATIONAL COMMERCIAL ARBITRATION 395 (2000), 'awards in excess of $ 1 million are unremarkable in the biggest cases'.

practice as to the treatment of costs in international commercial arbitrations.[15] One of the primary reasons behind this is the fact that the issue of costs is left to the widest discretion of the arbitrators,[16] and thus, a concrete guideline cannot be carved out from existing case laws.

The two common forms of costs employed by courts across jurisdictions can be classified as costs on party-party basis,[17] and costs on indemnity basis.[18] Costs on party-party basis refers to the practice of the court to only allow costs which are proportionate to the matters in issue and resolve any doubt which it may have as to whether or not costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.[19] This means that the party seeking to recover its costs has to prove the reasonableness and proportionality of the amount claimed. When awarding costs on an indemnity basis, all costs shall be allowed except those of unreasonable amount or which have been unreasonably incurred. Any doubts which the taxing master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.[20] There is no requirement for the costs to be proportionate.[21] This has the effect of putting the onus on the paying party to show that the costs claimed are unreasonable which usually turn out to be an order for a higher percentage of their costs on assessment than would be the case if costs were assessed on the party to party basis for the receiving party.

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[15] Alan Redfurn & Martin Hunter, Law And Practice Of International Commercial Arbitration 406 (3rd edn. 1999).

[16] Report of the Working Group on International Contract Practices, at 99, UN Doc. A/CN.9/216 (Feb. 16-26, 1982) (Even the drafters of the UNCITRAL Model law concluded that 'the question regarding costs of arbitration is not an appropriate matter to be dealt with in the model law').

[17] Also known as Standard basis in some jurisdictions.

[18] Gordon Woodman & Diethelm Klippel, Risk and the Law 149 (2008).

[19] *See* High Court Rules, 2011, Cap. 4 O. 62, R. 28(2) (H.K.). Also *see* Civil Procedure Rules, 1998, R. 44.3(2) (Eng.), *Uniform Civil Procedure Rules, 1999* (Qld.) § 703, (Austl.).

[20] *Supra* note 19.

[21] For understanding of the term proportionate, please see Civil Procedure Rules, R. 1.1, The Overriding Objective, *available at* http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01#1.1 [Requires courts to deal with cases in ways that are proportionate to the amount of money involved; to the importance of the case; to the complexity of the issues; and to the financial position of each party]

IV. Pre-Award Stage: Use of Indemnity Costs

Arbitral Tribunals:

A reflection of the trend to levy penalty for delaying strategies is visible in the practice of various arbitral institutions. While determining costs, tribunals look at the results of the case as well as the conduct of the parties during the proceedings.[22] For instance, in international commercial arbitration, ICSID (International Centre for Settlement of Investment Disputes) tribunals are guided by three criteria while allocating costs:

i. The principle of 'costs should follow the event' which essentially translates into the fact that the successful party is entitled to seek an order directing the unsuccessful party to pay its costs.[23]
ii. The principle that the rationale behind costs should be to discourage misconduct by the parties. The application of this principle can be found in cases where costs are attributed to 'bad behaviour' of the parties.[24]
iii. The other notion is where costs should be shared equally by the parties (50:50 principle).[25]

ICSID tribunals tend to follow any one of the three aforementioned criteria.[26] Recoverable party costs should be considered akin to the damages suffered awarded on account of contractual breach or tortuous behaviour of the other party.[27] Using of costs on an indemnity basis can be considered as an incarnation of this view. As per the 2010 IBA Rules on Evidence, if the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of

[22] José Rosell, *Arbitration Costs as Relief and/or Damages*, 28.2 J. Int'l Arb. 115 (2011) [hereinafter 'José Rosell'].
[23] A similar rule can be found in Civil Procedure Rules, 1998, R. 36.10, (U.K.)
[24] In 21% of the cases where the 'costs follow the event' approach was followed, the outcome was attributed to 'bad behaviour'. Please *see* M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform* 11 Transnat'l Disp. Mgmt. (2014).
[25] José Rosell, *supra* note 22, at 118.
[26] Christoph Schreuer et al., The ICSID Convention: A Commentary, art. 61, ¶.17 (2009). Also *see supra* note 22, at 118.
[27] W. Laurence Craig et al., International Chamber of Commerce Arbitration 394 (2000).

the arbitration, including costs arising out of or in connection with the taking of evidence.[28]

ICSID and International Chamber of Commerce (ICC) maybe considered harbingers of this form of shifting of costs. A study undertaken by the ICC of the final awards rendered within 1989-1991 showed that out of 48 cases where the claimant clearly prevailed, the tribunal ordered the respondent to bear all the costs in 39 cases.[29] The robust stand taken by the tribunals against dilatory tactics is noteworthy in cases where even the winners have been denied costs as a sanction against their conduct. In these cases, the tribunal though more inclined towards awarding costs, has refused, partially or entirely, to award costs to the winning party against the losing party as a sanction against dilatory, obstructive or otherwise improper procedural conduct on the part of the former.[30] Hence, parties to an international arbitration are expected to abstain from delaying tactics.

Even when ICSID tribunals allocate costs on a 'loser pays' basis, they are sometimes reluctant to order the unsuccessful party to pay the party's legal costs and expenses unless circumstances exist that would contribute to the same. These circumstances unequivocally include dilatory tactics. In *ADC* v. *Republic of Hungary* the Tribunal noted that Hungary's conduct, which contributed to the length and cost of the proceedings, was relevant to its decision to award ADC the full amount of its legal and other expenses.[31] Further, the Tribunal ordered the respondent in this case to reimburse the successful claimant and laid down six factors for determining the same. The following factors out of the six are indicative of this approach: (i)Some of the points taken were unarguable but were nevertheless added to extend the time and cost of this arbitration (ii) Not only did the respondent change counsel mid-arbitration thereby causing some extra expense, but also changed experts at the very last minute (iii) On change of

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[28] *Rules on the Taking of Evidence in International Arbitration*, Adopted by a resolution of the IBA Council,INTERNATIONAL BAR ASSOCIATION, art. 9(7) (May 29, 2010).

