

SAMPLE ARTICLES

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GENERAL EDITORS' NOTE

It is a great pleasure to be associated with the birth of a new journal devoted to international arbitration. The *Asian International Arbitration Journal* is an initiative of the Singapore International Arbitration Centre and the Singapore Institute of Arbitrators. We are fortunate in having as our publishers, Kluwer Law International, which has a reputation second to none in the field of international commercial arbitration.

There are already a number of quality journals devoted to international commercial arbitration and it is legitimate to ask why another one is being produced. The answer lies in the regional focus of this journal. The *Asian International Arbitration Journal* aims to deal with international arbitration from an Asian perspective or focus. In this regard it should be noted that the significance of Asia in international commercial dispute resolution is rapidly rising. Certainly the statistics bear this out. For example, in 1983, 3.1% of parties to International Chamber of Commerce arbitrations came from Asia. By 2003, the percentage had risen to 13.9% comprising some 220 parties. The statistics published by the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre also show a similar rise in arbitrations administered by those organisations.

The growth of international arbitration in Asia is not surprising. It has followed inward investment and the rapid economic development of the region. Many arbitration centres and organisations have been established in Asia. In addition to Singapore and Hong Kong centres, mention must be made of such well-known organisations as the China International Economic and Trade Arbitration Commission, the Japan Commercial Arbitration Association, the Korean Commercial Arbitration Board, the Kuala Lumpur Regional Centre for Arbitration and the Indonesian National Arbitration Board. Some 20 of these organisations have come together to form a regional group known as the Asia Pacific Regional Arbitration Group.

We accepted appointment as General Editors of the journal on the basis that editorial policy and content would be determined independently by us. We would, however, like to state that the opinions and views

expressed by the contributors do not necessarily reflect the views of the General Editors, nor of the arbitral institutions that conceived this publication. Guidelines have been established which give preference to articles which deal with developments within a country in the region or which deal with broader issues of interest and demonstrate a high level of analysis. In addition to scholarly articles, notes on arbitral awards and legislation and book reviews will also be published. We welcome contributions which should be sent to the General Editors at mpryles@claytonutz.com and bdgccf@nus.edu.sg. In general, articles should not exceed 8,000 words. Further information about our editorial policy guidelines and our style guide can be obtained from Sabiha Shiraz at sabihashiraz@siac.org.sg.

We aim to make the *Asian International Arbitration Journal* a high quality journal with a regional focus but by no means parochial in nature. We are delighted to be associated with this endeavour and hope that readers find the journal worthwhile and interesting.

Michael Pryles
Philip Chan
July 2005

SEARCHING FOR STANDARDS: SUSPENSION OF ENFORCEMENT PROCEEDINGS UNDER ARTICLE VI OF THE NEW YORK CONVENTION

by Rena M Rico*

A. INTRODUCTION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹ is one of the more significant treaties to date mainly because it has received wide acceptance, with more than 120 countries acceding to its provisions.² This fact, however, is no indication that the New York Convention is spared from debate and discussion in the legal circle, as arbitration is currently a popular mode of dispute resolution. In particular, Art VI of the New York Convention has attracted much attention from legal scholars and has spurred controversial case law in the United States and in the Commonwealth in view of the uncertainty and the lack of definitive guidelines in the application of its provisions.

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1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (hereinafter referred to as 'the New York Convention' or 'the Convention').

2 B Sampson, 'Staying Enforcement of Foreign Commercial Arbitral Awards: A Federal Practice Contravening the Purposes of the New York Convention', 26 Brooklyn J of Intl Law 1839, 1843 (2001).

Article VI grants the court³ before which enforcement of an arbitral award is sought, the discretion to adjourn the proceedings for enforcement if an application for setting aside or suspension of the award is pending before a competent authority of the country in which, or under the law of which, that award was made. In addition, the court may, on application of the party claiming enforcement of the award, order the other party to give security.⁴

This paper shall evaluate the standards employed by the courts in deciding whether to suspend enforcement proceedings before them when actions to set aside or suspend an award are pending before the courts of the place where the award is made or under the law of which the award is made.⁵ Under current case law, it appears that suspension or enforcement of an arbitral award which is subject to proceedings to set aside in the court of origin is dependent on the probable success of the latter proceedings. It can be inferred that this standard is based on the underlying premise that the grounds enumerated in Art V of the New York Convention, particularly Art V(1)(e), are mandatory such that awards that are set aside can no longer be enforced in other jurisdictions. However, it is submitted that nowhere in the Convention does it state that the operation of the provisions of Art VI therein depends upon the success or failure of the applicant to set aside

3 *Ie* the court of enforcement or a court other than the court of the place in which, or under the law of which, the award was made.

4 The complete text of Art VI of the Convention reads:

If an application for setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article V(1)(e) reads:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that —

- (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

5 Hereinafter referred to as 'the court of origin'.

the award. It will be argued that in the light of the objectives of the New York Convention, the court of enforcement retains independent discretion to either enforce or suspend enforcement of the award, regardless of the outcome of the proceedings in the court of origin. Thus, it is advocated that the court of enforcement should take a broader approach by considering the factual and legal circumstances and ascertaining whether the rights of the parties are better protected by either adjournment or enforcement.

B. RELEVANT CASE LAW IN THE UNITED STATES

*Europcar Italia SpA v Maeillano Tours Inc*⁶ is the first attempt by a court to prescribe standards in determining whether or not the adjournment of enforcement proceedings is proper under Art VI of the Convention. The United States Court of Appeal for the Second Circuit enumerated the following factors to be considered by the District Court on remand to decide the issue of adjournment:

- (1) the general objectives of arbitration — the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;
- (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;
- (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;
- (4) the characteristic of the foreign proceedings including (a) whether they were brought to enforce an award (which would tend to weigh in favour of a stay) or to set the award aside (which would tend to weigh in favour of enforcement); (b) whether they were initiated before the underlying enforcement proceedings so as to raise concerns of international comity; (c) whether they were initiated by the party now seeking to enforce the award in the Federal Court; and (d) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;
- (5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Art VI

6 156 F 3d 310 (1998) (*'Europcar'*).

- of the Convention, the party seeking enforcement may receive 'suitable security' and that, under Art V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country; and
- (6) any other circumstances that could tend to shift the balance in favour of or against adjournment.⁷

It is important to note that in prescribing these guidelines, the court was weighing two conflicting policy considerations — that, on the one hand, the adjournment of enforcement proceedings impedes the goals of arbitration by encouraging the delay of the settlement of disputes and, on the other, a stay of enforcement proceedings precludes the possibility of conflicting results and the consequent offence to international comity.⁸ The court further held that '[b]ecause the primary goal of the convention is to facilitate the recognition and enforcement of arbitral awards, the first and second factors on the list should weigh heavily on the district court's determination'.⁹ Thus, the court still recognised the underlying objective of the New York Convention to give effect to foreign arbitral awards such that suspension orders under Art VI should not be used to frustrate this end. However, a review of case law in the United States decided before and after *Europcar* shows that the courts have placed undue reliance on the second policy consideration, *ie* that a stay should be granted to avoid inconsistent results in the decisions of the court of origin and court of enforcement.

