A General Introduction to Enforcement of Arbitration Awards in Asia and the Pacific Rim

1. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") is the international agreement which allows parties to take part in international arbitrations with the knowledge that arbitral awards rendered in one contracting state will be enforced in another contracting state. As of July 23, 2011, there were 146 signatories to the New York Convention.

   As an alternative dispute resolution mechanism, arbitration is entered into through the free will of the parties; the case enters the judicial realm mainly at the enforcement stage. When a party has won an arbitration case, the arbitration award must be sought to be recognized and enforced in the jurisdiction where the other party resides or its assets are located. It is on the basis of the court judgment that the winning party is able to collect and receive the compensation ordered under the award.

2. As per Article III of the Convention, each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory when the award is relied upon. The Article specifies that recognition and enforcement is subject to the conditions laid down in the Convention and that there shall not be imposed substantially more onerous conditions, or higher fees or charges, for the recognition or enforcement of arbitral awards to which the Convention applies.[1]

   Article V of the New York Convention goes on to state the grounds for refusing recognition and enforcement of a foreign award.

   The conditions referred to in Article III were intended by the Convention drafters to be exhaustive; however, various jurisdictions have not always treated them as such, with the resultant effect of offering domestic nationals protection against foreign awards.

   National jurisdictions, not only in Asia and the Pacific Rim countries, but also other parts of the world, have taken the view that a foreign award is assimilated to a domestic award and therefore the more stringent tests applicable to national arbitration are applied also to international arbitration.

3. A recent change in Australia has been made in order to clarify that the two grounds for enforcement of a foreign award under Article V(2) are indeed exhaustive. The International Arbitration Act 1974 ("the Act) of Australia, which gives effect to the country's obligations under the New York Convention, was amended by the International Arbitration Amendment Bill 2009 ("the Bill") on July 6, 2010. Among other changes (such as striking down the application of state/territory arbitration acts in

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 U.N.T.S. 3; 21 U.S.T. 2517; T.I.A.S. No. 6997, *entered into force* 7 June 1959.

recognition/enforcement of foreign awards, granting the Federal Court concurrent jurisdiction with State and Territory Supreme Courts in the enforcement of foreign arbitral awards, and expanding the definition of "agreement in writing"), the Bill has restricted the grounds for refusing enforcement based on public policy.

Specifically, the two categories of Article V(2) were incorporated into sections 8(5) and 8(7) of the Act. Since courts did not always treat the Article V(2) grounds as exhaustive, Section 3(A) was inserted into the Act, stating "[t]he courts may *only* refuse leave to enforce the foreign award in the circumstances mentioned in subsections [8](5) and (7)" (*emphasis added*).

4. A great deal of attention has been paid in arbitral doctrine around the world regarding what constitutes "public policy" and when such grounds may be invoked in order to refuse enforcement of an international award. Some countries have codified the norm in their respective domestic legislation frameworks that the offense must be against the international public policy of the state[2], while others have eliminated the "public policy" language all together in favor of more general wording[3]. By expanding on the elements that constitute "public policy" grounds, some national jurisdictions have been able to incorporate violations of fraud and corruption as a basis for non-enforcement.[4]

5. Case law developments in Australia have recently brought the public policy grounds to the forefront through the interesting lens of anti-trust legislation. In *Nicola v Ideal Image Development Corporation Incorporated*[5], the Federal Court granted the application for a stay of proceedings by a foreign party under the Act with respect to the claims that fell within the purview of the arbitration clause. The Court did not accept the argument that a breach of anti-trust law would necessarily render a matter unfit for arbitration on public policy grounds. *Nicola* came on the heels of *Yang v. S & L Consulting*[6], the case in which the Supreme Court of New South Wales decided that a Chinese arbitral award should be enforced under the International Arbitration Act of

[2] See, for example, Article 1096 of Portugese Civil Code, express reference to the only ground for refusing to review and confirm foreign awards is that the recognition of the award would lead to a result clearly incompatible with the principles of International public policy of the Portuguese State, where the offense may relate to the arbitration agreement (for instance, if it null/void), the arbitration itself (partiality of arbitrators, violation of defense rights), to the award, or enforcement; similarly, in Algeria Article 1056 of the Algerian Code of Civil and Administrative Procedure provides violation of International public policy as one of the six limited grounds for appealing decisions recognizing or ordering enforcement of a foreign arbitral award.