[29] Cited in Eric A. Schwartz, *The ICC Arbitral Process, Part IV: The Cost of ICC Arbitration*, 4 I.C.C .CT. BULL. (1993), Micha Buchler*, Awarding costs in International Commercial Arbitration: An overview*, 22 A.S.A. Bull, 261 (2004).

[30] *See e.g.*, Case No. 8486 of 1996, 24 Y.B. Comm. Arb. 172 (ICC Int'l Ct. Arb.); Case No. 7453 of 1994, 22 Y. B. Comm. Arb.163 (ICC Int'l Ct. Arb.)

[31] ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hungary, ICSID Case no. ARB/03/16, (Oct. 2, 2006).

counsel, the Respondent sought an adjournment of the long fixed hearing dates, opposed by the Claimants, which was rejected by the Tribunal.[32] In *Ecuador* v. *Petroecuador* it was found appropriate that Petroecuador should bear all costs incurred by the Centre in connection with this proceedings, including the fees and expenses of the members of a Centre as regards the circumstances of the case, which in their view, included the fact that exceptional delay had resulted from Petroecuador's tardiness in making the first advance payment requested by the Centre and its continued refusal to pay the subsequent advances requested in relation to the annulment proceedings.[33]

International tribunals have a strong infrastructure to discourage unwelcome strategies that disrupt the arbitral proceedings. With a surge in arbitral institutions around the world, these entrants should take a cue from ICSID and ICC to create an ethical matrix of regulations to use costs as a disincentive against employing distasteful conduct.

National Courts:

Proactive vigilance on the part of the Courts can go a long way in combating dilatory tactics in arbitration during the pre-award stage. When parties resort to means such as initiation of parallel proceedings in courts of law to prolong the process of settlement, indemnity costs have been used to curb such abuse of process.[34] This is because the damages which flow from the breach of that agreement are normally all the costs reasonably incurred by the party entitled to a stay of the proceedings.[35] The practice though, has been scarcely used. The English Court has admitted that if the receiving party's costs have been increased on account of unreasonable behaviour on part of the opponent, it is fair that it should recover an enhanced amount of its costs.[36] The Court while awarding indemnity costs for violating the arbitration agreement had deprecated the practice of resorting to parallel proceedings, for instance, in *A* v. *AJ*[37]*:*

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[32] *Supra* note 31, at 103.
[33] Repsol YPF Ecuador S.A. & Empresa Estatal Petróleos del Ecuador v. Republic of Ecuador, ICSID Case No. ARB/01/10, Decision on Annulment (Jan. 8, 2007).
[34] Kyrgyz Mobil Tel Ltd v. Fellowes International Holdings Ltd., [2005] EWHC (Comm) 1314 (Eng.).
[35] *Id.*
[36] ABCI v. Banque Franco-Tunisienne, [2003] 2 Lloyd's Rep. 146 (Eng.).
[37] A v. AJ, [2007] EWHC (Comm) 54 (Eng.).

> *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.*[38]

In situations where the successful applicant is able to establish that the breach has caused the innocent party to reasonably incur legal costs, the Court has deemed indemnity costs to be "appropriate".[39] In cases of breach of an exclusive 'English arbitration clause', the English court will ordinarily exercise its discretion, by way of an anti-suit injunction.[40] However, the methodology for compensation to be ordered where there has been a breach of an agreement to arbitrate has also been well recognized.[41] In the case of *Paramedics Electromedicina Commercial* v. *GE Medical Systems Information Technologies*, the court ordered damages instead of injunctive relief against breach of an arbitration agreement by way of institution of parallel proceedings,[42] but such an order on costs is yet to be encountered in the American front.

In *Kyrgyz Mobil Tel Ltd* v. *Fellowes International*, Cooke J. was concerned with the costs of complex litigation located in the English, British Virgin Islands and Kyrgyzstan courts wherein Fellowes International had caused Kyrgyz to ignore the arbitration agreement and start proceedings in the Kyrgyzstan court. In awarding costs against Fellowes in proceedings for an anti-suit injunction, Cooke J. construed the correct approach to be that of imposition of indemnity costs where there has been a breach of a jurisdiction clause by a party whereby it initiated proceedings in a non-chosen jurisdiction. As per Cooke J., the

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[38] *Supra* note 37, ¶ 15.
[39] *Supra* note 37, ¶ 15.
[40] Donohue v Armco Inc. and Ors., [2001] UKHL 64, [2002] 1 Lloyd's Rep. 425 (appeal taken from Eng.); Oceanconnect UK Ltd & Anr. v. Angara Maritime Ltd., [2010] EWCA (Civ) 1050 (Eng.).
[41] Mantovani v. Carapelli SpA, [1978] 2 Lloyd's Rep. 63, [1980] 1 Lloyd's Rep. 375 (Eng.); National Westminster Bank PlC v. Rabobank Nederland, [2007] EWHC (Comm) 1742.
[42] Paramedics Electromedicina Commercial, Ltd. v. GE Medical Systems Information Technologies Inc. 369 F.3d 645 (Ct. App. 2nd Cir. 2004).

Commercial Court in particular and all the courts in general, in England should adopt such an approach.[43]

V. The Hong Kong Position on Indemnity Costs

Under the Hong Kong approach, the courts, in proceedings arising out of or in connection with arbitral proceedings, in the absence of special circumstances, will normally consider it appropriate to order costs on an indemnity basis.[44] The arbitration mechanism has been envisaged to be such that, having regard to the underlying objectives in the Civil Justice Reforms ("CJR"), any unsuccessful application to challenge an arbitrator's award will normally attract indemnity costs against the applicant.

Background: Hong Kong has been known to be a favourable arbitration venue.[45] The Hong Kong judiciary has had a long reputation for its fairness and was recently rated as the best judicial system in Asia by a North Carolina think tank.[46] To make the judicial system more effective, the Honourable Chief Justice appointed the Working Party on Civil Justice Reform (Working Party) in February 2000 to review the rules and procedures of the High Court in civil proceedings and to recommend changes thereto, with a view to ensuring and improving access to justice at reasonable cost and speed. The Working Party

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[43] *Supra* note 34, at 42.