While similar cases decided after *Europcar* applied the factors enumerated therein in determining whether or not enforcement proceedings should be stayed, the decisions of the courts led to divergent results. In the case of *Consortio Rive SA de CV v Briggs of Cancun Inc, et al*,¹⁰ the court decided to adjourn proceedings pending appeal before Mexican courts of the dismissal of the action to set aside the arbitral award. The District Court noted that '[t]he Mexican action to nullify the award involves issues of Mexican law, which the Mexican courts are better situated than this Court to resolve'.¹¹ In *Nedagro BV v Zao Konversbank, et al*,¹²

7 *Id* at 317–318.

8 *Id* at 317.

9 *Id* at 318.

10 Civil Action No 99-2204 Section 'A', 2000 US Dist Lexis 899 (EDL 25 January 2000) ('*Consortio Rive*').

11 *Id* at 909.

12 No 02 CIV 3946 (HB), 2003 US Dist Lexis 787 (SDNY 21 January 2003) ('*Nedagro*').

the court resolved to stay proceedings, relying heavily on the decision of the Federal Arbitration Court of the Moscow District reversing the lower court's decision confirming the award.¹³ The court considered that among the factors enumerated in *Europcar*, the fourth factor was the most important, noting that it was the petitioner or the party in whose favour the award was rendered, who first sought to enforce the award in Russia and, following *Europcar*, this fact raised 'concerns of international comity'. Finally, in *MGM Productions Group Inc v Aeroflot Russian Airlines*,¹⁴ the District Court enforced the award and denied the motion for a stay of proceedings. In that case, the court observed that issues on appeal raised by Aeroflot before Swedish courts were issues which the arbitration panel presumably considered and thus only served to delay the proceedings. Moreover, the court noted that the Swedish appeal to set aside the award was brought by Aeroflot only after MGM petitioned before the District Court to enforce the award.

Cases decided prior to *Europcar* showed that courts would grant a stay to prevent inconsistent results from the court of origin or if there is a probability of success in the proceedings to set aside the award. In *Fertilizer Corp of India, et al v IDI Management Inc*,¹⁵ the court, while citing the pro-enforcement policy of the New York Convention, decided to adjourn the proceedings 'to avoid the possibility of an inconsistent result'.¹⁶ In the case of *Spier v Calzaturificio Tecnica SpA*,¹⁷ the court suspended enforcement proceedings on the ground that it was not satisfied that Tecnica's position to set aside the award in Italy was transparently frivolous. It noted that under the New York Convention the 'basis for refusal of enforcement [under Art V(1)(e)] would be nullified if the Convention did not also empower the courts of the country where enforcement is sought to at least consider the pendency of a challenge in the country of issuance'.¹⁸ The case of *Caribbean*

13 The Federal Arbitration Court of the Moscow District further remanded the case to the Arbitrazh Court of the City of Moscow to retry certain specified issues, thus, at the time the decision was issued in *Nedagro*, proceedings to set aside the award were still ongoing.

14 No 03 CIV 0500 (RMB), 2003 US Dist LEXIS 8174 (SDNY 14 May 2003) ('MGM').

15 517 F Supp 948 (1981) ('Fertilizer Corp').

16 *Id* at 962.

17 663 F Supp 871 (1987) ('Spier').

18 *Id* at 875. The court also recognized that the Convention is

a compromise between national interests and international aspirations, [wherein it] specifically provides that the foreign award will not be enforced

*Trading and Fidelity Corp v Nigerian National Petroleum Corp*¹⁹ echoed the ruling in *Spier* and stayed the proceedings. Finally, in *Ukrvneshprom State Foreign Economic Enterprise v Tradeway Inc*,²⁰ the court denied the motion to stay proceedings and enforced the award. It found that Tradeway was unable or unwilling to substantiate the grounds upon which it based its petition before the Supreme Court of Ukraine to set aside the award and observed that 'Tradeway appears to be seeking a legal basis for avoiding the effect of the award'.²¹

Thus, it appears that based on the above survey of case law decided prior and subsequent to *Europcar*, United States District Courts either grant or refuse a stay depending on the success of the proceedings to set aside the award in the court of origin. This gives the distinct impression that the courts view the outcome of the proceedings in the court of origin as determinative of the proceedings in the court of enforcement. In *Fertilizer Corp* and *Nedagro*, the court granted a stay to prevent inconsistent results, *ie* it refused to enforce an award that may be set aside in the court of origin. This is slightly modified in *Spier*, *Caribbean Trading* and *Consortio Rive*, wherein the court would grant a stay only when there is a likelihood of success in the proceedings to set aside the award in the court of origin.²²

Even when the courts decided to grant enforcement despite pending proceedings to set aside the award in the court of origin, as in *Ukrvneshprom* and *MGM*, the principal consideration that weighed in favour of enforcement was the courts' finding that proceedings to set aside the award were meant to simply delay enforcement. By concluding that the proceedings to set aside the award were frivolous

if the 'award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made'.

19 1990 US Dist LEXIS 17198 (SDNY 18 December 1990) ('*Caribbean Trading*').

20 No 95 CIV 10278 (RPP), 1995 US Dist LEXIS 2827 (SDNY 11 March 1996) ('*Ukrvneshprom*').

21 *Id* at *20.

22 In *Spier*, the Italian courts later set aside the award on the ground that the arbitral tribunal exceeded its powers under the arbitration agreement. On this basis, the District Court denied *Spier*'s renewed petition to enforce the arbitral award. See No 86 CIV 3447 (CSH) (SDNY 22 October 1999); E Gaillard and J Edelman, '*Baker Marine and Spier Strike a Blow to the Enforceability in the United States of Awards Set Aside at the Seat*', [2002] Int ALR 2 (37-43).

and dilatory, the court enforced the award on the belief that the chances of obtaining a judgment to set aside the award were remote.