[3] In its Civil Procedure Code of 2004, Vietnam adopted the language "basic principles of the laws of Vietnam", rather than the "public policy" phrasing of the New York Convention; this was the only element for non-recognition which did not closesly match the grounds established under Article V.

[4] The Arbitration and Conciliation Act of 1996 (the "A&C Act") of India provides that a court may refuse to enforce a foreign award on certain grounds which are laid out in Section 48. The grounds established under Part II of the A&C Act are very similar to the grounds under Article V of the New York Convention, but goes further than the Convention by stating that the award shall be deemed to be in conflict with the public policy of India if it was induced by fraud or corruption.

[5] [2009] FCA 1177

[6] [2009] NSWSC 223

1974 since it was not a violation of public policy to enforce an award unless the underlying contract is unenforceable under ordinary contractual principles.

6. Should a party to an arbitration feel uneasy regarding the probability of enforcement of an arbitral award or the often lengthy time-frame required for such enforcement, it could explore the existence of a bilateral investment treaty ("BIT").

   In an unanimous decision of November 2011, a three-member panel held in *White Industries Australia Limited v. Republic of India* that since the Australian company had been unable to enforce, and collect under, a 2002 arbitration award against Coal India in a mining dispute, India was in breach of its obligations under the Australia-India BIT. Specifically, White Industries argued that the delay violated, *inter alia*, the provisions on fair and equitable treatment, expropriation and most favored nation treatment. This recent decision could well pave the way for increased reliance on BITs as a form of increased protection in commercial arbitrations.

7. Recent developments in case law has also brought to light an evolving view of what constitutes a "final" or "enforceable" foreign award. A 2010 case from Singapore dealt with the issue of an award being set aside on the basis of the tribunal having allegedly exceeded its powers. In *PT Perusahaan Gas Negara (Perserso) TBK v CRW Joint Operation*[7], a dispute arose between the parties with respect to provisions regarding Variation Orders of the 1st edition of the Federation Internationale des Ingenieurs Conseil ("FIDIC") Conditions of Contract for Construction. The matter was referred to the Dispute Adjudication Board ("DAB"), which released a series of decisions. Subsequently, the claimant submitted a Notice of Dissatisfaction ("NOD") in relation to one particular decision that ordered the claimant to make payment to the respondent in the amount of $17 million. The respondent filed a request for arbitration with the ICC, seeking to obtain an award which would declare the claimant obligated to pay this sum of money, notwithstanding the NOD. The ICC tribunal issued an award in favor of the respondent for the full amount of the relief sought, and the claimant argued in Court that the ICC tribunal had exceeded its powers because it had simply converted the DAB decision into a final award without determining whether the DAB decision was made in accordance with the contract. The Court relied upon cases construing Article V(1)(c) of the New York Convention, which is similar to Article 34(2)(a)(iii) of the UNCITRAL Model Law (the "Model Law"), and stated, *inter alia*, that the enforcement of an award may be refused based on evidence that the award is concerned with a difference not contemplated by, or not falling under the terms of, the arbitration submission made, or includes decisions on matters outside the scope of the submission to arbitration. The Court held that tribunal had exceeded its powers as it was required under the contract to review the merits of the decision of the DAB prior to rendering an award as to whether the respondent was entitled to immediate payment of the $17 million. As a result, under Article 34(2)(a)(iii) of the Model Law, the international award was set aside. This setting aside of a foreign arbitration

[7] PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation [2010] SGHC 2010

award, albeit a rare occurrence in Singapore, has caused some controversy among construction law experts.

8. In general, recognition and enforcement of foreign awards in Asia and the Pacific Rim region is still a controversial issue even if national courts are progressively accepting the principle that a foreign award may not be treated as a domestic award and that the New York Convention preferential regime needs to be applied systematically.

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