[44] Please see decisions of Hong Kong Judiciary taken after the Civil Justice Reforms were implemented in 2009. *Supra* note 2, Gao Haiyan & Anor v. Keeneye Holdings Ltd & Anr. (No 2), [2012] 1 H.K.C. 49 (C.F.I.) [hereinafter Gao Haiyan case]; A v. R, [2009] H.K.C.F.I. 342 (C.F.I.) [hereinafter A v. R case].

[45]Secretary for Justice, *HK the place for international arbitration* (Oct. 2, 2003), *available at* http://www.doj.gov.hk/eng/archive/pdf/pr021003e.pdf.
See also John Bussey, *In Hong Kong, Business Watches Snowden Test the Law,* Wall St. J. (July 5, 2013), http://online.wsj.com/news/articles/SB10001424127887324260204578585860124962072.

[46] Political and Economic Risk Consultancy (PERC) survey: Hong Kong's judicial system scored 1.45 on the scale (zero representing the best performance and 10 the worst), Singapore with a grade of 1.92, followed by Japan (3.50), South Korea (4.62), Taiwan (4.93), the Philippines (6.10), Malaysia (6.47), India (6.50), Thailand (7.00), China (7.25), Vietnam's (8.10) and Indonesia (8.26). *See* Agence France-Presse, *Hong Kong has best judicial system in Asia: business survey,* ABS-CBN NEWS, (Sept. 15, 2008), http://www.abs-cbnnews.com/world/09/15/08/hong-kong-has-best-judicial-system-asia-business-survey.

completed the review and published its Final Report on 3 March 2004, making a total of 150 recommendations.[47]

The CJR was finally implemented in April 2009 in Hong Kong. A new regime called 'sanctioned offer' and 'sanctioned payment' was introduced to encourage prompt settlement in litigation.[48] Now any party, defendant or plaintiff, could make an offer to settle the claim. There would be consequences in terms of costs and interest where the party concerned failed to do better than the sanctioned offer or payment.[49] Thus, if a plaintiff made a sanctioned offer which is declined by the defendant, and the plaintiff obtains a judgment better than the offer, the defendant is likely to be ordered to pay the plaintiff's costs on an indemnity basis, enhanced interest (up to 10% above judgment rate) on those costs and enhanced interest (up to 10% above judgment rate) on any sum awarded to the plaintiff and the same rule applies to the plaintiff in case of a sanctioned offer made by the defendant.[50]

To illustrate, let's say it can be reasonably assessed that the plaintiff, if successful at trial, is likely to be awarded HK$1 million. An early sanctioned offer by the plaintiff to accept from the defendant a sum of HK$990K would yield obvious advantages to the plaintiff. If the defendant, for fear of a severe sanction, accepts the offer, the plaintiff will be able to quickly recoup more or less all his likely entitlement deficient of only a small discount. However if the defendant

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[47] Final Report, Chief Justice's Working Party Om Civil Justice Reform, available at http://www.legco.gov.hk/yr06-07/english/bc/bc57/papers/bc570611cb1960-e.pdf.

[48] Rules of High Court, (2011) Cap. 4A, O. 22 (H.K.), *Available at* http://www.legislation.gov.hk/blis_ind.nsf/CURALLENGDOC/E07CB071EA75BF174825758A000ACC34?OpenDocument. *See also* Rules of the District Court, (2000) Cap. 336H (H.K.), *Available at* http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/A65E02C849A77A12482575EE006D84F2?OpenDocument&bt=0.

[49] Civil Justice Reform, *An Overview by the Judiciary,* http://www.rcul.judiciary.gov.hk/rc/download.jsp?FN=documents/eng/CJR_An_Overview_eng.pdf.

[50] For further details of the principles and mechanism of Sanctioned Offer/Payment, please refer to the Judiciary's publication: *How to Shorten Legal Proceedings: Sanctioned offers and Sanctioned Payments,* CIVIL JUSTICE REFORM, http://www.civiljustice.gov.hk/cjr/download.jsp?FN=eng/documents/Leaflet_08_Eng.pdf.

does not accept the offer and the plaintiff eventually succeeds at trial with an award of HK$1 million, then the defendant is likely to be ordered to pay the plaintiff's costs on an indemnity basis with enhanced interest.

Thus, Hong Kong approaches the principle of imposing indemnity costs as a general rule unless special circumstances demand otherwise. This sends a radical message, in support of prompt settlement of cases, to prospective litigants against adopting dilatory tactics to prolong a court case.

A. A v. *R*

The Hong Kong approach ushered in the Civil Justice Reforms in 2009 with the landmark decision of Justice Reyes in *A* v. *R*[51] which reverberated with gusto the growing discontent with dilatory tactics, of lawyers, which have destroyed the purpose of arbitration and created judicial congestion. Justice Reyes endeared parties to comply with arbitration awards and deemed enforcement of the same as "a matter of course"[52] and appeals to set aside an award or order refusing enforcements as "exceptional events"[53]. He also underlined the objectives of the CJR wherein a party seeking to un-meritoriously challenge an award would not be complying with its obligation to the Court under Order 1A Rule 3 to further the underlying objectives of CJR, in particular, the duty to assist the Court in the just, cost-effective and efficient resolution of a dispute.[54] Thus, the Court ought to award costs against a losing party on an indemnity basis when an award is unsuccessfully challenged. Accordingly, in the absence of special circumstances, indemnity costs were awarded.