C. CASE LAW IN THE COMMONWEALTH

Judges of the Commonwealth appear to have similar inclinations. In cases where an arbitral award is sought to be enforced while there are pending proceedings to set aside in the court of origin, judges exercise discretion by determining whether proceedings to set aside the award are meritorious and bona fide. In the case of *Soleh Boneh International Ltd & Anor v Government of the Republic of Uganda and National Housing Corp*,²³ the Court of Appeal of the United Kingdom considered two factors in deciding whether proceedings to enforce the award should be stayed despite pending proceedings to set aside and whether security should be granted to the party seeking enforcement: (1) the strength of the argument that the award is invalid, as perceived on a brief consideration by the court asked to enforce the award; and (2) the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading.²⁴ In particular, the Court of Appeal noted the following factual circumstances: (a) the nature of the arguments submitted before the Swedish courts in the action to set aside the award; (b) the length of time (14 years) already spent in dealing with the determination of the validity of the award; and (c) the apparent lack of enthusiasm on the part of the defendants against whom the award was rendered, in pursuing its action before the Swedish court. On a finding that the case presented by the defendant to set aside the award were 'seriously arguable', the court in *Soleh Boneh* focused its discussion not so much on the issue of whether the proceedings for enforcement should be adjourned, but rather on the amount of security to be provided by the defendant as a 'balancing factor' in staying the proceedings. The court noted that to adjourn the enforcement proceedings and to order security in a significant sum would provide a real incentive for the defendants to proceed with their application to set aside the award expeditiously and to protect the plaintiffs against

23 [1993] 2 Lloyd's Rep 208 ('*Soleh Boneh*').

24 *Id* at 212.

dissipation and deterioration of assets in the event that enforcement is later carried out.

In the case of *Powerex Corp v Alcan Inc*,²⁵ the Supreme Court of British Columbia determined that the issue on the adjournment of enforcement proceedings hinged on whether proceedings to set aside in Oregon were brought for the purpose of delay, and whether the defendant Alcan (the party against whom the award is sought to be enforced) has failed to diligently prepare for the enforcement hearing as indicative of its intention to delay proceedings. Although the court found that Alcan had not been diligent in preparing for the enforcement hearings before it, and instead focused more on obtaining adjournment of the enforcement proceedings, suggesting a possible dilatory tactic, the court nevertheless ordered the adjournment of the enforcement proceedings pending the determination of the Oregon court on whether or not the award must be set aside. In so ruling, the court relied on its finding that Alcan's action to set aside the award before the Oregon court is not frivolous and that Alcan has an arguable case which is not bound to fail. Thus, between the two relevant factors specified by the court, it still placed emphasis on the 'possibility of success' factor in determining whether proceedings for enforcement should be stayed.

In *Hallen v Angledal*,²⁶ the Supreme Court of New South Wales refused to adjourn the enforcement proceedings on the ground that defendants failed to convince the court that the application to set aside the award in Sweden was made before a 'competent authority' as required in Art VI of the New York Convention and that the application to set aside had a genuine chance of success. The court cited a previous ruling by the High Court of Hong Kong²⁷ wherein it stated that the defendant seeking adjournment must show that its application to set aside the award in a foreign court has 'some reasonably arguable grounds which afford some prospects of success'.

In another Hong Kong case, the court admitted as an *obiter* that when considering an issue of whether to adjourn enforcement proceedings in Hong Kong due to a pending application to set aside in a foreign

25 2003 CarswellBC 1758.

26 [1999] NSWSC 552.

27 *Hebei Import & Export Corp v Polytek Engineering Co Ltd* 14 Mealey's International Arbitration Report (1999, No 2) pp G-1 to G-15.

jurisdiction, the court would have to address the issue of the validity of the award and if it finds the award to be clearly invalid, an adjournment would most likely follow.²⁸

Finally, in the case of *Yukos Oil Co v Dardana Ltd*,²⁹ the Court of Appeal of the United Kingdom considered international comity and the likelihood of conflict of laws problems as factors in deciding whether to grant a stay of the proceedings. However, the court also stated in no uncertain terms that '[i]f a stay is granted and the foreign competent authority sets aside the award, the basis for the order recognizing or enforcing the award will have fallen away, and it can then be set aside'. Thus, proceedings for the enforcement or suspension of enforcement of an award that is subject to proceedings to set aside in the court of origin would still depend on the probable outcome of such proceedings.

D. PROBLEMS WITH THE 'POSSIBILITY OF SUCCESS' APPROACH

Reliance by the courts on the factors showing a probability of success in the proceedings to set aside when determining whether or not to stay enforcement proceedings is based on the premise that the court will not enforce an award that has been set aside. It is rooted in the idea that Art V(1)(e) of the Convention as a ground for resisting enforcement is mandatory, such that when the award has been set aside in the court of origin, the court of enforcement would refuse enforcement of the award.

Courts in the United States and in France³⁰ have taken a bold step in advocating the enforceability of arbitral awards and have enforced arbitral awards that were set aside in the court of origin. This fueled an interesting round of debate among legal scholars as to whether the grounds to resist enforcement under Art V are discretionary and not

28 *Societe Nationale D' Operations Petrolieres De la Cote D' Ivoire-Holding (acting on behalf of Petroci Exploration Production SA) v Keen Lloyd Resources Ltd* [2001] 1282 HKCU 1.

29 [2002] EWCA Civ 543.

30 *Chromalloy Aeroservices v Arab Republic of Egypt* 939 F Supp 907 (DDC 1996); Cass le Civ, 8 October 1984, *Pabalk Ticaret Sirkeri v Norsolor* (1985) Rev Arb 430; Cass le Civ, 23 March 1994, *Hilmarton v Omnium de Traitement et de Valorisation (OTV)* (1994) Rev Arb 327.

mandatory and whether such view is consistent with the language and spirit of the New York Convention.³¹ For purposes of this discussion, suffice it to state that the issue on the mandatory language of Art V, particularly non-enforcement on the ground that the award has not yet become binding, or has been set aside or suspended, remains unsettled. Thus, the courts, in relying on the premise that an annulled award may no longer be enforced under Art V(1)(e) to determine a petition under Art VI, may not be establishing its decision on solid ground.

Moreover, a reading of the Convention fails to express the intention that the application of Art VI depends on grounds for refusal of enforcement under Art V. It is submitted that Art VI is meant to have independent application and operation in the scheme of promoting the enforceability of arbitral awards under the Convention. Thus, when proceedings to enforce an award are conducted simultaneously with proceedings to set aside the award, the court of enforcement is faced with three options: (1) grant enforcement; (2) refuse enforcement; or (3) stay proceedings pending the outcome of the proceedings to set aside the award. The option to suspend proceedings is a middle ground offered by the Convention as the decision of the foreign court to grant or deny the application to set aside the award may reasonably affect the decision of the court of enforcement. It does not necessarily follow, however, and nowhere in the Convention is it provided, that the decision by the court of enforcement on an Art VI issue would depend on the probable outcome of the proceedings in the court of origin to set aside the award. If such was the intention, the Convention could have provided for an automatic stay of proceedings once an action to set aside an award has commenced or that any enforcement granted is merely provisional.³² But it did not do so. It can be reasonably inferred, therefore, that by granting the court the discretion to stay proceedings during a pending action to set aside an award in the court of origin, the

31 One writer argues that the legislative history of the New York Convention supports the view that the application of Art V is discretionary. The framers of the Convention deliberately changed the language of Art V from 'shall' to 'may', conveying the intention to make the grounds enumerated therein as discretionary upon the courts of enforcement. See KR Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards', 3 *Tex Int'l LJ* 43 (2002). A more comprehensive discussion on this point is more appropriate in a separate article.