B. Gao Haiyan v. *Keeneye Holdings Ltd*

The Bench in both *Gao Haiyan* case,[55] and *Grand Pacific* case,[56] were inspired by Justice Reyes' landmark decision. Six months before *Grand Pacific,* the Court of Appeal ('CA') in the High Court of the Hong Kong Special Administrative Region had expressed in *Gao Haiyan* v. *Keeneye Holdings* that it would be

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[51] A v. R case, *supra* note 44.
[52] *Supra* note 51*,* at 67.
[53] *Supra* note 51, at 68.
[54] *Supra* note 51, at 69.
[55] Gao Haiyan case, *supra* note 44.
[56] Grand Pacific, *supra* note 3. It would be interesting to note that Hon Tang VP and Fok JA were present in the three member Bench in both *Gao Haiyan* and *Grand Pacific.*

paradoxical if a defendant who is faced with a claim against which he has a complete defence should only obtain costs on a party and party basis.[57] It confirmed that courts should be more ready to award indemnity costs to support the underlying objective of the Civil Justice Reforms.[58] The merits of the appeal were not considered as 'special reasons' for not awarding indemnity costs in this case as well. There were many judgments relied on for arguing that merit in arguments suffices as a reasonable cause to not award costs on indemnity basis and that this was not a case where the court process had been abused with a view to delay enforcement of the award.[59] But the cases relied upon preceded the Civil Justice Reform and were thus not taken into consideration.[60] On the other hand, the Court opined that had the case been "hopeless", it would have provided additional reasons for indemnity costs.[61]

C. Pacific China Holdings Ltd v. *Grand Pacific Holdings Ltd*

The Court of Appeal, in *Grand Pacific,* lived up to the reputation of the Hong Kong judiciary in ensuring fairness by going beyond the strict letter of law and removed any doubts that would confound a reasonable litigant. The *Grand Pacific* judgment was just another chapter in the arbitration friendly Hong Kong jurisprudence. In *Pacific China Holdings Ltd* v. *Grand Pacific Holdings Ltd,*[62] an ICC award was set aside in favour of Grand Pacific by the Court of First Instance on the basis of breach of Articles 34(2)(a)(ii) and 34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration ('UNICTRAL Model Law'). In May 2012, the CA unanimously overturned the decision and reinstated the award. As per the Court "only a sufficiently serious error" undermining due process could be regarded as a violation of Article 34(2)(a)(ii) of UNCITRAL

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[57] *Supra* note 44, at 8.
[58] *Id.* at 9.
[59] Cases relied were Wing Hong Construction Ltd. v. Tin Wo Engineering Co. Ltd., [2010] H.K.E.C. 919 (H.K.) [hereinafter Wing Hong Construction]; Town Planning Board v. Society for Protection of the Harbour Ltd. (No. 2), [2004] 7 H.K.C.F.A.R. 114 (C.F.A); Karaha Bodas Co Llc v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara 2011 A.B.C.A. 291 (Can.).
[60] Wing Hong Construction *supra* note 59, though decided after CJR, did not support the contention [11... The nature of arbitration is such that, having regard to the underlying objectives in the RHC, an unsuccessful application to challenge an arbitrators award will normally attract indemnity costs against the applicant.]
[61] Wing Hong Construction *supra* note 59, at 14.
[62] Grand Pacific, *supra* note 3.

Model Law. It had to be proven that the tribunal's conduct was of a "serious" or even "egregious" nature to establish breach of the said Article.[63] The decision was confirmed by the Hong Court of Final Appeal; ('CFA') wherein on 19 February 2013, the CFA refused leave to appeal against the judgment of the CA.[64]

However, it was the separate decision on costs in which the CA ordered Pacific China to pay Grand Pacific's costs from the court below and the CA proceedings on an indemnity basis that reconfirmed the judiciary's attitude towards arbitration and its disposition against dilatory manoeuvres.[65] The CA held it fair that if a party was unsuccessful in setting aside or resisting enforcement of the arbitral award, in the absence of special circumstances, it should pay costs on an indemnity basis.[66] The fact that the challenge was reasonably arguable was not held to be a special circumstance that would warrant an exclusion of indemnity costs.[67]

> *But parties opt for arbitration because they would not accept the uncertainty of litigation, so the fact that an appeal was necessary to put matters right does not detract from the reason for ordering indemnity costs in the first place.*[68]

Thus, the CFA did consider the fact that setting aside of the award in favour of Grand Pacific by the Hong Kong Court of First Instance, before the decision was overturned by the higher court lends some credit to the assumption that Grand Pacific's stand had some merit. In other words, the CFA held the institution of a mere appeal against the arbitral award, irrespective of the merits therein, as conduct justifying indemnity costs. It sends out a very strong signal in

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[63] Grand Pacific, *supra* note 3, ¶ 94.
[64] Justin D'agostino, Martin Wallace & Yu-Shin Teoh, *Hong Kong Court Of Final Appeal Refuses Leave To Appeal In The Grand Pacific V. Pacific China Case,* KLUWER ARB. BLOG (Feb. 20, 2013), *available at* http://kluwerarbitrationblog.com/blog/2013/02/20/hong-kong-court-of-final-appeal-refuses-leave-to-appeal-in-the-grand-pacific-v-pacific-china-case/ [hereinafter '*D'agostino*'].
[65] Grand Pacific, *supra* note 3.
[66] Grand Pacific, *supra* note 3, ¶ 15.
[67] Grand Pacific, *supra* note 3, ¶ 17.
[68] Grand Pacific, *supra* note 3, ¶ 21.

favour of the arbitration process and preservation of contractual sanctity that contains the arbitration clause.

Another thing worthy of note here is that none of the parties had made a sanctioned offer or payment which was required for a mechanical imposition of indemnity costs as per Order 22 of the Rules of High Court which deals with indemnity costs apropos sanctioned offers.[69] The Court interpreted the law and took it a step further by relying on its earlier decision in *Gao Haiyan* v. *Keeneye Holdings*[70] and extended indemnity costs to every case unless special circumstances demanded otherwise. The court deemed it reasonable that any confident party would not venture to make any sanctioned offer if it was sure of its success and this should not deprive it of costs on an indemnity basis.[71]

As evident from the aforementioned judicial pronouncements, Hong Kong has adopted a fierce arsenal in the form of indemnity costs against dilatory unmeritorious challenges arising out of or in connection with arbitral proceedings. It is not even necessary for a party successfully resisting an application seeking to challenge the award, to establish the application itself as an abuse of process to justify indemnity costs. This is because a party in whose favour the arbitral award is rendered should not have had to contend with any types of challenges to the award after the arbitral proceedings are over. To quote Justice Reyes:

> *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.*[72]

It might appear to be harsh that the Hong Kong approach may bring even arguable cases within the purview of the general rule of indemnity costs[73] but the provision of 'special circumstances' can be construed in the future by the courts to provide it with sufficient discretion to depart from the rule in cases of genuine

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[69] *Supra* note 48.
[70] Gao Haiyan case, *supra* note 44.
[71] Grand Pacific, *supra note* 3, ¶ 12.
[72] A v. R, *supra* note 44, ¶ 70.
[73] As noted above, the decision by the Court of First Instance in *Grand Pacific v. Pacific China* was given in favor of Grand Pacific. And it was overturned by the higher court of appeal which awarded indemnity costs against Grand Pacific. The lower court's decision and the apparent merits in the stand of Grand Pacific were disregarded.

grievances as distinguished from mere dissatisfaction with the award on technical or insignificant grounds. Thus in the absence of special circumstances, the court will normally consider it appropriate to order costs on an indemnity basis. This will indeed deter parties who lose out in arbitration proceedings to prolong the legal battle in Courts.

VI. The Conservative Approach

The Conservative approach, when juxtaposed with the Hong Kong approach, follows an orthodox ideology in imposition of indemnity costs wherein indemnity costs are awarded only in special circumstances with standard costs being the routine norm.[74] The threshold for these special circumstances is high and thus imposition of indemnity costs is rare.

A. Australia

Costs are ordinarily awarded against the unsuccessful party on a "party-and-party" basis. An award of costs on an indemnity basis may be made only in a special case, where the circumstances justify departure from the ordinary principle.[75] The general principle of costs is expressed in Section 681(1) of the *Uniform Civil Procedure Rules.*[76] Standard costs i.e. costs on party to party basis only take into consideration costs that were necessary or proper for the attainment of justice or for enforcement or defence of rights.[77] Indemnity costs

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[74] The authors have used the term 'Conservative Approach' to describe the trend in Australia, United Kingdom United States, Malaysia and Singapore. These countries impose indemnity costs only in exceptional cases.

[75] *See Degman Pty Ltd. (in liq) v Wright, (No. 2)* [1983] 2 NSWLR 354 (Austl.); *Qantas Airways Limited v Dillingham Corporation* (Unreported, Sup. Ct. NSW, May 14, 1987) (Austl.); *Singleton v Macquarie Broadcasting Holdings Limited* 24 NSWLR 103, (Rogers CJ Comm D) (Austl.); *Blackburn v NSW* (Unreported, Sup. Ct. NSW, David Hunt J, Aug. 9, 1991) (Austl.); *Melouhowee Pty Ltd. v Steenbohm* (Unreported, Sup. Ct. NSW, Waddell CJ, Feb. 6, 1992); *Sky Channel Pty Ltd. v Minister for Transport and Communications* (Unreported, Federal Court of Australia, Einfeld J, Feb. 19, 1993); *Woodger v Federal Capital Press of Australia Pty Ltd.* 107 ACTR 1, 40 (Miles CJ); *AWA Ltd. v Daniels* (Unreported, Sup. Ct. NSW, Rogers CJ, Apr. 27, 1993) (Austl.).

[76] *Uniform Civil Procedure Rules 1999* s 681, (Austl.) [General rule about costs: (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise].

[77] In several jurisdictions the rules of court specify that, without limiting the court's discretion, the usual

are viewed as harsher category of costs awarded only in circumstances involving misconduct.[78]

Examples of cases where indemnity costs have been awarded are when allegations of fraud were made which were known to be false by the party making them,[79] where there was wilful disregard for known facts or clearly established law,[80] and when proceedings were instigated with ulterior motive.[81]

Australia has used indemnity costs as a punitive measure against dilatory tactics in civil litigation in contrast to arbitration cases wherein courts have awarded costs on indemnity basis against claims which were made with no basis and should never have been made in the first place,[82] against misconduct aimed at prolonging court proceedings,[83] and where a party maintained a cause of action with no real prospect of success.[84] Though Australia does not have a mechanism which is similar to the system of sanctioned payment that exists in Hong Kong,

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order will be that costs which follow the event: *Uniform Civil Procedure Rules 2005* (Qld) reg 42(1) (Austl.); *Uniform Civil Procedure Rules 1999* (Qld) r 689; *Supreme Court Rules 1987* (SA) r 101.02, *Supreme Court Civil Rules 2006* (SA) r 263(1); Rules of the Supreme Court 1971 (WA) O 66 r 1. *See also Colgate-Palmolive Company v Cussons Pty Ltd.* [1993] 46 FCR 225, 232 (Austl.) [hereinafter *Colgate Palmolive case*].

[78] *Grouped Proceedings in the Federal Court (ALRC Report 46),* LAW REFORM COMMISSION OF AUSTL. (Dec. 1988): "The principle of the 'heads I win, tails you lose' approach to costs is unacceptable." See also P.J. Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26 (1960); G.D. Watson & P. Lantz, *Bringing Fairness to the Costs System - An Indemnity Scheme for the Costs of Successful Appeals and Other Proceedings*, 19OSGOODE HALL L.J. 447 (1981).

[79] Thors v. Weekes (1989) 92 ALR 131, 152 (Austl).

[80] *J-Corp Pty Ltd v Australia Builders Labourers Federation Union of Workers,(No 2)* (1993) 46 IR 301 (Austl.).

[81] *Justice Woodward in Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd.,* (1988) 81 ALR 397 (Austl.).

[82] *Ragata Developments Pty Ltd v Westpac Banking Corporation*, [1993] FCA 115 (Davies J.) (Austl.)

[83] *Colgate Palmolive case, supra* note 77.

[84] *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*, (1988) 81 ALR 397. (Austl.).

it still awarded indemnity costs where a settlement was offered and there was evidence of lack of willingness to compromise or negotiate.[85]

These were however exceptional circumstances and Australia does not punish every discontented appellant. Further, these cases were in the realm of civil litigation not pertaining to arbitration. The country was recently offered an opportunity to deal with the question of whether unsuccessful applications against setting aside of an award rendered in arbitration proceedings amounted to special circumstances warranting imposition of indemnity costs.