32 P Lastenhouse, 'Why Setting Aside An Arbitral Award is not Enough to Remove it from the International Scene', 16 *J Int Arb* 2 33-34 (1999).

Convention intended that discretion to be preserved, the outcome of the proceedings to set aside notwithstanding.

A consideration of the likelihood of success in the proceedings to set aside is further problematic as the courts, in order to make a reasonable determination of the probability of success, must look into the merits of the claims of the party seeking to set aside the award before the court of origin.³³ Most likely, arguments put forward by the respondent for setting aside the award would deal with the merits of the arbitral award itself. Thus, the court of enforcement would have to make an assessment of whether or not, based on the arguments presented by the respondent to set aside the award, the court of origin would nullify the award. As the setting aside of an award is generally a matter of local law, this would entail an evaluation by the court of enforcement of the law of the court of origin. This, in turn, may lead the court to look into the merits of the arbitral award itself and the arguments raised against its validity to make a fair determination of the likelihood of success in the application to set aside the award. In this manner, the court of enforcement is placed in an uncomfortable position by having to determine the merits of an application to set aside, using the law of the court of origin and by requiring at least a prima facie consideration of the arbitral award to determine the relative strength of the arguments put forward by the parties in the proceedings to set aside. In both instances, the court of enforcement would not be equipped to make such determination.

Courts justify their reliance on the probable outcome of the proceedings to set aside the award by reasons of 'international comity' or 'uniformity' and to 'prevent inconsistent results'.³⁴ It is submitted that it is not the intention of the Convention to provide a uniform regime for the recognition and enforcement of arbitral awards. Rather, the policy of the Convention was to facilitate the enforcement of arbitral awards among member states.³⁵ This is supported by the provisions of Art VII which authorises a party seeking enforcement of an award to avail of

33 WM Tupman, 'Staying Enforcement of Arbitral Awards under the New York Convention', 3 Arb Int'l 209, 221 (1987).

34 See *Nedagro BV v Zao Konversbank, et al*, No 02 CIV 3946 (HB), 2003 US Dist Lexis 787 (SDNY 21 January 2003); *Fertilizer Corp of India, et al v IDI Management Inc* 517 F Supp 948 (1981).

35 See *Lastenhouse* at 32.

the provisions of any applicable law or treaty of the country where enforcement is sought when such provisions are more favourable than the terms of the Convention.³⁶ Thus, the Convention allows the application of local laws and other treaties on proceedings to enforce an award which would otherwise be subject to its terms when such application would lead to more favourable results, *ie* the enforcement, rather than the nullification, of the award. This is consistent with the objective of the Convention to facilitate the recognition and enforcement of foreign arbitral awards. The application of local laws and other treaties to which the country where the award is sought to be enforced may be a party hardly envisages a consistent international enforcement regime.

The fear of some courts that to allow enforcement of an award that may be set aside or annulled later would bring about inconsistent results and 'legal chaos' is largely unfounded. A party against whom an award is enforced in one jurisdiction which is later set aside in the court of origin, may seek injunctive relief and other restitutionary remedies before the court which ordered enforcement of the award.³⁷ Note, however, that the prayer for injunctive and other restitutionary relief should not be granted as a matter of course simply because the award has been set aside but must be subject to an independent review and evaluation by the courts. In any event, a party is not without judicial recourse if an award that has been enforced against it is later set aside.

It is submitted that the proper approach to be taken by the court of enforcement in determining whether or not to grant a stay, is that regardless of the outcome of the proceedings to set aside, the court of enforcement retains the discretion to grant or refuse enforcement of the arbitral award. The determination should not be on the probability

36 The relevant portion reads:

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

37 See *Tupman* at 221. See also MH Strub, Jr, 'Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines', 68 *Tex L Rev* 1031, 1063 (1999).

of success of the action to set aside in the court of origin but rather, the courts should look into other circumstances that may affect the rights and obligations of the parties, with a view to preserving the objective of the New York Convention in facilitating the recognition and enforcement of foreign arbitral awards.

E. A BROADENING OF STANDARDS

The discretion given to the court of enforcement under Art VI is quite powerful as the court may *motu proprio*, or on its own motion, without any corresponding application from any of the parties involved, adjourn the proceedings for enforcement. Of course, this discretion is not unfettered and must always be exercised within the bounds of reason, fairness and equity. As the courts grappled with this provision over the years to formulate a guiding principle in the proper exercise of discretion accorded to them, it is observed that the courts' tendency to regard international comity as a primary concern has made the general spirit and objective of the New York Convention secondary.

It is submitted that in applying the provisions of the New York Convention, the focus must be to promote and advance its objectives, namely, to facilitate the international recognition and enforcement of foreign arbitral awards. Thus, in determining an application under Art VI of the Convention, focus should be shifted from matters external to the proceedings before the court and enforcement and, instead, the courts must look into the various factual and legal circumstances involved and determine if it is in the best interests of the parties to have the proceedings adjourned or the award enforced, as the case may be.

One important factor to consider is the particular benefit which a decision in the court of origin may have in the determination of the court of enforcement on whether or not to enforce the award. For example, the court of enforcement may choose to stay proceedings before it on the ground that the nature of the controversy is such that the opinion of the court of origin, having expertise in the law of the seat of arbitration, would considerably assist the court of enforcement in making a determination on whether or not the award should be enforced, *ie* that the dispute is largely on an issue, the proper resolution of which would entail the application of the law of the court of origin. In this way, the court of enforcement, knowing the reasons adopted by the court of origin in disposing of the action to set aside the award,

would be better equipped in exercising its discretion on whether or not to enforce the award. The court of enforcement is able to avoid the awkward situation of having to evaluate the merits of the action to set aside the award which necessarily involves the law of the seat of arbitration and instead defer resolution of the proceedings to the forum better-equipped to deal with the dispute.

The court of enforcement may likewise stay proceedings in the event that the dispute does not call for any public policy or subject matter considerations under Art V(2) of the Convention³⁸ and the grounds to set aside the award deal principally with the application of the law of the seat of arbitration.

The courts may also consider the hardship and difficulties likely to be suffered by the parties in the event that adjournment is granted or enforcement is ordered, notwithstanding the pending proceedings to set aside.³⁹ This may entail a consideration of the assets of the party within the jurisdiction of the court of enforcement, the status of the parties involved, the nature of the award sought to be enforced, and whether circumstances are such that immediate enforcement of the award would protect the rights of the parties as against the prejudice suffered by the party against whom the award is enforced.

Europcar was on the right track in enumerating various factors to be evaluated by the courts when considering an Art VI application. Unfortunately, despite this pronouncement, cases subsequent to *Europcar* still gravitated towards the traditional examination of the probable success of the application to set aside the award in the court of origin in determining whether the proceedings before the court of enforcement should be adjourned. This is not to say, however, that a consideration of the proceedings to set aside should be altogether ignored. It is conceded that a *prima facie* review of the merits and arguments in the

38 Article V(2) reads:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that—
 - (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) the recognition and enforcement of the award would be contrary to the public policy of that country.