J. Croft tried to adopt the Hong Kong approach when enforcing an award from Mongolia in the Victorian Supreme Court,[86] but in *IMC Aviation Solutions Pty. Ltd.* v. *Altain Khuder LLC*, the CA, in refusing enforcement, held that this did not reflect current Australian law.[87] The Court ruled that unsuccessfully resisting enforcement of a foreign arbitral award is not an established category of special circumstances in Australia.[88] The Court below had taken into account the decision rendered by Reyes J,[89] and found that such considerations applied with equal force in Victoria, 'both from an arbitration perspective and also from the perspective of legislation such as that contained in the Civil Procedure Act and in the Hong Kong Civil Justice Reforms.' Although the CA did not venture to provide a view on whether the approach of Reyes J should be followed in Victoria, it deemed the reliance placed on the Hong Kong decision as erroneous and decided not to award indemnity costs for want of 'special circumstances'. The Court also did not comment on the finding of J. Croft where he had found an analogy to the Hong Kong CJR in the overarching purpose of the Civil Procedure Act 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute' [90] and the overarching obligation of a party directed to achieving that purpose.

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[85] *Maitland Hospital v Fisher, (No 2)* (1992) 27 NSWLR 721 at 724 (Austl.).
[86] Luke Nottage, *International Commercial Arbitration in Australia: What's New and What's Next?*, 10.5 J. Of Int'l Arb. 476 (2013).
[87] *IMC Aviation Solutions Pty Ltd v Altain Khuder L.L.C.* [2011] VSCA 248 (Austl.),
[88] *Supra* note 82, at 55.
[89] A v. R case*, supra* note 44.
[90] *Hodgson v Amcor Ltd.* [2011] VSC 63 (Austl.).

B. England

Since the use of indemnity costs proceedings arising out of arbitration has not quite taken root yet,[91] a final analysis on the same cannot not be based on an impressive amount of jurisprudence. The courts, in civil suits, have found that a question of whether or not to award indemnity costs will always be relevant to whether there is something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way that justifies an order for indemnity costs.[92] In this fashion, England follows Australia's lead insofar as awarding indemnity costs only in special circumstances is considered.[93] The guiding principles on costs on an indemnity basis in England were summarized by the English High Court in *Fiona Trust & Holding Corporate* v. *Yuri Privalov.*[94] The case dealt with contracts which had been induced by bribery and had been rescinded on discovery of the bribery clause. In that case Andrew Smith J., who was required to determine issues about relief and costs, following his judgment on liability, identified the case scenarios that would warrant an imposition of costs on indemnity basis. It included *inter alia*:

(i) reasonableness of allegations and the manner in which it was pursued,
(ii) pursuit of an unjustified case,
(iii) pursuit of allegations despite the lack of any foundation in the documentary evidence for those allegations,
(iv) pursuit of claim which is speculative, weak, opportunistic, thin or farfetched,
(v) where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant,
(vi) where during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the

[91] Courts have awarded indemnity costs in application against arbital awards only once in Exfin Shipping *(*India*)* Ltd. *v.* Tolani Shipping Co Ltd [2006] EWHC (Comm) 1090, 13(Eng.) [hereinafter 'Tolani Shipping case'].
[92] Excelsior Commercial & Indus'l Holdings Ltd. v. Salisbury Ham Johnson, [2002] EWCA (Civ) 879 (Eng.) [hereinafter 'Excelsior Commercial case'].
[93] *See* Fiona Trust & Holding Corp. v. Yuri Privalov, [2011] EWHC (Comm.) 664 (Eng.).
[94] *Id.*

> allegations which it has made, only then to suffer a resounding defeat.[95]

A continued emphasis seems to be on the unreasonableness of the litigation.[96] The only judgment in which the English Courts have been bold enough to order costs on an indemnity basis against an unsuccessful application for setting aside an arbitral award is that of *Exfin Shipping* (*India*) *Ltd.* v. *Tolani Shipping Co Ltd.*[97] Calling the application 'wholly unmeritorious', the Court gave its decision on costs based on the fact that the party 'had acted in its own perceived commercial interest and without merit and should pay the commercial price of doing so'.[98] The judgment only speaks of the arguments made which include an argument suggesting unreasonableness and 'objective of delaying payment' on the part of the unsuccessful party. The judgment makes no attempt to clarify any stance on whether such a situation of an 'unreasonable application' would result in indemnity costs being awarded in all cases. Further, another factor that contributed to the decision on costs was the fact that the party had been previously warned about its disregard for time.[99] This transforms the imposition of indemnity costs in this case into a 'qualified' penalty insomuch as it was built on the premise of a previous warning.

The conservative approach in England is a much softer and nebulous version of the Australian approach that requires more judicial deliberation. The jurisprudence on awarding indemnity costs is still in its nascent stage and is yet to touch the contours of arbitration. The guidelines set out in *Fiona Trust* case,[100] are however comprehensive and if implemented firmly against appeals against arbitration awards, can aid the arbitral process in being the final stop rather than the first stop in the path to resolving a dispute.

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[95] *Supra* note 92 at ¶ 61.
[96] Reid Minty (a firm) v. Gordon Taylor [2002] 2 All E.R. 150, Kiam v. MGN Ltd (No. 2) [2002] 2 All E.R. 242(Eng.).
[97] Tolani Shipping case, *supra* note 91.
[98] *Id.* at ¶ 13.
[99] *Id.*
[100] *Supra* note 92.

C. *United States of America:*

The trend of awarding costs to deter dilatory tactics in United States is an oft-used tool and is closer to the Hong Kong approach.[101] The American disposition was recently displayed in *Johnson Controls, Inc.* v. *Edman Controls, Inc.*[102], wherein the court noted that challenges to commercial arbitral awards bear a high risk of sanctions as they "undermine the integrity of the arbitral process".[103] Appeals against the arbitral award deprived the holder of the award, part of the value of the arbitration to which both parties agreed.[104]

This judicial sentiment is an echo of the stance taken in *Grand Pacific* as the court did not consider merit in the arguments to be a significant factor in imposing sanctions. The court's emphasis on the value of the arbitration and use of sanctions as a threat against attempts at eroding this value marks a step forward from the decisions in *B.L. Harbert International LLC* v. *Hercules Steel Co.*,[105] and *Lewis* v. *Circuit City Stores.*[106] In *B.L. Harbert* [107] the plaintiff's argument in his appeal was nothing more than a disagreement with the arbitrator's decision, which was held not to be a basis for vacating an arbitral award. The Court was "exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards."[108] In 2007, the Tenth Circuit in *Lewis* reiterated in the same tone that the bringing

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[101] Manning v. Smith Barney, Harris Upham & Co., 822 F. Supp. 1081, 1083-84 (S.D.N.Y. 1993); See also Matter of U.S Offshore, Inc. (Seabulk Offshore, Ltd.), 753 F. Supp. 86, 92 (S.D.N.Y. 1990) (granting attorneys' fees under Rule 11 where party's arguments "appear[ed] to have been motivated by a desire to forestall complying with the award ... and ... in the main [were] not warranted by existing law or a good faith argument to extend, modify or reverse existing law"). Also B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 913-14 (11th Cir. 2006) (suggesting that "[w]hen a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken" and that in such a case sanctions may be appropriate).

[102] Johnson Controls v. Edman Controls Inc., 712 F.3d 1021 (7th Cir. 2013) [hereinafter Johnson Controls case].

[103] *Id.* at part V

[104] *Id.*

[105] B.L. Harbert International LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006).

[106] Circuit City case, *supra* note 2, at 1140, 1153.

[107] Johnson Controls case, *supra* note 105.

[108] *Id.* at 914.

of an appeal itself may constitute "sanctionable multiplication of proceedings" justifying an award of costs and fees under § 1927[109]. The Court highlighted the `narrow standard of review' presented by arbitration and justified the imposition of Section 1927 sanctions if the arguments presented are `completely meritless'.

In 2010, a New York Court issued sanctions against a law firm that "succeeded in undermining the purpose of arbitration and protracting this dispute into three year, multi-million dollar litigation".[110] Another decision of the New York Court in the case of *Digitelcom, Ltd.* v. *Tele2 Sverige AB,*[111] has been described to have "echoed" the Hong Kong court approach.[112] The court after disposing off the challenger's multi-pronged attack on the arbitration award, warned that litigants must be discouraged from defeating the purpose of arbitration by bringing petitions based on "nothing more than dissatisfaction with the tribunal's conclusions"[113] and held sanctions to be peculiarly appropriate in the context of a challenge to an arbitration award which appears to be a largely dilatory effort.

These decisions have underscored the point that unscrupulous attempts to vacate arbitration awards destroy the "promise of arbitration". US Courts have been very reluctant to tolerate such antics.[114] Thus they have unequivocally adopted the strategy of imposing sanctions in cases of dilatory tactics in arbitration by virtue of which they can give breath to their "national policy favouring arbitration."[115] From a brief perusal of the decisions in *Digitelcom*[116],

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[109] Circuit City case, *supra* note 2.
[110] Prospect Capital Corp. v. Emnon, Case. No. 08 Civ. 3721 (LBS) (S.D.N.Y. Mar. 9, 2010) [hereinafter Prospect Capital case].
[111] Digitelcom, Ltd. v. Tele2 Sverige AB, 12 Civ. 3082 (S.D.N.Y. July 25, 2012) [hereinafter Digitelcom case].
[112] *D'agostino*, *supra* note 64.
[113] Prospect Capital case, *supra* note 110 (in part D: Attorney Fees).
[114] See DMA International, Inc. v. Qwest Communications International Inc., 585 F.3d 1341 (10th Cir. 2009) [hereinafter DMA International case] ["We do not take our decision to impose sanctions lightly. To the contrary, we recently took the opportunity to warn those spurned by an arbitration award that we will impose sanctions in appropriate cases" and the Tenth Circuit directed counsel to personally pay the attorney's fees of the arbitration winner]. Also see Lewis v. Circuit City Stores, Inc., 500 F.3d 1140, 1153 (10th Cir.2007).
[115] Hall Street Associates v. Mattel, Inc., 552 U.S. 576 (2008).
[116] Digitelcom case, *supra* note 111.

DMA International[117], *Johnson Controls*[118] and *Lewis,*[119] it appears that the US Courts place importance on some ostensible form of circumstances that warrant sanctions rather than a mechanical imposition of sanctions merely on account of an appeal preferred against an arbitral award as is the case in Hong Kong. However, the manner and frequency in which sanctions have been awarded in matters related to arbitration reveal that the United States' approach is a simulation of its Australian counterpart in form but inclines towards the Hong Kong attitude in substance and spirit.

D. Malaysia:

Though Malaysia allows imposition of indemnity costs to chastise dilatory strategies,[120] no conspicuous use of the same has been made in the sphere of arbitration in the country. It could be said that if the Courts were to impose indemnity costs against unscrupulous appeals from arbitral awards, the premise of such an order would be based on Order 59 Rule 10 of Rules of Court ('RC') which penalises a party who fails to establish any claim or issue which he has raised and this has "unnecessarily or unreasonably protracted" the trial or "added to the costs or complexity of those proceedings".[121] The Federal Court in *Takako Sakao* v. *Ng Pek Yuen & Another*[122] set out some guidelines for an award of indemnity costs and emphasised that the discretion to award such costs is

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[117] DMA International case, *supra* note 114; Circuit City case, *supra* note 2.

[118] Johnson Controls case, *supra* note 102.

[119] Circuit City case, *supra* note 2.

[120] *See* Rules of Court 2012. under Courts Of Judicature Act, 1964 and Subordinate Courts Rules Act, 1955.
Order 59 Rule 5(2): Costs arising from misconduct or neglect [5....(2)...the Court shall, for the purpose of that paragraph, have regard in particular to the following matters:
(a) the omission to do anything the doing of which would have been calculated to save costs;
(b) the doing of anything calculated to occasion, or in a manner or at a time calculated to occasion unnecessary costs; and (c) any unnecessary delay in the proceedings.
The Court may order that:
(i) the costs of that party shall not be allowed in whole or in part
(ii) costs occasioned by the failure of that claim or issue be paid to the other party regardless of the outcome.]

[121] *Supra* 120, at Order 59 Rule 10: Costs due to unnecessary claims or issues.