39 See *Tupman* at 222.

proceedings to set aside may be made by the court of enforcement. However, this should not be the only factor or the overriding factor to be considered by the courts such that the adjournment of enforcement proceedings would seem automatic or granted as a matter of course upon a showing by the defendant of the probable chance of success in the proceedings to set aside. It is advocated that courts take a broader and more holistic approach in the assessment of an Art VI application by looking into the legal and factual circumstances before it, bearing in mind the objectives of the Convention, rather than looking at factors external to the award such as the likelihood of success in the pending proceedings to set aside.

E. CONCLUSION

A survey of the decisions of the District Courts of the United States and various courts in the Commonwealth which apply Art VI of the Convention shows that their decision to grant or deny a stay is determined by the probable success of the proceedings to set aside in the court of origin. This is based on the premise that Art V(1)(e) is mandatory and that the court would refuse enforcement of an award that is ultimately set aside in the court of origin. However, the proposition that the grounds to refuse enforcement under Art V of the Convention are mandatory is still debatable. Moreover, a reading of the Convention fails to support the idea that the application of Art VI depends on the operation of the grounds for refusal of enforcement under Art V. It is submitted that Art VI is meant to have independent application and operation in the scheme of recognition and enforcement of arbitral awards under the Convention such that in the event of simultaneous proceedings in the court of origin to set aside the award, the court of enforcement retains discretion to either grant or deny enforcement, regardless of the outcome of the proceedings to set aside the award. Courts are thus urged to apply Art VI with a view to promoting the objectives of the Convention by facilitating the recognition and enforcement of arbitral awards. With this approach, in determining whether proceedings for enforcement should be adjourned, courts must look into various factual and legal circumstances involved to ascertain whether the rights of the parties are better preserved and protected through adjournment or enforcement, as the case may be.

ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA

by Chua Eu Jin*

A. INTRODUCTION

Over the last decade, China has been the destination of choice for many multinational companies. However, investments can sometimes go wrong and disputes arise between parties to an investment. Foreign investors may therefore have to resort to legal action to extricate themselves from their investments.

Among the various ways of settling disputes in China between Chinese and foreign parties, arbitration is the most popular. In part this is because China has for several years promoted arbitration as the preferred method for dealing with commercial disputes. Indeed, the China International Economic and Trade Arbitration Commission ('CIETAC') has emerged in recent years as a world heavyweight in terms of numbers of cases heard each year. Although some commentators have criticised the CIETAC regime, this appears to have not gone unheeded. At the time of this publication, CIETAC has issued a draft set of rules ('the Draft Rules') containing amendments (which will be discussed in the following sections) that go some way toward redressing the criticisms. It is anticipated that the Draft Rules are to come into effect in May 2005. This article is based on the sixth (and current) draft issued by CIETAC.

Where China is concerned, arbitration possesses a clear advantage over litigation as a result of the near global enforceability of arbitration

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awards under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the New York Convention') to which China is also a member. This article focuses on arbitration as a forum for dispute resolution in China — in particular CIETAC arbitration — and examines certain features of arbitration including the validity of an arbitration clause/agreement, choice and appointment of arbitrators and enforcement.

B. CHINESE ARBITRATION LAW 1995 AND ARBITRATION AGREEMENTS/CLAUSES

The legislation in China governing arbitration is the Arbitration Law 1995 ('the Arbitration Law').

1. *Validity of an Arbitration Agreement/Clause under Chinese Law*

Article 16 of the Arbitration Law provides that an arbitration clause must contain the following:

- (1) an expression of intention to apply for arbitration;
- (2) the matters for arbitration; and
- (3) a designated arbitration commission.

Article 18 of the Arbitration Law provides:

If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or selection of the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be void.

Once a dispute has arisen, it may be difficult for the parties to agree on any supplemental agreement. Thus, in order that the parties' intention to submit any disputes to arbitration is not frustrated, it is important for the parties to ensure that the arbitration clause in their contract complies with art 16 of the Arbitration Law from the outset, selecting in particular the arbitral commission.

Under art 16 of the Arbitration Law (and art 3 of the CIETAC Arbitration Rules ('the CIETAC Rules'), an arbitration agreement must also be in writing. Exchanges of letters, telexes, telegrams, and/or documents exchanged electronically should constitute a 'written agreement'.¹

1 Article 11 of the Contract Law 1999.

2. *Ad Hoc Arbitration*

The Arbitration Law does not contain any reference to, or provision for, ad hoc arbitration. Therefore, although not expressly forbidden by the Arbitration Law, no clear legal basis exists for ad hoc arbitration in China and as a result arbitration in China is essentially institutional, *ie* administered by an arbitral commission such as CIETAC.

Further, as we have said, under art 18 of the Arbitration Law, if an arbitration agreement does not specify an arbitration commission, the arbitration agreement will be void under Chinese law.

The position has been further clarified by the case of *People's Insurance Company of China, Guangzhou Branch v Guangdong Guanghe Power Co Ltd*² in which the Supreme People's Court held that ad hoc arbitrations are not permitted in mainland China. Thus, it seems clear that at present arbitration conducted in China, whether or not governed by Chinese law, should be institutional.

The Supreme People's Court also issued draft Provisions Regarding the Handling by the People's Courts of Cases Involving Foreign-related Arbitrations and Foreign Arbitrations on 31 December 2003 ('the SPC Draft Provisions'). Although outside the scope of this article, the SPC Draft Provisions appear to place further restriction on ad hoc arbitration³ and it remains to be seen how the issue of ad hoc arbitration, common in international jurisdictions, will be resolved in China in the future.

2 (2003) *Min Si Zhong Zi* No. 29.

3 Article 27 of the SPC Draft Provisions provides:

An arbitration agreement between the parties that provides for ad hoc arbitration shall be invalid, except where the relevant parties are all nationals of countries that are members of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the laws of such countries do not prohibit ad hoc arbitration.

Because the Supreme People's Court has held that ad hoc arbitrations are not permitted in China and because there is no provision for ad hoc arbitration in the Arbitration Law, art 27 appears to be directed at ad hoc arbitrations *outside* China. However, by the same token, because Chinese law does not allow ad hoc arbitration, in any circumstances where one party is seeking to enforce an ad hoc arbitration award against a Chinese party via the Chinese courts, the arbitration agreement would be invalid under the second limb of art 27 and the Chinese courts may refuse to enforce such awards even where the agreement is valid under its governing law.