[122] Takako Sakao (f) v. Ng Pek Yuen (f) & Anr. (No 2), [2010] 2 M.L.J. 181 (Malay.).

unfettered. In another case, the court opined that costs on an indemnity basis is normally granted because a party had conducted its case improperly or in bad faith but as there was no evidence to indicate mala fides in the case, indemnity costs were not granted.[123]

With the RC already providing for indemnity costs against dilatory tactics in its legal framework,[124] it could be reasonably assumed that Malaysia would toe the line between the Hong Kong approach and the conservative approach when it comes to treating the act of challenging an arbitral award as an exceptional event. Order 59 Rule 8 of the RC further provides some guidance in this light on the special matters to be taken into account in the exercise of the Court's discretion in the award of costs, one of which is to consider the "*conduct of all parties, including before and during the proceedings*."[125] In recent times, the country has been gearing up to emerge as an arbitration-friendly jurisdiction in Asia.[126] It has already reinforced its pro-arbitration sentiment.[127] Kuala Lumpur should consider using

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[123] Commission of the City of Kuching North v. Chonglin Plaza Sdn Bhd , [2010] 6 CLJ 438 at 20.

[124] *See* Order 59 Rule 16(4), Rules of Court 2012 under Courts Of Judicature Act, 1964 and Subordinate Courts Rules Act, 1955: [On a determination of costs on the indemnity basis, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts....shall be resolved in favour of the receiving party..]

[125] *Supra* note 120 at Order 59 Rule 8. The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account—
(a) any offer of contribution or offer of settlement under Order 22B;
(b) the conduct of all the parties, including conduct before and during the proceedings;
(c) the conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution; and
(d) in particular, the extent to which the parties have followed any relevant pre-action protocol or practice direction for the time being issued by the Registrar.

[126] See *KL Arbitration Centre Goes Global, Taps India*, NEW STRAITS TIMES, (Jan. 29, 2012) http://www.nst.com.my/latest/kl-arbitration-centre-goes-global-taps-india-1.38801.

[127] Please *see* Federal Court decision of Intelek Timur Sdn Bhd v. Future Heritage [2004] 1 M.L.J. 401 and the Court of Appeal in AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd [2013] 2 C.L.J. 395.

the Hong Kong approach in pursuance of this object by imploring the courts to discourage frivolous challenges to arbitral awards by imposing indemnity costs.

E. Singapore:

In Asia, Hong Kong and Singapore have famously rivalled each other to receive the larger share of the region's 'arbitration pie'.[128] It would appear that this would be incentive enough for Singapore to adopt the Hong Kong approach of treatment of an arbitral award as inviolable. Singapore's law on indemnity costs[129] runs parallel to its codified Malaysian counterpart.[130] But Singapore has chartered further territory to safeguard the sanctity of arbitral proceedings. The judgment of *Tjong Very Sumito and others* v. *Antig Investments Pte Ltd.*,[131] provided the scope that already existed in English law by categorically relying on the English Courts judgment of *A* v. *B*,[132] where the court held that initiating proceedings of the court in violation of an arbitration clause could 'normally be characterised as so serious a departure from 'the norm' so as to require judicial discouragement' and awarded indemnity costs for the same. Thus the courts of Singapore have recognised, at least on one count, improper invocation of the jurisdiction of a court in form of 'unmeritorious appeals' as a valid ground for imposing indemnity costs.[133] However, this was an isolated decision and there does not exist a discernible policy that would set the stepping stone for the allocation of these costs in this precise form. But keeping in mind Singapore's staunch pro-arbitration history and the doors that the *Tjong Very sumito* judgment has opened, the practice of imposing indemnity costs against frivolous challenges to an arbitral award seems inevitable.

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[128] Michael McIlwrath, *Can Arbitration Keep Up? Singapore Ratchets Up Forum Competition*, KLUWER ARB. BLOG, (Aug. 31, 2013), *available at* http://kluwerarbitrationblog.com/blog/2013/10/31/can-arbitration-keep-up-singapore-forum-competition/.

[129] Singapore Supreme Court of Judicature Act, Rules of Court, 1996, O 59, r 6A, r 7 and r 6.

[130] Malaysia Supreme Court of Judicature Act, Rules of Court, 2012, O 59, r 8, r 5(2) and r 10.

[131] Tjong Very Sumito v. Antig Investments Pte Ltd., [2009] SGCA 41 (Sing.).

[132] A v. B [2007] 1 Lloyd's Rep. 358 (Eng.).

[133] *Supra* note 129, at 71.

VII. Conclusion

If parties which lose in arbitration are permitted to freely re-litigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system, and dispute resolution will be slower instead of being faster. It will eventually turn arbitration into a far more costly scheme than approaching a court of law. For arbitration to be a meaningful alternative to litigation, the parties must be able to trust that the arbitrator's decision will be the last in all but the most unusual cases.

It is advised that countries initiate a trend of willingness to award indemnity costs in cases of unsuccessful appeals against arbitral awards to scale back this creeping expansion of applications of court review of arbitration awards. Unhindered appeals from awards without any potential deterrent have turned what should have been an exceptional and high-risk strategy into something which is potentially worth-a-go. Adopting the Hong Kong approach against anti arbitration injunctions and parallel proceedings should be deliberated upon.

As discussed above, imposition of costs on indemnity basis has been used as an effective punitive tool to punish misconduct and dilatory tactics across countries. However, the Hong Kong approach has turned a new leaf by turning this tool into an effective deterrent arsenal. This outlook would be welcomed by the arbitration fraternity but it is a norm that needs to be carefully regulated to prevent genuine grievances from being penalized. The question of 'appropriate circumstances' when an indemnity cost should not be awarded is of intense pragmatic character, well suited for gradual development but requiring the most careful analysis. It is one question upon which all common law and civil law jurisdictions can learn much from each other. It is incumbent upon the courts in different jurisdictions to be sensitive to each other's reactions to cases of imposition of indemnity costs against unsuccessful appeals. Hence, a balance must be struck by the courts in judiciously employing discretion between imposing sanctions on disgruntled claimants to deter them from wilfully or recklessly abusing the court process and simultaneously making it possible for grave grievances to be redressed, with an exaggerated emphasis on the former.