C. CHINESE ARBITRATION INSTITUTES/COMMISSIONS

The main Chinese arbitration commission that deals with foreign-related arbitration is CIETAC (unless the dispute is of a maritime nature, in which case the dispute will most likely be dealt with by the China Maritime Arbitration Commission ('CMAC')). China also has various domestic arbitration commissions. Because of changes to the jurisdictional scope of these domestic arbitration commissions in 1996, and subsequent changes to CIETAC's jurisdictional scope in 1998 and 2000, the distinction between foreign-related arbitrations and domestic arbitration has become blurred: domestic commissions can now hear foreign-related cases, and CIETAC also can now hear most domestic disputes.

Despite this, CIETAC (and CMAC) remain the principal commissions of choice for hearing foreign-related arbitrations, not least because domestic arbitration commissions tend not to have a sufficiently wide panel of arbitrators from which an appointment can be made.

D. CHOICE OF ARBITRATION VENUE?

Under art 128 of the Chinese Contract Law 1999 ('the Contract Law'), parties to a contract with a 'foreign element' can opt for arbitration in China or outside China.⁴ Conversely, parties to a contract without a 'foreign element' will have no choice but to choose arbitration in China.

Despite the choice open to parties to contracts with a foreign element, many foreign companies still find themselves with CIETAC (or another Chinese arbitral commission) as the seat of the arbitration where the other party to the contract is a Chinese entity. Although such choice is

4 Under art 126 of the Contract Law, parties to a contract with a 'foreign element' may also choose the governing law of the contract unless Chinese law provides otherwise: exceptions include Sino-foreign joint venture contracts and natural resources contracts. Article 178 of the Opinion of the Supreme People's Court on Several Questions regarding the Implementation of the Chinese Civil Code (adopted on 26 January 1988) ('the Civil Code Judicial Interpretations') provides that a contract will have a foreign element when: (1) one or both parties to the contract are foreign or stateless parties; (2) the subject matter of the contract is located in a foreign country; or (3) the act which gives rise to, modifies or extinguishes, the rights and obligations under the contract occurs in a foreign country.

often a matter of negotiation, some of the reasons for CIETAC having been selected include the fact that Chinese parties generally prefer arbitration in China to arbitration outside China; this is probably because they are more comfortable with having arbitration in their own jurisdiction. Further, many standard Chinese contracts generally provide for arbitration in China, and foreign parties in the main do not accord sufficient importance to dispute resolution clauses to insist otherwise.

Under the current CIETAC Rules, parties are not permitted to choose a venue for CIETAC arbitration outside China (and it is not entirely clear for these purposes whether Hong Kong is deemed to be part of China), ie CIETAC arbitration has to be conducted in China. However, the Draft Rules appear to allow parties to choose CIETAC arbitration, but with the venue/seat outside China, for example, in London, Singapore or elsewhere. If implemented, this will revolutionise the concept of CIETAC arbitration, allowing CIETAC to administer arbitrations anywhere in the world.

Orthodoxy dictates that the place of the signing of the award (which is usually, but not always, the venue of the arbitration hearing), establishes the origin of that award. As the Draft Rules also specifically provide that the award is deemed to be issued from the arbitration seat – which might differ from the place where the award is signed – this could give rise to potential conflict with other common law jurisdictions. It could also give rise to the nice question of how a CIETAC administered award – heard in London – will be treated by the Chinese People's Courts: as a London award enforceable under the New York Convention; or a foreign-related/domestic CIETAC award?

E. CHOICE AND APPOINTMENT OF ARBITRATORS

The current CIETAC Rules stipulate that arbitrators in CIETAC administered proceedings must be appointed from CIETAC's own panel of arbitrators which comprises both Chinese and 'foreign' arbitrators (with Chinese arbitrators outnumbering 'foreign' arbitrators). Parties to the arbitration, therefore, do not have full freedom of choice of arbitrator.

The Draft Rules, however, allow the parties to agree that qualified arbitrators can be selected from outside CIETAC's panel, if CIETAC endorses the appointment. This opens up the scope of choice,

as CIETAC's panel currently predominantly consists of Chinese nationals.

Most CIETAC arbitrations will involve a panel of three arbitrators, with each party to the contract having a choice of one arbitrator and either a joint appointment being made in respect of the third arbitrator, or authorisation being given to CIETAC to appoint the third arbitrator. Pursuant to art 24 of the current CIETAC Rules, the third arbitrator acts as presiding arbitrator.

In practice, parties are usually unable to agree on the presiding arbitrator, and under the current CIETAC Rules, CIETAC makes the appointment from its panel. The Draft Rules, however, set out a procedure which involves the parties each giving to CIETAC a list of three names, which names — if CIETAC agrees — need not be from CIETAC's panel. If one of the three names from one party matches a name from the other party, that person will be appointed as the presiding arbitrator. If two or more names match, CIETAC will decide the appointment from these matched names based on the circumstances of the case. If no names match, or the parties do not make an appointment, or fail to provide CIETAC with a list of three names, CIETAC will make the appointment from its panel (which may result in an appointee other than any of the names provided by the parties).

In the interest of impartiality, it is generally advisable that a provision be inserted into the arbitration agreement providing that the nationality of the third arbitrator not be of the nationality of either of the parties to the contract. The reason for this is that a Chinese contractual party will invariably appoint a Chinese arbitrator and a Western contractual party will invariably appoint a non-Chinese arbitrator. If, as is usually the case, the parties are unable to agree on the appointment of the third arbitrator, such that CIETAC makes the appointment pursuant to the CIETAC Rules (and this is still the default mechanism under the Draft Rules), it is possible that CIETAC will appoint a Chinese national as the third and presiding arbitrator.⁵ Unfortunately — and this could be more in the way of perception rather than substantive merit — this

⁵ The reason for this, arguably, is that there are many more Chinese arbitrators on CIETAC's panel than non-Chinese arbitrators. Notably, and perhaps responding to criticisms levelled at it, CIETAC has, in some recent cases, appointed a non-Chinese national to be the third arbitrator.

could give rise to a perceived 2:1 advantage in favour of the Chinese party, particularly if the latter is believed to wield local influence.

Such a perceived difficulty can be avoided by providing in the contract that the nationality of the third arbitrator cannot be the same nationality as either of the two parties to the contract. From experience, CIETAC has accepted and respected such a provision.

In addition, it has been observed that many foreign arbitrators may be reluctant to accept a CIETAC appointment because remuneration is much lower than in other international arbitrations (this is something to be borne in mind before deciding on CIETAC arbitration as the venue for dispute resolution).

F. RULES AND PROCEDURE IN CIETAC PROCEEDINGS

In the absence of agreement, the arbitration rules issued by CIETAC govern CIETAC proceedings. Amendments made by the parties to the current CIETAC Rules must first receive CIETAC's approval.

However, the Draft Rules now provide that amendments (for example, located in the arbitration agreement) should be respected and allowed, so long as such amendments can be implemented and also do not violate mandatory provisions of the law of the seat of the arbitration. The removal of the requirement that CIETAC's approval be obtained provides greater autonomy to the parties to decide how they want the arbitration to be conducted, and is in line with international practice on the conduct of arbitration proceedings.

The Draft Rules also make clear that the parties can select other arbitral rules to govern their arbitration, for example, the UNCITRAL Rules, etc. This appears to reflect CIETAC's evolving willingness to administer arbitrations under rules other than its own.

The Draft Rules also provide that unless the parties agree otherwise, CIETAC arbitration hearings need no longer follow the procedure of Chinese court hearings; the arbitrators can conduct either inquisitorial or adversarial proceedings and also allow the cross-examination of witnesses, convene pre-hearing conferences and issue directions. This proposed change addresses one of the most frequent criticisms of CIETAC arbitrations today.

The arbitral tribunal is also given power under the Draft Rules to create deadlines for the submission of evidence. The tribunal can

refuse to accept evidence submitted after the deadline (although it can be extended with the tribunal's approval). A shorter time period has also been stipulated for concluding an arbitration matter: for foreign-related arbitrations the time for issuing an award has been shortened from nine months to six (from the establishment of the tribunal); for domestic arbitrations, from six months to four.

G. EFFECT OF ARBITRATION AGREEMENT

A valid arbitration agreement concluded between two parties should prevent one party from commencing court proceedings under Chinese law.

Article 5 of the Arbitration Law provides that if the parties have concluded an arbitration agreement and one party institutes proceedings in a People's Court, the People's Court shall not accept the case unless the arbitration agreement is void.

In addition, art 26 of the Arbitration Law provides that if there is an arbitration agreement, yet one party commences litigation in a People's Court, the People's Court will dismiss the case where the other party challenges the jurisdiction of the court by submitting the arbitration agreement before the first hearing.⁶

In general, therefore, the existence of an arbitration agreement should prevent the parties to the contract from circumventing that agreement and instituting proceedings in the courts. However, art 26 of the Arbitration Law provides a caveat to this by stipulating that where a plaintiff has commenced proceedings in the People's Court (in circumstances where the parties have concluded an arbitration agreement) and the defendant does not raise an objection to the People's Court prior to the first hearing, the defendant shall be deemed to have renounced the arbitration agreement and the People's Court shall continue to try the case.

Further, art 148 of the Opinion of the Supreme People's Court on Certain Questions Concerning the Implementation of the Civil Procedure Law⁷ provides that if a party commences proceedings before the court and:

6 Unless the arbitration agreement is void. See also art 257 of the Civil Procedure Law, adopted on 9 April 1991.

7 Issued on 14 July 1992.

- (1) does not declare the existence of an arbitration agreement; and
- (2) the other party submits a defence;

the court shall be deemed to have jurisdiction over the case.

Thus, in circumstances where an arbitration agreement does exist and where the plaintiff has commenced court proceedings, the defendant should be careful not to submit a defence to the court, but instead should challenge the jurisdiction of the court on the basis of the arbitration agreement. In such circumstances, the court should dismiss the case and refer the parties to arbitration pursuant to the arbitration agreement.

H. ENFORCEMENT

1. *CIETAC Awards*

As referred to above, there are two types of arbitral award that may be rendered by CIETAC (or another Chinese arbitral institution): domestic and foreign-related. An application for enforcement must be made within six months (if the parties are companies/organisations) or one year (if one of the parties is a natural person).⁸

Although not formally capable of appeal, a party can apply to the Chinese courts to have the award set aside. The grounds for setting aside these two types of award are different. In short, there are more grounds available upon which to set aside a domestic award.

Article 58 of the Arbitration Law provides that awards that do not involve a 'foreign-element' can be set aside on the following grounds:

- (1) there is no arbitration agreement;
- (2) the matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
- (3) the formation of the arbitration tribunal or the arbitration procedure was not in conformity with statutory procedure;
- (4) the evidence on which the award is based was forged;
- (5) the other party has withheld evidence sufficient to affect the impartiality of the arbitration; or

⁸ Article 219 of the Civil Procedure Law. This timetable has been followed in the SPC Draft Provisions.

- (6) while arbitrating the case, the arbitrators committed embezzlement, accepted bribes, practised graft or made an award that perverted the law.⁹

In addition, the second limb of art 58 of the Arbitration Law provides that the award may also be set aside if the People's Court determines that it is contrary to the public interest (of China). Thus, it can be seen that the grounds for setting aside a domestic award are relatively broad in scope.

Under art 260 of the Civil Procedure Law, a party can apply to have a foreign-related award set aside, or enforcement can be refused, on the following four grounds:

- (a) failure to have concluded a written arbitration agreement or to have included an arbitration clause in the contract;
- (b) the party against whom enforcement is sought was not notified to appoint an arbitrator or to take part in the arbitration proceedings, or was unable to state his case due to reasons for which it was not responsible;
- (c) the formation of the arbitration tribunal was not in accordance with the arbitration rules; and
- (d) the matters covered and decided by the arbitration award are beyond the scope of the arbitration agreement or beyond the authority of the arbitral institution.

In addition, applications to set aside foreign-related awards can also be made on the ground that the arbitration award is contrary to the public interest of China.

Pursuant to the Supreme People's Court Notice Concerning Setting Aside Foreign-related Arbitral Awards dated 23 April 1998, the Supreme People's Court has the final say in deciding whether to enforce a foreign-related arbitral award in China.¹⁰ Local courts in China have

⁹ Similar grounds exist for refusing enforcement under art 217 of the Civil Procedure Law.

¹⁰ See also the Supreme People's Court Notice on Questions on Matters Concerning the People's Court Dealing with Foreign-related Arbitration and International Arbitration dated 28 August 1995 ('the August 1995 Notice'), which provides that if the Intermediate People's Court wishes to refuse enforcement of the award, it must report this to the Higher People's Court; if the Higher People's Court agrees with the lower court, it must also in turn report this to the Supreme People's Court. Thus, the Supreme People's Court must give its approval before enforcement of a foreign-related or foreign arbitral award can be refused.

been criticised in the past for having protectionist tendencies towards local Chinese parties and this Supreme People's Court Notice at least removes the power to refuse enforcement from the local courts and confers it on the Supreme People's Court.

2. Foreign/International Awards

Foreign awards fall into two broad categories: non-New York Convention awards and New York Convention awards. Again, similar time limits exist for enforcement: six months for companies/organisations and one year where one party is a natural person.

3. Non-New York Convention Awards

China is party to several judicial assistance agreements that provide for the mutual recognition of arbitral awards; such agreements are relevant in respect of countries not party to the New York Convention. As of April 2004, 134 countries are party to the New York Convention; as such the practical relevance of these judicial assistance agreements is very limited. Where enforcement is not covered by international agreement, the principle of reciprocity will apply.

4. New York Convention Awards

China signed up to the New York Convention on 22 April 1987. This was subject to the reciprocity reservation, but given the number of signatories to the New York Convention this is not significant.

In theory, therefore, enforcement of an arbitral award rendered in a New York Convention state should be capable of enforcement in China. However, there are no clear statistics of the enforcement of arbitral awards in China and concerns have been levied by practitioners that local protectionism and lack of judicial independence hinder enforcement, particularly in local courts.

As a result the Supreme People's Court issued the August 1995 Notice and the Provisions on Matters Concerning Fees and the Examination Period Relating to the Recognition and Enforcement of Foreign Arbitration Awards effective on 21 October 1998 ('the Provisions'). Section 4 of the Provisions provides that if the People's Court decides not to recognise and enforce an award pursuant to an application under Art 4 of the New York Convention, it should issue its decision

within two months of the application date and, if it decides not to grant the application, should report the matter up to the Supreme People's Court (*ie* up the court hierarchy) within the same two-month period in accordance with the August 1995 Notice.

Although this is a step in the right direction, there is no prescribed time limit within which the Supreme People's Court must deal with such a referral and it is not uncommon to experience lengthy delays at this stage.

Finally, it should be noted that Hong Kong falls into a separate category due to its unique status as the Hong Kong Special Administrative Region. Upon handover of Hong Kong to China in 1997, it was identified that the New York Convention might not apply to Hong Kong awards being enforced in mainland China¹¹ and vice versa. This is because the New York Convention applies only to the enforcement of awards between two separate contracting states and Hong Kong was no longer an independent state, but a region of China.

This issue was resolved in 2000 by the enactment of the Memorandum of Understanding in Hong Kong and China, which for all practical purposes replicates the New York Convention as between Hong Kong and China.

Notably, the Supreme People's Court has clarified¹² that a Hong Kong award should be treated as a New York Convention award for the purposes of the August 1995 Notice and the Provisions.



11 This was important because the grounds for setting aside domestic arbitral institution awards are greater than for New York Convention awards.

12 In a response to the Hong Kong Secretary for Justice, Ms Elsie Leung, dated 13 March 2003.

BOOK REVIEW

by Cecil Abraham

Arbitration in the Philippines and the Alternative Dispute Resolution Act of 2004, *by* Eduardo P Lizares, EPL Publications

Arbitration in the Philippines and the Alternative Dispute Resolution Act of 2004 by Mr Eduardo P Lizares is an apt publication. It is published less than a year after the approval of the Republic Act 9285 (that deals with arbitration) of the Philippines on 2 April 2004.

The author would have, as any pioneer embarking on a similar project, encountered severe scarcity of judicial authorities and commentaries to rely on. This would have acted as a serious handicap for many an author. In the hands of Mr Lizares this handicap appears to have turned into an opportunity — an opportunity to make original arguments based on foreign case law and the principles of international commercial arbitration.

The book, as its title suggests, sets out the law of arbitration in the Philippines in an orderly fashion in its nine chapters. It sets out the ADR Act (Act No 9285) and UNICTRAL Model Law on International Commercial Arbitration, both of which are referred throughout in the book.

The introductory chapter explains the relevance of arbitration as a dispute resolution tool, the laws applicable to arbitration and the areas where arbitration is being used to resolve disputes in the Philippines. This chapter is particularly important for foreign audience to get a feel of the scope of arbitration law and practice in the Philippines.

In this chapter, the author explains how arbitration could address the drawbacks of litigation in the Philippines and project itself as an

alternative tool for commercial dispute resolution. While some of his arguments are based on universally accepted advantages of arbitration such as confidentiality, some of them may be a notch too optimistic. An example is how arbitration could be cost and time effective, or less adversarial than litigation. Perhaps he should have highlighted the enforceability feature, given the fact that the Philippines is a party to the New York Convention.

In chapter II, the contractual nature of arbitration is discussed in some detail. The issue of arbitrability, capacity of parties, forum and content, principle of separability, operation and effect of arbitration agreements, *etc* are explained. It also explains, citing the *LM Power Engineering Corp v Capitol Indus Constr Groups* case, that the judicial attitude of the courts towards arbitration in the Philippines is to 'liberally construe arbitration clauses to encourage alternative dispute resolution', and that the courts would resolve any doubt as to the agreed tool of dispute resolution in favour of arbitration.

The book also deals with the law relating to arbitrators and arbitral tribunal (chapter III), the arbitration proceedings (chapter IV) including the place of arbitration, the applicable procedural law, evidentiary matters and experts, the arbitral awards (chapter V), and the enforcement of domestic arbitral awards (chapter VII).

In the chapter on recourse against arbitral awards (chapter VI), the author highlights the various ways of challenging an award, including the vacating of the award where the award is procured through corruption, fraud and other undue means, or where there is evident partiality or corruption on the part of the arbitrators, or where the arbitrators exceeds their powers. It also sets out the provisions on appeal and correction of awards for clerical errors.

There is detailed discussion about foreign awards in chapter VIII. It, *inter alia*, sets out the procedure for enforcement and grounds for refusal of enforcement of arbitral awards made under the New York Convention, enforcement of non-New York Convention arbitral awards, and enforcement of arbitral agreements.

The book concludes with a chapter (chapter IX) that makes a number of recommendations for legislative amendments and reconsideration of judicial pronouncements for the better conduct of arbitration in the Philippines. This chapter is a good gauge of the author's concern for arbitration in the Philippines. He does not hesitate to criticise the judicial

decisions, the local legislation and the local practices. In doing so, he is found willing to forgo the neutral tone of providing information to his readers, a general scheme followed throughout the other parts of his book, for a more assertive and persuasive tone. In my opinion, this chapter would arguably be the most valuable of all chapters to local jurisprudence, and I sincerely hope that the authorities will address the concerns raised.

For instance, under Philippine law, as long as a construction contract contains an arbitration clause, any party thereto has the right to compel the other to arbitration before the Construction Industry Arbitration Commission ('CIAC') even if the other party objects to its jurisdiction because their arbitration agreement calls for arbitration before another body. This lack of choice may in turn rule out the parties' choice as to a number of issues including forum, procedure, procedural law and rules, as well as the mode of selection of arbitrators. This obviously is inconsistent with the party autonomy theme of the Model Law and many other modern arbitration statutes.

In chapter IX, Mr Lizares, inter alia, calls to remove the monopoly granted by the Act to CIAC in construction disputes over the agreement of parties. The author also calls for the reconsideration of the Supreme Court ruling in *China Chang Jiang Energy* where it was held that CIAC has jurisdiction over all construction disputes regardless of the forum the parties chose.

The author also argues that the possible interference of higher courts in the arbitral proceedings by way of temporary restraining orders or injunctions should be disallowed.

The simplicity of the language makes the book a pleasant and informative read for both veteran practitioners and novices alike. It is also a very helpful guide for those who may, given the transnational nature of arbitration, come across the Philippine arbitration practices.

The legal points are well arranged, making the reference a convenient act even for busy practitioners. Perhaps, the next edition should have a more-detailed index, a relatively minor aberration in the current edition.